



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO. 155 OF 1993

BAHATI TEMO

WILLIAM MJAPE

STEPHEN KAHINDI MWADZANI

CHARLES CHARO

JOHNSON KOYA

KESI MJAPE

ROBERT LUGO.....PLAINTIFFS

VERSUS

SWAFIYA ABDALLA

FATUMA SWALEH.....DEFENDANTS

RULING

1. By a Notice of Motion dated 9th November 2011 and brought under Section 34,51 and 94 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, the defendants sought for orders that:

- i. The plaintiffs' temporary or semi-permanent houses and cash crops which were in situ on the suit property when this suit was commenced be valued by the District Works Officers, Kilifi or the District Quantity Surveyor and Lands Officers, Kilifi for the purposes of compensation as decreed by the court;**
- ii. The court do set the amount of compensation and mode of payment for each of the plaintiffs' structure in accordance with the values or average of the values given by the public officers mentioned above as ordered and decreed by court;**
- iii. The other structures which have been created after the commencement of this suit be excluded from the valuation exercise as they have been created in contravention of the lis pendens doctrine and for the sole purpose of stealing a march against the defendants.**

iv. The defendants, the court Bailiff, the Auctioneer, the District Works officer and or the District Quantity surveyors and Lands officers, Kilifi District be afforded police protection under the superintendent of O.C.S, Malindi Police Station so as to undertake the valuation exercise and put the defendants in possession of the suit property without a breach of the peace;

v. Any plaintiff or their agents or servants or family members who may resist the execution process be arrested and detained in prison for 30 days for such resistance and for failure to vacate and deliver the suit property voluntarily in compliance with the orders and decree of court;

vi. The costs of this application be provided.

2. The application is supported by the affidavit of Swafiya Abdalla (AKA Swafiya Swaleh Mahdi Swaleh) and Fatuma Swaleh Mahdi (AKA Fatuma Swaleh Mahdi Swaleh) sworn on 9th November, 2011 and a further affidavit sworn by Fatuma Swaleh Mahdi Sworn on 16th January, 2018 and the grounds set out in the motion.

3. The application came up for hearing before the court (Mukunya, J) on 27th November, 2013 who allowed the application in terms of prayers (1), (3) and (4) thereof. Pursuant to the orders made by the court on 27th November 2013, a valuation report dated 23rd June, 2014 was filed on 28th August, 2014 by the District valuer, Kilifi/Malindi/Kaloleni/Ganze/Lamu/Tana River Districts.

4. When the matter came up before me on 10th October, 2017, Mr. S.M Kimani, Counsel for the Defendants/Applicants urged the court to consider the valuation filed as reasonable compensation to the plaintiffs save for the 7th plaintiff who had no structure and therefore is not entitled to any compensation. The 5th plaintiff who had filed a Notice of intention to act in person and notice of withdrawal of suit on 6th October, 2017, sought for time to consult his former advocate in Malindi. Although the 2nd, 3rd, 4th, 6th and 7th plaintiffs filed their replying affidavit on 25th September, 2017 in opposition to the application, they sought for leave to file further affidavits which leave was duly granted by the court.

5. Plaintiffs filed a joint Replying Affidavit dated 17th November, 2017 and filed on 17th November, 2017 and grounds of opposition also filed on 17th November, 2017. In addition, the 2nd, 3rd, 4th, 6th, and 7th plaintiffs filed a joint further replying affidavit sworn on 29th November, 2017 and filed in court on 4th December, 2017.

6. The plaintiff's main contention is that they were not aware of the proceedings herein until they were served with a hearing notice for the application as their advocates never communicated to them about what was going on. They aver that they have never refused to comply with the judgment of the court, but contend that they have lived on the land since time in memorial and have nowhere else to go. The plaintiffs have also opposed the application on the ground that the judgement the defendants are seeking to execute was made more than 12 years, hence is statute barred in terms of Sections 4 (4) and 17 of the Limitation of Actions Act, Cap 22 laws of Kenya.

7. In his submissions, Mr. S.M Kimani, Counsel for the Defendants/Applicants argued that the application was filed before the expiry of twelve years hence the judgement is not time barred and therefore Section 4(4) of the Limitations of Actions Act does not apply. He pointed out that the plaintiffs have failed to file valuation reports to assist the court to determine the compensation payable, hence urged the court to go by the valuation report on record and grant prayer 2 of the application.

8. I have carefully considered the application herein. As already stated, the court (Mukunya J) had on 27th November, 2013 granted prayers (1), (3) and (4) of the motion. What was left for determination is mainly prayer 2 for the court to set the amount of compensation and mode of payment for each of the plaintiffs' structures. The orders made by the court on 27th November, 2013 have not been set aside and are still in

force, therefore the grounds raised by the plaintiffs have no basis. Moreover, the judgement herein was delivered on 12th November, 2002 while this application was filed on 11th November, 2011. Twelve (12) years had not expired, and therefore Section 4 (4) of the Limitation Act does not apply.

9. I note that the 5th plaintiff filed a notice of withdrawal of suit on 6th October, 2017. The suit was determined by the court on 12th November, 2002 and therefore the withdrawal, in my view, is of no effect.

10. The court is to set the amount of compensation payable to the plaintiffs. There is only one valuation report filed. The plaintiffs were granted an opportunity to engage a valuer of their choice and file their valuation reports for the court to arrive at its finding. However, the plaintiffs failed to file any valuation report. Consequently, I have no hesitation in adopting the amounts set out in the valuation report filed herein on 28th August 2014 as the reasonable compensation payable to the plaintiffs who had structures when the suit was on going. The 7th plaintiff had not structure and therefore no compensation is payable to him.

11. The upshot of this is that this court grants the application in terms of prayers (2) in terms of the figures in the valuation report dated 28th August, 2014. I also grant prayers 5 of the application. Considering the circumstances of this case, I order that each party bear their own costs.

It is so ordered.

Dated signed and delivered at Mombasa this 11th April, 2018.

C. YANO

JUDGE