



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 142 OF 2014**

**SALIM BAKARI MWINYI & OTHERS.....PLAINTIFFS**

**-VERSUS-**

**MOHAMED ALI MOSES alias GANDI & OTHERS.....DEFENDANTS**

**RULING**

1. The applications that came up for hearing and which were argued by way of written submissions were the following:

**(i) The plaintiffs' application dated 1<sup>st</sup> August 2017 and preliminary objection dated 15<sup>th</sup> November 2017.**

**(ii) The 3<sup>rd</sup> defendant's notice of motion dated 19<sup>th</sup> October 2017.**

**(iii) The 5<sup>th</sup> defendant's application dated 10<sup>th</sup> November 2017**

**(iv) 6<sup>th</sup> Defendant's application dated 1<sup>st</sup> December 2017.**

2. During the highlighting of the submissions, Ms Mukoya advocate appearing for the plaintiffs informed the Court that the fencing was complete therefore the orders sought in their application were overtaken by events. The Court interpreted this to mean the plaintiffs have abandoned the orders they are seeking. Accordingly, I do make an order that the application dated 1<sup>st</sup> August 2017 be and is hereby marked as abandoned. The costs of the motion are awarded to the defendants who had filed their responses and submissions which costs are ordered in the cause.

3. All the defendants' applications sought similar orders i.e. *"that this honourable Court be pleased to strike out the entire plaintiffs' suit with costs of the application and suit being provided for."* The grounds upon which the applications are premised are as per those in Order 2 rule 15 of the Civil Procedure Rules to include that the suit does not disclose a reasonable cause of action; the suit is scandalous, frivolous and vexatious; that each of the defendants own their separate titles and not jointly with any other defendant. It is also stated that the plaintiffs are not in physical occupation of the suit land. That the failure by the plaintiffs to establish the doctrine of adverse possession both in the originating summons and the supporting affidavit makes this suit incompetent, misconceived in law & defective, *et al* and ought to be struck out for being an abuse of the Court process.

4. All the defendants' applications are brought under the provisions of Order 2 rule 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applications have been opposed by the plaintiffs vide a replying affidavit sworn by Salim Bakari Mwinyi. In paragraph 10 of the replying affidavit dated 16<sup>th</sup> November 2017, this plaintiff deposes that there is admission by the defendant vide annex 'e' that there were people in occupation of the suit land known as *"jeuri community"* and whether they include the plaintiffs or other groups is a matter of evidence that can only be adduced during the trial.

5. The plaintiffs also took issue with the locus of the person who swore the affidavit in support of the 5<sup>th</sup> defendant's application. That the question of adverse possession is a matter to be decided on evidence. In the replying affidavit dated 19.1.2018 and filed in Court on 22.1.2018, Mr Bakari deposed that the mere possession of a title document cannot displace the plaintiffs' claim for adverse possession. He deposed that their fore-fathers have been in occupation of the suit land together with the adjoining parcels and they all form jointly their ancestral land. That their claim is for the entire parcel of land being claimed by the six (6) defendants. He opposed the prayers sought in the application.

6. The parties filed written submissions which I have read. In the cases cited by the 6<sup>th</sup> defendant i.e. **Joseph Mureithi vs Mathenge Njeru (2016) eKLR**, the Court made the observations after taking the evidence. In the application to strike out the suit in **Perej General Trading**

**Ltd & Another vs Mumias Sugar Co Ltd (2016) eKLR**, Justice Olga Sewe allowed the application which was based on judgment on admission and in the **GBM Kariuki vs Nation Media Group & 3 Others (2012) eKLR**, the application to strike out the suit was dismissed.

7. In the 5<sup>th</sup> defendant's submissions and list of authorities, they have submitted on what a party needs to demonstrate to be entitled to the grant of orders for ownership of land by adverse possession. Whether the 5<sup>th</sup> defendant has a title deed which is valid or not is not in issue. What is to be determined is the physical occupation of this land by the plaintiffs and for how long. The question of occupation is a matter of fact that must be established by evidence. This matter is yet to be heard on merits and for any of the defendants to allude the plaintiff are not in physical occupation in my view is premature.

8. In the case of **Wilson Kazngu Kalama & 110 others vs Salim Bakshwein & Another (2015) eKLR** was a determination of the Court of Appeal from a judgment of the High Court who had taken evidence from both parties. The Court of Appeal discussed what ingredients a party needs to establish to be awarded land under the doctrine of adverse possession. Again the 3<sup>rd</sup> defendant at page 4 of their submissions refers the Court to the issue of occupation. They state thus *"the 3<sup>rd</sup> defendant has demonstrated that the plaintiffs' occupation though not on its suit property has not been peaceful since several suits have previously been filed challenging the titles."* The 3<sup>rd</sup> defendant by filing this application expects the Court to rely on the evidence shown by their annexures (of previous suits) without giving the plaintiff an opportunity to also present their case. Parties have not taken directions on how this matter should proceed whether by affidavit evidence or viva voce evidence. This position if adopted by the Court would abuse the rules of natural justice on the right to being accorded a fair hearing. This application is also premature and an abuse of the Court process.

9. The initial pleadings in this matter which is the originating summons and the supporting affidavit dated 10<sup>th</sup> June 2014 was drawn by Salim Bakari Mwinyi c/o Chief's office Mtwapa. Whether or not Ms Joseph Gathuku & Co advocates were properly appointed to appear for the plaintiffs does not in my opinion and I so hold invalidate the suit as originally commenced. Consequently this ground of objection also collapses. On the issue of separate titles there is no denial that the defendants' property are adjacent to each other. As put by the plaintiff, it was initially one **"big land"** which they allege is their ancestral land. It is upto the plaintiffs to establish a claim against each defendant. In any event, the defendants have not demonstrated the inconvenience they are caused having been sued together.

10. In conclusion, it's my finding and I so hold that the applications dated 19.10.2017, 10.11.17 and 1.12.2017 brought by the 3<sup>rd</sup>, 5<sup>th</sup> & 6<sup>th</sup> defendants respectively are premature, lacking in merit and merely intended to delay the hearing of this case on its merits. Accordingly each and all of the applications are hereby dismissed with costs to the plaintiffs ordered in the cause.

**Dated, signed & delivered at Mombasa this 22<sup>nd</sup> June 2018**

**A. OMOLLO**

**JUDGE**