



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 201 OF 2016

REV. SAMSON KISIA

REV. DAVID KIATU

MR. GILBERT KABAGE

PASTOR FRANCIS JOMO (Suing as Trustees of the

Baptist Convention of Kenya).....**PLAINTIFF/APPLICANT**

-VS-

FRANCIS THOYA, COUNTY SECRETARY

COUNTY GOVERNMENT OF MOMBASA

HON. RASHID BEDZIMBA.....RESPONDENTS/DEFENDANTS

RULING

1. By a Notice of Motion dated 23rd October 2017 brought under Order 36 Rule 1 of the Civil Procedure Rules, the Plaintiffs are seeking for orders that judgment be entered in favour of the Plaintiffs as prayed in the plaint and costs. In the plaint dated 20th July 2016, the Plaintiffs are seeking a declaration that all that property known as **PLOT NO.91/11/MN** belong to the Plaintiffs and that the defendants have no legal right over the same; a permanent injunction restraining the Defendants from encroaching, trespassing into or in any way whatsoever interfering with the Plaintiffs' possession and quiet enjoyment of all that property known as **PLOT NO.91/11/MN**; general damages for trespass, nuisance and disturbance and costs of the Suit.

2. The Plaintiffs' Application is based on the grounds that the High Court in a judgment delivered in **Constitutional Petition No.98 of 2012** has conclusively dealt with the issues raised in this suit and that since no appeal has been lodged against the said judgment the same is binding on the parties and there is no need on litigating on what has already been adjudicated. The Application is supported by the Affidavit of William Onyango Wameyo sworn on 23rd October 2017 and to which he has annexed a copy of the Judgment in **Mombasa High Court Petition No.98 of 2012** marked "A".

3. The Application is opposed by the Defendants who filed Grounds of Opposition dated 30th April 2018, namely:

i. THAT the provisions of Order 36 does not apply in the current suit.

ii. THAT there are numerous issues for the Courts determination:

a. THAT the Defendants were not a party in Constitutional Petition No.98 of 2012.

b. THAT under the new constitutional dispensation, all claims under the defunct Municipal Council of Mombasa are to be directed towards the Transitional Authority established under the Transitional Authority Act.

iii. THAT the decision in Constitutional Petition No.98 of 2012 was not on land ownership.

4. In his submissions, Mr. Wameyo Counsel for the Plaintiffs submitted that none of the Defendants has filed defence to the Suit. He added that the issue for determination is the ownership of the property known as **PLOT NO.91/11/MN** in which the Plaintiffs are seeking a declaration that the suit property belong to them and the defendants have no legal rights over it. Mr. Wameyo submitted that the High Court in **Constitutional Petition No.98 of 2012** had in paragraph 28(a) thereof declared that the Suit Property belong to the Plaintiff and there has been no appeal against that decision. He urged the Court to allow the Application as there is no defence filed. Mr. Wameyo further submitted that under Section 1A of the Civil Procedure Act, the Court should determine matters expeditiously without undue delay and waste of time and resources.

5. Mr. Mohamed, Counsel for the Defendants on his part submitted that in the **Constitutional Petition No..98 of 2012**, one of the Respondents was the Municipal Council of Mombasa while in this case, one of the Defendants is the County Government of Mombasa. Relying on the case of (Interim) **County Secretary, County Government of Kakamega – v- Republic, Ex- parte Ali Adam and & Another (2017)eKLR**, Mr. Mohamed Submitted that the County Government of Mombasa was not a direct successor to the Municipal Council of Mombasa and that it was incumbent upon the Petitioner in **Petition No.98 of 2012** to go to the relevant body for dispensation. Mr. Mohamed urged the Court to dismiss the application with costs.

6. In response, Mr. Wameyo submitted that the effect of the declaration in **Petition No.98 of 2012** binds all parties as the same was in rem and not in personum. Mr. Wameyo submitted that the Defendants cannot raise the issues decided in **Petition No.98 of 2012** in this case as this Court is not sitting on appeal over the Petition. Consequently, Mr. Wameyo submitted that the decision in **Petition No.98 of 2012** is subsisting and holds and binds all parties. He pointed out that the cause of action in this case arose in 2016 and the acts complained of was by the defendants.

7. I have considered all the issues raised in the Application. The principles which guide the courts in determination and application for summary judgment are well settled. In the case of **Gupta –v- Continental Builders Ltd (1978) KLR 83**, the Court of Appeal stated:

“If no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in proper case. Prima facie triable issues ought to be allowed to go to trial as sham or bogus defence ought to be rejected peremptorily.”

8. In the case of **Continental Butchery Ltd –v- Nthiwa (1989) KLR 573**, Madan JA stated:

“With a view to eliminate delays in the administration of justice which would help litigants out of their just dues or enjoyment of their property, the Court is empowered in an appropriate suit to enter judgment for the claim of the Plaintiff under the summary procedure provided under Order 35 subject to there being no bona fide triable issues which would entitle a defendant leave to defend. If a bona fide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham ”

9. With the above quoted words, the first principles of applications for summary judgment are that where there are no triable issues raised or where the triable issues raised are a sham, the court will grant an Application for Summary Judgment to eliminate delays in the administration of justice. It is the Application of this principle in the present case that will determine the outcome of the Plaintiffs' Application herein.

10. From the pleadings it is apparent that both the Plaintiffs and the Defendants are in agreement that there have been previous proceedings being **Petition No.98 of 2012** between the Plaintiffs and the Attorney General, the Ministry of Education and the defunct Municipal Council of Mombasa. The Plaintiffs have exhibited a copy of the judgment in **Petition No.98 of 2012**. In that judgment, the Court declared, inter alia, that the Suit Property belong to Plaintiffs and the Respondents had no proprietary interest in it. There is no evidence that the said judgment was set aside or varied in appeal. The same is therefore still in force.

11. In the Plaint dated 20th July 2016, the Plaintiffs aver inter alia that on 16th and 17th July 2017, the Defendants trespassed into and interfered with the Plaintiffs' possession and quiet enjoyment of the Suit Property. The Plaintiffs then filed this suit seeking the reliefs in the Plaint.

12. The Defendants have not filed defence to the Plaintiffs' claim and therefore have not challenged the claim. In response to the Plaintiffs' Application for summary judgment, the Defendants filed the grounds of opposition dated 30th April 2018. The Defendants have submitted that they were not a party to **Petition No.98 of 2012** and relied on the case of (Interim) County Secretary, County Government of Kakamega (supra). I must however point out that the issue for determination in the above cited case was different from the one in this case. In the case of (interim) County Secretary, County Government of Kakamega (supra), the issue was whether the County Government of Kakamega as the successor of the defunct Municipal Council of Kakamega was under a legal duty to satisfy the decree in a case that was decided against the latter. In this case, the Plaintiffs are seeking specific reliefs against the defendants. In this case, the substantive issue for determination is whether the Plaintiffs are the proprietors of the suit Property and whether the defendants have without color of right trespassed into and interfered with the Plaintiffs possession and enjoyment of the Suit Property. The Plaintiffs aver that the **High Court in Petition No.98 of 2012** has determined that the Suit Property belongs to the Plaintiffs. The defendants have not filed any defence and therefore did not contest the Plaintiffs' claim. I am therefore unable to see any defence the Defendants would have to the Plaintiffs' claim.

13. Having considered the Plaintiffs' pleadings and the evidence on record, I do find that the Notice of Motion dated 23rd October 2017 is merited and the same is hereby allowed. Judgment be and is hereby entered in favour of the Plaintiffs in terms of prayer (a) and (b) of the Plaint. I decline to grant prayer (c) thereof as no evidence was led in support of it.

The Plaintiffs shall have the costs of the suit and of this application.

It is so ordered.

Ruling dated, signed and delivered at Mombasa this 23rd day of July 2018.

C. YANO

JUDGE