



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 76 OF 2014(O.S)

JOSEPHAT TEMO CHIKOLA & 13 OTHERS.....PLAINTIFFS

=VERSUS=

1. FATUMA WALEH MAHDI

2. SOPHIA SWALEH MAHDI.....DEFENDANTS

R U L I N G

1. The Application before me is the one dated 5th June, 2014, in which the Defendants are seeking for the following orders:-

(a) THAT the representative action filed herein is struck out for failure to obtain leave of court to institute a representative action as required by the rules of court as amended and for being an abuse of the court process there being a judgment in rem dismissing a previous action for adverse possession in Mombasa H.C.C.C No. 155 of 1995 (OS); the applicants are in any event on part of the land in contravention of the said judgment; and the defendants have had possession of the land and have indeed dealt with the same;

(b) THAT the costs of this application be provided for.

2. The Application is supported by the Affidavit of the Defendants who have deponed that they are the legal representatives of the erstwhile registered owner of plot 358 Malindi and that upon the killing of their father, they applied to join in the proceedings then pending before the High Court in Mombasa HCCC No. 155 of 1993.

3. The Applicants have deponed that the present representative action is incompetent because the Plaintiffs never obtained the leave of the court at the time of commencement of the action; that there were squatters who lost their case in HCCC No. 155 of 1993 and were required to vacate the land and that the process of valuing the structures and crops on the land has been delayed.

4. According to the Applicants, the Plaintiffs are children of the Plaintiffs in the concluded suit and that they are bound by the Judgment of the High Court at Mombasa.

5. It is the Applicants' case that the action is untenable because the Plaintiffs have failed to comply with the requirements of the law to exhibit a certified extract of the title and that the photographs of the structures exhibited on the Plaintiffs' affidavit are not known to them.

6. The Plaintiffs/Respondents have not opposed the Applicants' Application.
7. The Applicants' Advocate filed detailed submissions which I have considered.
8. The only issue that I am supposed to determine at this stage is whether the suit is a representative action and if so whether the leave of the court was required before the commencement of the suit.
9. The court is also supposed to determine if indeed the suit is an abuse of the court process in view of a Judgment in Mombasa HCCC No. 155 of 1995 (OS).
10. In the Originating Summons dated 16th April, 2014, the Plaintiffs have described themselves as “suing on their behalf and on behalf of the squatters/residents upon the suit property Plot NO.358, Malindi measuring 112.82 acres.”
11. I am in agreement with the Plaintiffs' advocate submissions that failure to comply with Order 1 Rule 8 is fatal to a representative action. Obtaining leave to sue in a representative capacity and giving a notice of the suit to all such persons personally or by public advertisement must be done at the time of commencement of the suit.
12. However, the Plaintiffs in this matter have averred that they have also filed the suit on their own behalf.
13. To the extent that the Plaintiffs are claiming the suit property on their own behalf, I shall not strike out the suit solely on the ground that they did not obtain the leave of the court to bring the suit as a representative action. The suit can proceed as if it has been commenced by the fourteen Plaintiffs alone and not on behalf of the other unnamed squatters.
14. Is this suit an abuse of the court process?
15. The Applicants' advocate has submitted that there being a Judgment in rem in Mombasa HCCC No.155 1995 (OS), wherein the squatters suit for an order to be declared as owners of the land by adverse possession was dismissed, the present claim is an abuse of the court process.
16. I have perused the Judgment in Mombasa HCCC No.155 of 1993 (OS).
17. In that suit, the seven Plaintiffs claimed that they are entitled to the suit property by way of adverse possession of all that parcel of land known as 358, Msabaha Malindi.
18. None of the current Plaintiffs were parties in Mombasa HCCC No. 155 of 1993 (os).
19. It is not clear to this court at this stage the relationship of the current Plaintiffs and the Plaintiffs in Mombasa HCCC No. 155 of 1993 (OS).
20. Before ascertaining whether indeed the current Plaintiffs are related to the Plaintiffs in HCCC No. 155 of 1993, or whether they were even aware of the proceedings in Mombasa HCCC No. 155 of 1993, it would be unsafe to strike out the Plaintiffs' suit at this stage.
21. In my view, the issue as to whether this suit is an abuse of the court process can only be determined after evidence has been tendered at trial. It could as well turn out that the Plaintiff's claim over the suit property is independent the claim by the Plaintiffs in HCCC No. 155 of 1993 (os).
22. In the circumstances, and without going into the merits of the Plaintiffs' claim, I direct that the issues that have been raised by the Defendants should be raised at trial.
23. For those reasons, I dismiss the Application dated 5th June, 2014 with no orders as to costs.

Dated, signed and delivered in Malindi this 3rd day of February, 2017.

O. A. Angote

Judge