



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 182 OF 2016

**JOYCE NINGALA MWAMUTSI (THE ADMINISTRATOR OF THE ESTATE OF
DAVID MWAMUTSI MURIRA.....PLAINTIFF**

=VERSUS=

1. SALIM JUMA ALI

2. RASHID ALI.....DEFENDANTS

RULING

1. I have before me an application dated 15th July 2016. The Plaintiff David Mwamutsi Murira is seeking for orders:-

i. THAT the Defendants/Respondents by themselves, their agents and/or servants or employees or anybody acting through them be restrained from building and/or erecting structures, cultivating, fencing, trespassing or doing anything adverse to the Plaintiff/Applicant's parcel of land number Mbwaka/Maereni/311.

ii. THAT the Respondents be evicted from the suitland and/or compelling them to handover vacant possession of the land to him.

2. By a Supporting Affidavit sworn on 15th July 2016, the Plaintiff has given a long history of the dispute going back to 1975 when he states he bought the suitland measuring approximately 0.5 Ha. It is his case that he holds a valid title deed to the parcel of land and is desirous of developing the same but the Defendants would not let him and are instead busy putting up permanent structures and a Mosque on the parcel of land. It is the Applicant's case that unless the Defendants are restrained by an order of this court, he stands to suffer immense loss and damage.

3. The Defendants Salim Juma Ali and Rashid Ali Birya who are brothers and the Administrators of the Estate of the late Juma Ali Birya have filed both grounds of opposition and a Replying Affidavit in opposition to the grant of the orders sought. In the Replying Affidavit sworn by Salim Juma Ali on 8th November 2016, the Dependants aver that this application and the entire suit is an abuse of the court process as the same is sub judice Mombasa High Court Civil Case No. 44 of 2012(OS) which is pending disposal.

4. It is the Respondents/Defendants case that their late father Juma Ali Birya and their families have

resided on Plot No. Mbwaka/Maereni/311 for over 40 years starting from 13th September 1975 when their father purchased the same from one Katana Chiringa. They aver that since the said purchase, they have been in exclusive possession of the plot and have wholly developed the same as their ancestral home in which they have put up a trading centre with several shops, a public mosque and a public Islamic Madrassa.

5. The defendants further accuse the Plaintiff of being indolent and guilty of unreasonable delays. It is their case that the mandatory injunction order sought by the plaintiff in both the suit and this application cannot be granted by a court of equity at an interlocutory stage without trial as that would be tantamount to determining the suit at an interlocutory level.

6. I have considered the Application and the issues raised before me. I have equally considered the Grounds of Opposition and the Replying Affidavit filed by the Respondents. In addition, I have studied the submissions and authorities placed before me by the Learned Advocates for the parties.

7. It is not contested that the Respondents are presently residing in the suitland and thus the orders sought herein are of a mandatory injunction in nature. In ***Kenya Breweries Ltd –vs- Washington Okeyo (2002)EA 109***, the Court of Appeal held that the test for the grant of a mandatory injunction was as correctly stated in **Volume 24 of Halsbury’s Laws of England, 4th Edition Paragraph 948** that:-

“A mandatory injunction can be granted on interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”

8. Similarly in ***Sharif Abdi Hassan –vs- Nadhif Jama Adan (2006) eKLR(Civil Appeal No. 121/2005)***, the Court of Appeal observed that:

“The courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”

9. In the matter before me, David Mwamutsi Murira avers that he bought the parcel of land in dispute on 29th August 1975 from one Katana Chiringa. He has annexed a copy of a Sale Agreement marked as “DMM-1”. He further avers that the said Katana Chiringa later sold the same piece of land to the father of the defendants herein Juma Ali Biryra and that he reported the matter to a Panel of Elders who adjudicated on the issues and declared him to be the rightful owner of the suitland. The resultant award was filed in court being Kaloleni District Magistrate’s Court Land Case No. 12 of 1976. The brief decision of the Honourable P.J.D Mwangulu, then District Magistrate III Kaloleni delivered on 22/9/77 is attached to the application as follows:

“JUDGMENT”

In this case the Plaintiff David Mwamutsi sued Katana Chiringa for a claim of a piece of shamba Plot No. 311. The Defendant admitted in writing that he leaves the shamba to the Plaintiff. The court took formal proof. I enter Judgement for the Plaintiff as prayed with costs. Shamba is awarded to the Plaintiff David Mwamutsi."

10. The Plaintiff further indicates that when this award was made the Defendant/Respondents further again trespassed into the land forcing the Plaintiff to file an objection before the Land Adjudication Kilifi. This process culminated in Land Appeal Case No. 141/82 wherein it was ordered that the suitland be registered in the Plaintiff’s name. A certificate of Title was eventually issued in the Plaintiff’s name

on 30/4/1987.

11. The chronology of events as narrated by the Defendants is not very different from the narration by the Plaintiff. According to the Defendants, their father the late Juma Ali Biry aforesaid purchased the land from the very same Katana Chiringa on 13th September 1975. They have annexed a Sale Agreement confirming the sale. It is however their case that the Plaintiff herein secretly filed the proceedings before the District Magistrate's Court in Kaloleni without following the provisions of the Land Adjudication Act. They therefore contend that the decision arrived at ex-parte by the Honourable P.J.D. Mwangulu on 22nd September 1977 was null and void as the consent of the Land Adjudication Officer had not been obtained to institute proceedings as was required under Section 30 of the Land Adjudication Act.

12. In regard to Land Case Appeal No. 141 of 1982, the Defendants concur that the Plaintiff filed the same after the Senior Land Adjudication Officer had awarded him only one quarter (1/4) portion of the suitland. It is their case that the Appeal went before the Special District Commissioner's Court at Kilifi who after hearing the case but "without evaluating the evidence tendered" relied on the decision of the District Magistrate's Court at Kaloleni. It is their stand that the District Magistrate Court had no jurisdiction to enter the alleged Judgment.

13. Accordingly, after their Appeal to the Minister failed to bear fruit, the Defendants on 24th July 1987 moved to the High Court in Mombasa and filed Judicial Review proceedings for certiorari and prohibition against the decision of the Special District Commissioner's Court. It is apparent that the Judicial Review application never moved past the leave Stage. While the Plaintiff contends in the Plaint that the application was dismissed, the Defendants at Paragraph 8 of the Statement of Defence aver as follows:

"The Defendants admit the averments in Paragraph 8 of the Plaint to the extend (sic) only that Judicial Review Application No. 50 of 1987(Msa) was filed by their deceased father against the decision of the Minister but denies(sic) that the same was dismissed and puts the Plaintiff to very strict proof thereof. The defendants aver and maintain that the Judicial review file in Miscellaneous Application No. 50 of 1987(Msa) went missing immediately the court granted stay orders against the decision of the Minister in Appeal No. 141 of 1982 before the Substantive motion for certiorari was heard presumably with underhand dealings from the Plaintiff as a result of which the Plaintiff got himself registered as the owner of Parcel No. Mbwaka/Maereni /311 contrary to the orders of stay given in the aforesaid Judicial Review case and the Plaintiff is put to very strict proof to the contrary.

14. What emerges from the foregoing is that pursuant to a court order, the Plaintiff was determined to be the owner of the parcel of land in question and has been the Registered Owner thereof having been issued with a Certificate of Title on 30th April 1987. It is not disputed that the award of the elders and the District Courts have neither been challenged nor appealed. It is further evident that the Judicial Review proceedings did not quash the decision that was made in the Minister's Land Appeal Case No. 141 of 1982. Since then, the Defendants continue to stay on the impugned land and continue to carry on developments thereon.

15. Indeed it is evident that on 19th March 2012, the Defendants moved to court and filed Civil Case No. 44 of 2012(O.S) seeking orders that they are entitled to the suitland by virtue of adverse possession.

16. The Defendants now contend that if the orders sought herein are granted, it will be tantamount to condemning them unheard in the claim for adverse possession. Given the history of the dispute as outlined hereabove, I must say that the claim for adverse possession is quite interesting. To my view, I think it is pertinent that the person against whom the order of adverse possession is sought should either be in possession or able to exercise, of his own free will, some form of control over the land in question. As was said in the old English case of **Adriam vs Earl of Sandwich (1877) QBD 487:-**

"The legitimate object of all statutes of limitation is in no doubt to a quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at

some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part or want to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

17. Given the in and out- of –court disputes the parties have heard since 1977, I doubt that the Plaintiff herein can be described as a party that has neglected to assert his rights over the suitland. Without delving into the merits of the claim for adverse possession, which is intended for consolidation with this matter, I am , in view of the foregoing, not persuaded that it is a matter that should preclude this court from making a proper determination on the application before me. Indeed it is worthy of note that the claims made in Mombasa High Court Civil Case No. 44 of 2012(OS) are also the subject of Paragraph 16 of the Defendants Defence herein where they assert that the Plaintiff’s rights to the suitland have been extinguished by operation of the law on the basis that the Defendants have exclusively occupied the suit property over a long period of time and have acquired the same under the doctrine of adverse possession.

18. Commenting on the doctrine of res judicata, the Court of Appeal in ***William Koross –vs- Hezekiah Kiptoo Komen & Others, Civil Appeal No. 223 of 2013(2015) eKLR*** had this to say:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

19. I think the Plaintiff herein was long entitled to the fruits of his success in the litigations the parties have heard. From the record, I note that the Plaintiff David Mwamutsi Murira passed away on 23rd December 2016 at the ripe age of 80 years. I think his legal representative Joyce Ningala Mwamutsi who was substituted for him in these proceedings on 16th March 2017 should have the benefit of enjoying the fruits of their success.

20. Accordingly, I hereby grant Prayers 4 and 5 of the Application dated 15th July 2016. The said orders will be stayed for a period of 45 days to allow the Respondents to remove the structures they have built on the suitland and/or to seek alternative accommodation.

21. The Plaintiff shall also have the costs of the Application.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J. O. OLOLA

JUDGE