REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 219 OF 2015

1. CHARO LEWA

2. KAHINDI CHARO

3. NICHOLAS LEWA

4. KADII CHARO LEWA...PLAINTIFFS

VERSUS

1. ESTATE OF MOHAMED OMAR BAWALY

2. JOGI MOTORS LTD

3. NATIONAL LAND COMMISSION

4. HON. ATTORNEY GENERAL............................DEFENDANTS

RULING

1. By a Plaint dated 24th November 2015 and filed herein on 1st December 2015, the 4 Plaintiffs have asked the Court for :-

(i) A declaration that the Plaintiffs are entitled to the suitland by adverse possession.

(ii) An Order that the 1st and 2nd Defendants, be permanently restrained by themselves, their agents, servants, workers and/or employees from entering, remaining in and/or removing the Plaintiff's mango trees, coconut trees, cashewnut trees and/or destroying the Plaintiff's food crops and/or in any manner which may interfere with the Plaintiff's peaceful stay and occupation of the suit property.

(iii) Costs of this suit.

(iv) Any other or further Orders this Court may deem just and fit to grant

2. Contemporaneous with the said application, the Plaintiffs filed a Notice of Motion of even date seeking Orders of injunction against the Defendants. Having heard the arguments for and against the injunction application the Honourable Justice Angote then seized of the matter delivered a Ruling herein on 22nd

July 2016 in which he ordered the status quo prevailing to be maintained pending the hearing and determination of the suit. The Learned Judge clarified in the said Ruling that the status quo as at the time meant that the Plaintiffs were the ones utilizing the property.

3. Subsequently, by an application dated and filed herein on 24th January 2017, the 2nd Defendant/Applicant now prays for an Order:-

(a) That the suit herein be struck out with costs.

4. The said application is supported by an Affidavit sworn by Richard Rodrot, a Director of the 2nd Defendant sworn on 24th January 2017. The said application is premised on the grounds set out on the face thereof as follows:-

(i) That the suit against the 2nd Applicant /Defendant was filed by way of Plaint. A suit on adverse possession should be instituted vide an Originating Summons and not a Plaint.

(ii) That the procedure adopted by the Plaintiffs in bringing the claim is wrong and there is no jurisdiction by which these proceedings can be converted so as to continue as though it had begun by way of Originating Summons.

(iii) That the Plaintiffs have not been in quiet possession of the suit property for a continuous period of 12 years.

(iv) That the Plaintiffs have stated in their Supporting Affidavit sworn on 24th November 2015 that their occupation of the suitland was interrupted in 2009 and if indeed that is true, then the claim of adverse possession is premature and statute barred.

(v) That unless the Orders sought here are granted the 2nd Defendant/Applicant will suffer (irreparable) loss and damage.

5. In a Replying Affidavit sworn by the 1st Plaintiff Charo Lewa on 16th March 2017, the Plaintiffs are opposed to the grant of the Orders sought by the 2nd Defendant. It is their case that no technical objection may be raised to any pleading on the grounds of any want of form. In addition, they state that this Court has inherent powers under the Civil Procedure Act and may order any suit wrongly filed to proceed as if the same has been properly filed.

6. The Plaintiffs further contend that the matters raised herein are fairly complicated and complex and that even if the same were brought by way of Originating Summons, the Court may have still ordered that the same proceed as if commenced by way of a Plaint.

7. The Plaintiffs aver that the 2nd Defendant has no right to file any application in this suit to strike out the same for the grounds stated since its Director had in his sworn affidavit of 7th December 2016(in opposition to the Plaintiff's application for injunction) stated that the 2nd Defendant has no interest in Plot No. 139, the suit property herein. They accordingly pray that the application be dismissed as the same lacks merit.

8. I have considered the application and the response thereto. I have equally considered the submissions placed before me together with various authorities by the Learned Advocates appearing for the Applicant and the Respondents. For the record, the 1st Defendant argued for and was in support of the Application.

9. Order 2 Rule 15 of the Civil Procedure Rules provides as follows:-

"15.(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.

10. The main contention by the 2nd Defendant in the Application before me is that the suit having been brought by way of a Plaint, there is no jurisdiction by which the same can be converted to proceed as if the same were brought by way of an Originating Summons which procedure is what would have clothed the Court with jurisdiction to hear the dispute.

11. In ***Dev Surinder Kumar Bji –vs- Agility Logistics Limited, Civil*** **Suit No. 311 of 2013(2014)eKLR**, *it was held inter alia, that:-*

"For a pleading to be dismissed pursuant to the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules, it should be made clear and obvious that the issues raised by the Plaintiff can neither be substituted, nor disclose any reasonable or justifiable action as against the Defendant."

12. The principles applicable in considering whether or not to strike out a pleading were long considered by the Court of Appeal in ***D.T. Dobie & Company (Kenya) Ltd –vs- Muchina (1982) KLR*** where Madan JA(As he then was) adopted the findings of ***Sellers LJ in Wenlock –vs- Moloney (1965) 1 WLR 1238*** and observed that:-

"*This summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not a proper exercise of that power."*

13. Madan JA(as he then was) further added in the DT Dobie case (above) that:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a Court of justice ought not to act in darkness without the full facts of the case before it.

14. In the suit before me, I note that other than the contested prayer for a declaration that the Plaintiffs are entitled to the suit by way of adverse possession, there are other prayers including one for a permanent injunction against the Defendants. Ruling on the interlocutory injunction application dated 24th November 2016, the Honourable Justice Angote found as a matter of fact that it is the Plaintiffs who are currently utilizing the suit property. To strike out the suit at this stage without making a conclusive determination of the rights of the parties herein would therefore amount to a gross dereliction of duty on the part of this Court.

15. In the circumstances, I find no merit in the application dated 24th January 2017. The same is dismissed with costs to the Plaintiffs.

Dated, signed and delivered at Malindi this 15th day of November, 2017.

J.O. OLOLA

JUDGE