



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 75 OF 2015 (O.S)

MTSONGA KABILA CHIRO.....1ST PLAINTIFF
KHAMIS MOHAMED.....2ND PLAINTIFF
EMMANUEL FADHILI JEFWA.....3RD PLAINTIFF
MASHA MRAMBA MASHA.....4TH PLAINTIFF
ESTHER TSOROMBA TSULU5TH PLAINTIFF

VERSUS

JOHN SIMON KEN MUNGAI GAITHO.....1ST DEFENDANT
PANSY HOLDINGS LIMITED2ND DEFENDANT
DAVID KAHIRO GACHERU3RD DEFENDANT
LACONIC HOLDINGS LIMITED.....4TH DEFENDANT
TOUCAN COMPANY LIMITED5TH DEFENDANT
WADIS ENTERPRISES LIMITED.....6TH DEFENDANT
LONE PALM LIMITED7TH DEFENDANT

RULING

1. In the Application dated 21st June, 2016, the 7th Defendant is seeking for the following orders:

- a. That this Honourable Court be pleased to strike out the Originating Summons filed by the Plaintiffs herein for being vexatious and an abuse of court process.*
- b. That the claim for adverse possession is unconstitutional.*
- c. That this Honourable court be pleased to award costs to the 7th Defendant herein.*

2. The Application is premised on the Affidavit of the Attorney of the 7th Defendant who has deponed

that the Constitution does not provide for deprivation of private property through adverse possession, unlike in the repealed Constitution and that the 7th Defendant will be highly prejudiced if it has to defend the current claim.

3. The 4th and 5th Defendants' Director swore an Affidavit supporting the 7th Defendant's Application.

4. In response, the 1st Plaintiff deponed that under Article 40 of the Constitution, they are entitled to the suit land and that the Plaintiffs are entitled to the suit land by way of adverse possession.

5. In his submissions, the 7th Defendant's advocate submitted that the Plaintiffs have not revealed who the multiple Plaintiffs are; when they entered the land; how many families have lived on the property and the nature of claim for each Plaintiff.

6. Counsel submitted that Article 40 of the 2010 Constitution ousted the arbitrary deprivation of property and that in the absence of a provision in terms of Section 75(6) (v) of the repealed Constitution, the current Constitution does not allow for the operation of the doctrine of adverse possession.

7. The Applicants' counsel submitted that Section 152A of the Land Act specifically prohibits any person from unlawfully occupying private land and that to follow the common law doctrine of adverse possession blindly while ignoring the Constitution will be a blow to Article 40.

8. The 4th and 5th Defendant's advocates filed submissions in support of the Application.

9. According to counsel, the members of Barani Pole Pole Self Help Group have not been named in the suit; that the 117 persons whose names appear in Exhibit MKC 1 have no locus standi to file the suit either as Plaintiffs or Interested Parties and that they have not established that they are entitled to the suit.

10. The Plaintiffs' advocate did not file submissions.

11. In the Originating Summons filed in this court on 15th May, 2015, the five (5) Plaintiffs claim to be the proprietors of 123 acres of land by adverse possession. The portions of land that the Plaintiffs are claiming have been enumerated in the Originating Summons.

12. The grounds on which the Originating Summons is predicated on are that the Plaintiffs have been residing and cultivating the suit property since they were born.

13. The Affidavit in support of the Originating Summons was signed by the 1st Plaintiff who has deponed that he has the authority of the other Co-Plaintiffs to swear the Affidavit on their behalf and on behalf of the members of Barani Pole Pole Self Help Group. The 1st Plaintiff annexed the written and signed authority on his Affidavit.

14. Whether the 1st Plaintiff indeed had the authority to swear the Affidavit in support of the Originating Summons or not is an issue that the court can deal with at the trial, and not at this stage.

15. Consequently, and in view of the written authority annexed on the Affidavit, the locus standi of the 1st Plaintiff or the other Plaintiffs cannot be questioned at an interlocutory stage.

16. Although the 7th Defendant's advocate has acknowledged that the Court of Appeal has held that the doctrine of adverse possession is not unconstitutional, he has submitted that the "*doctrine of Adverse possession stands in an utilitarian position unassailable by this court.*"

17. Indeed, it is this court which held that the doctrine of adverse possession, which is informed by the provisions of Sections 7, 9, 13 and 38 of the Limitations of Actions Act, is not unconstitutional (***See the case of Kahindi Ngala Mwangandi vs. Mtana Lewa (2014) eKLR.***)

18. That decision was upheld by the detailed Judgment of the Court of Appeal (*See Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR.*)

19. For emphasis, this is what the Court of Appeal said in respect to the doctrine of adverse possession viz-a-viz the provisions of Article 40 of the Constitution:

Makhandia, JA:

“However, the Judge opined and rightly so in my view that since Article 40 does not specifically mention that the right to own property can be limited by any law relating to Limitation of Actions, neither does it state that such a law cannot be enacted....”

Ouko, JA:

“...it is necessary to state here that the fact that the Constitution does not make a provision recognizing the doctrine of adverse possession cannot per se imply that it has outlawed it... The process leading to acquisition of land by adverse possession is, accordingly not arbitrary and does not contravene Article 40(2) (a) of the Constitution.

M’Inoti, JA:

“Bearing in mind the prevalence of law on Limitation of Actions and adverse possession, both in commonwealth and civil law jurisdictions, I would find the limitation to the right to property through the doctrine of adverse possession to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

20. That being the position, the 7th Defendant’s argument that the doctrine of adverse possession ignores the provisions of Article 40 of the Constitution does not arise.

21. As to the question of whether the Plaintiffs’ pleadings disclose where, why and how the Plaintiffs entered the suit land, that can only be dealt with at trial and not at this stage.

22. For those reasons, I dismiss the Application dated 21st June, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2017.

J.O. OLOLA

JUDGE