



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 220 OF 2013

JANE AWUOR ONDIEGE..... 1ST PLAINTIFF

SAMUEL ANTHONY ONDIEGE 2ND PLAINTIFF

-VERSUS-

ALI YUSUF MALUMBO..... 1ST DEFENDANT

OMAR YUSUF..... 2ND DEFENDANT

MARURU YUSUF3RD DEFENDANT

ATHUMAN MOHAMED MWACHEGA..... 4TH DEFENDANT

THE KENYA POWER & LIGHTING COMPANY LIMITED..... 5TH DEFENDANT

RULING

1. The court is considering a Notice of Motion Application dated 29th May 2014 filed by the Defendants. The same is supported by the Affidavit of ATHUMAN MOHAMED MWACHEGA and seeks to strike out the plaint with costs on three grounds:

- i. **The consent of the Land Control Board was never obtained at all or within the required time.**
- ii. **The suit is statute barred as the same has been brought 30 years from the date of the of the agreement.**
- iii. **The claim for adverse possession cannot be brought by way of Plaint.**

2. The Defendants argue that the Plaintiffs aver that the land in dispute being KWALE/MABOKONI/353 was purchased by the late Anthony Ondiege yet there is no mention that the suit property was transferred to the deceased or consent of the Land Control Board obtained within the requisite six months as required by law. As such, the Defendants contend the alleged sale was null and void.

3. On limitation, the Defendants submitted that the suit is statute barred because the suit land was bought on 19th June 1983. That the same amount to over 30 years which is well over the 12 years provided for in **section 7** of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.

4. Finally, the Defendants' argument is that a claim based on adverse possession cannot be brought by way of a plaint. That the same can only be brought by way of originating summons in accordance with **section 38** of the Limitation of Actions Act.

5. The Plaintiffs opposed the application through their grounds of opposition filed on 14th August 2014. The grounds thereof are as follows:

- i. The suit is not for adverse possession but for declaratory relief
 - ii. Section 7 of the Limitation of Actions Act does not apply to the suit because it is not a claim for land but for declaratory relief.
 - iii. The Defendants' application is an abuse of the court process and is based on wrong understanding of the law.
6. The Plaintiffs submitted that their claim is not for recovery of land but they are seeking declaratory reliefs which cannot be construed within the provisions of section 7 of the Limitation of Actions Act.
 7. I have considered the pleadings filed herein and the documents in support thereof. On the question of whether the consent of the Land Control Board was obtained or not is a matter that requires evidence therefore it is better left for full trial. It cannot be determined by way of this application.
 8. On limitation, the Plaintiffs allege that the suit property was purchased by the Deceased on 19th June 1983 from the 1st, 2nd and 3rd Defendants for Kshs. 7,000/-. Ordinarily, any claim based on a contract of sale of land should be brought before expiry of 6 years from the date of that contract in accordance with section 7 of the Limitation of Actions Act. However, I note that the Plaintiffs' claim is not based on the contract alone but also a claim for adverse possession. In paragraph 6 of the plaint, it is stated thus;

“The 1-3 defendants dilly dallied in transferring the title and effecting registration in favour of the deceased during his lifetime. The deceased nonetheless took possession of the suit land, built on it and settled his family members some of whom have been born and raised thereon to date, a period of exactly thirty (30) years now.

Prayer 1: A declaration that the plaintiffs are beneficial owners of the suit land with better title through adverse possession and purchase.” (Underline mine).

The claim of adverse possession cannot therefore be statute barred.

9. The other question for determination is whether the suit is bad in law because it is filed by way of plaint instead of originating summons. The high court stated in the recent case of **ALFEEN MEHDIMOHAMED SHAMSUDIN V BASIL FEROZ MOHAMED & 223 OTHERS [2015] eKLR**

“that although the procedure for filing a claim for adverse possession is by way of originating summons, Article 159 of the Constitution of Kenya, 2010 and obligates this court to deal with substantive justice without due regard to rules of procedure. Further Sections 1A, 1B and 3A of the Civil Procedure Act requires this court to consider the overriding objects of the Act which is to ensure justice is done. Justice can only be done by offering parties opportunities to present their case before Court”

10. The Court of Appeal in the case of **Kimani vs Kenya Anti-corruption Commission** held that striking out pleadings leads to high costs of litigation as well as waste of judicial time' That the Court must examine whether striking out is in line with the overriding objectives and in that case the court declined to strike out the appeal. In this instance, the Plaintiffs' claim of adverse possession should not be defeated simply because the same is brought by way of plaint instead of originating summons.
11. For these reasons, I find the Defendants' application to be without merit and dismiss it with costs.

Ruling Dated & Delivered in Mombasa this 12th day of February 2016

A.OMOLLO

JUDGE