



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC 3 OF 2011 (OS)

IN THE MATTER OF: PORTION NO. 3 OF 2011 (OS)

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22, LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFF HAS OBTAINED TITLE OVER THE SAID PARCEL OF LAND BY ADVERSE POSSESSION

KADENGE DUKA NDEGE.....PLAINTIFF/RESPONDENT

=VERSUS=

ZAID BIN AHMED BIN SAID NAJI.....1ST DEFENDANT/APPLICANT

ZEID AHMED SAID.....2ND DEFENDANT/APPLICANT

R U L I N G

1. This suit was commenced by the Plaintiff by way of an Originating Summons.
2. In the suit, the Plaintiff is seeking to be declared as proprietor of land within portion number 44 Malindi by adverse possession. The suit is partly heard by Meoli J.
3. The Defendant has filed an Application dated 9th March, 2016 in which he is seeking for the following orders:-

(a) THAT pending the hearing and determination of this suit an injunction be issued restraining the Plaintiff by himself, agents, servants and any other person claiming interest through him from burying the remains of the Plaintiff's late mother or any other member of the Plaintiff's family on plot NO. 44 Mambui belonging to the Defendant herein.

(b) THAT the OCS Marereni police station be directed to ensure compliance of the orders herein.

(c) That costs of this Application be provided for.

4. The Application is premised on the grounds that as long as the issue of ownership has not been determined, the Plaintiff's mother cannot be buried on the suit property and that the suit land belongs to the Defendant.
5. In response to the Application for interim orders of injunction, the Plaintiff filed an Application dated 18th March, 2016 in which he sought to set aside the injunctive orders that were granted ex parte.
6. In the said Application, the Plaintiff sought for an order allowing him to bury the deceased within the portion of plot No. 44 measuring 60 meters by 150 meters.
7. According to the Plaintiff's Affidavit, his family's graveyard is within the undisputed portion measuring 60 meters by 150 meters; that he does not have any other known home to bury his late mother and that the undisputed area is where he has buried his other family members.
8. In response to the Plaintiff's Application, the Defendants' deponed that the Plaintiff resides in Gongoni and therefore cannot claim that he has nowhere else to bury his mother.
9. The parties appeared before me on 23rd March, 2016 and made oral submissions. I have considered the said submissions.
10. It is not in dispute that the Defendant is the registered proprietor of plot number 44 Mambui.
11. The issue of whether the Plaintiff is entitled to a portion of the suit property by virtue of the doctrine of adverse possession can only be determined after trial. In the meantime, the holder of the title document remains the legal owner.
12. Although the Plaintiff's advocate submitted that the Defendant had agreed to give to the Plaintiff the land that the Plaintiff was occupying vide an agreement of 30th November 2010, it is the Plaintiff who filed this suit after the purported agreement claiming for the entire suit property.
13. Consequently, the Plaintiff cannot rely on the agreement of 30th November, 2010 having rejected it by the filing of this suit.
14. Until the status of the beneficial owner of plot number 44 is ascertained by this court, the Plaintiff cannot bury the remains of his late mother on the suit property. The Defendant is the legal owner of the suit property until the court declares, if at all, that the Plaintiff is entitled to it under the doctrine of adverse possession.
15. For those reasons, I allow the Defendants' Application dated 9th March, 2016 and dismiss the Plaintiff's Application dated 18th March, 2016 with costs.

Dated and delivered in Malindi this 1st day of **April**, 2016.

O. A. Angote

Judge