



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.135 OF 2011 (OS)

1. MWALIMU KALUME CHARO
2. FRANCIS TSALWA WASHIALI.....PLAINTIFFS
=VERSUS=
KIFALU KARISA KITSAO.....DEFENDANT

J U D G M E N T

Introduction:

1. This suit was commenced by way of an Originating Summons dated 22nd August, 2011. In the Originating Summons, the Plaintiffs are seeking for the determination of the following questions:-

- (a) Is the 1st Plaintiff entitled to apply for the cancellation of the registered title issued to KIFALU KARISA KITSAO in the whole of the interest comprised thereof.**
- (b) Is the Plaintiffs the legal beneficial owner of Plot Number KILIF/MTONDIA 116 in the whole or the portions of the interest comprised thereof.**
- (c) Are the Plaintiffs entitled to any proprietary and/or possession interest in plot number KLIFI/MTONDIA 116 or a portion thereof?**

2. The Originating Summons is premised on the grounds that the Plaintiffs have been in occupation of parcel of land known as Kilifi/Mtondia 116 for over 25 years; that the 1st Plaintiff's father Kalume Charo was allocated the land by the settlement land trustees as the first allottee and that the 1st Plaintiff was born on the land since 1968 and has lived on the land since then to date.

3. According to the Plaintiffs, the Defendant has perpetuated fraud by illegally obtaining the title to the suit land in the year 2007.

4. The Originating Summons is supported by the Affidavit and annexures.

5. In his Replying Affidavit, the Defendant deponed that it is his late father who was registered as the owner of parcel of land number Kilifi/Mtondia/116; that his late father, his mother and siblings were

residing on the land and that his father was legally allocated the suit property by the Ministry of Lands and Settlement.

6. The Defendant further deponed that the suit is bad in law and in breach of the Civil Procedure Rules.

7. This matter proceeded by way of viva voce evidence.

8. The 1st Plaintiff, PW1, informed the court that he was born in 1960; that he has been staying on the suit property since 1968; that the land was allocated to his father; that the Defendant sued him in Kilifi PMCC No.211 of 2009 over the suit property and that the said suit was dismissed.

9. PW1 informed the court that there has been a multiplicity of suits because the Defendant did not want his family to continue occupying the suit property.

10. According to PW1, it is his father who was allocated the suit property by the Ministry of Lands and Settlement and was issued with the allotment letter although the charge document shows the Defendant's father's father name.

11. It was the evidence of PW1 that he has been staying on the suit property that was allocated to his father since 1964 and that he is the one who invited the 2nd Plaintiff on the land in 1998.

12. According to the 1st Plaintiff, the Defendant's father purported to be the administrator of the Estate of his father when they are not related at all; that he discovered this discrepancy when he was pursuing the succession case and that evidence was given in the Kilifi case about the Defendant's father fraudulent dealings in the suit property.

13. The 2nd Plaintiff, PW2, informed the court that he occupies 5 ½ acres of the suit property; that the whole land is 13 acres and that the Defendant's two brothers occupy a small portion of the suit property measuring 50 X 100 feet.

14. According to PW2, he was invited on the suit property in 1999 and that he has put up a permanent building.

15. According to PW2, the adjudication officers testified in the Kilifi case and confirmed that the suit property was allocated to the Plaintiff's father.

The Defendant's case:

16. The Defendant, DW1, informed the court that he only knew the 1st Plaintiff when he entered the suit property; that the suit property belongs to his late father and that he has a Title Deed which is in his name.

17. According to DW1, his father was issued with a Title Deed in respect to the suit property in the year 2005 before the same was transferred to him upon his father's death.

18. In cross examination, DW1 stated that three of his brothers are staying on the land although he is the one who is entitled to the whole land.

19. When asked why the Title Deed did not show entries numbers 1-3, the Defendant could not explain. The Defendant was unable to explain how the discharge of charge was done by his father.

20. By the consent of both parties, the proceedings in Kilifi PMCC No. 211 of 2009 were produced in evidence.

Submissions:

21. The Plaintiffs' advocate submitted that in 1994, the Defendant's father put into motion a scheme to divest the suit property from the 1st Plaintiff's father; that he incepted to inherit the land and when he failed, he attempted to give documents at the land disputes Tribunal showing that he purchased the land; that the land office unwittingly proceeded to process the title into the Defendant's name and that the title does not have entries numbers 1, 2, 3 and 4.

22. Counsel submitted that the 1st Plaintiff occupies 7 acres while the 2nd Plaintiff occupies 5 acres and that the Plaintiffs have built permanent houses on the land.

23. The Plaintiffs' advocate submitted that the Defendant did not show how the 1st Plaintiff's father was discharged from the nominal roll, how his father obtained his interest in the suit property and when his father occupied the land if at all.

24. Counsel urged this court to rely on the proceedings in Kilifi PMCCC No. 211 of 2009 in which DW11 confirmed in the lower court that indeed the suit property was allocated to the 1st Plaintiff's father.

25. The Defendant's counsel on the other hand submitted that the 1st Plaintiff was unable the hearing and determination of to demonstrate his relationship with the late Kalume Kacharo whom he alleges to be his late father.

26. The Defendant's advocate submitted that an originating summons is intended to enable simple matters; that the Plaintiffs herein have moved the court for the determination of questions that involve serious and complex questions of both law and facts by way of an Originating Summons and that the main question for determination is whether the Defendant's title should be cancelled.

27. Having alleged that the suit property belongs to his father, counsel submitted that the 1st Plaintiff did not bring the suit as an administrator of the Estate of the late Kalume Kacharo.

28. Counsel submitted that no right to the property of a person who has died can be established in any court unless letters of administration are first granted and that the Plaintiff do not have the locus standi to bring the suit.

29. The Defendant's counsel urged that the Plaintiff cannot succeed with the prayer for adverse possession because the title was registered in favour of the Defendant in the year 2007 and that 12 years had not lapsed by the time the suit was filed; that there has been interruption of the Plaintiffs stay on the suit property by the filing of the numerous suits and that the Defendant's siblings are also residing on the suit property.

30. The Defendant's counsel finally submitted that the Plaintiffs failed to prove that the Defendant fraudulent obtained the title document.

Analysis and findings:

31. The suit before me was commenced by way of an Originating Summons filed pursuant to the provisions of Order 37 of the Civil Procedure Rules. It is not clear under which Rule the Originating Summons was filed, considering that Order 37 has 20 Rules.

32. The Plaintiffs are seeking for an order of cancellation of the title deed that was issued to the Defendant and for a declaration that they are the legal/or beneficial owners of parcel of land number Kilifi/Mtondia/116.

33. The Originating Summons is principally based on the grounds that it is the 1st Plaintiff's father who was allocated the suit property by the Settlement Fund Trustees and that the Defendant or his father perpetrated a fraud by illegally obtaining a title for the suit land in the year 2005 or 2007.

34. The Originating Summons is further premised on the ground that it is the Plaintiffs who occupy the land and that they have utilised the land for a very long time.

35. Other than the prayer for cancellation of the title deed that was issued to the Defendant, it is not clear whether the Plaintiffs are also seeking to be declared the proprietors of the suit property by way of the doctrine of adverse possession. However, for the purpose of this Judgment, I shall take it to mean that the Plaintiffs are seeking for the a prayer in the alternative.

36. The evidence by PW1 was that it was his father who was allocated the suit property and that when his father died, the Defendant's father fraudulently had the land registered in his name in the year 2005.

37. According to the evidence of PW1, the Defendant fraudulently went ahead to inherit the suit property in the year 2007. However, to conceal the fraud, it was the evidence of PW1 that the entries number 1, 2, 3 and 4 in the Defendant's title were omitted from the title document.

38. PW1 produced in evidence a copy of the Title Deed that was issued to the Defendant on 4th May, 2007. The said title only shows entries numbers 5 and 6. The title does not show the processes that were followed before it was issued to the Defendant.

39. The Plaintiff also produced in evidence the letter dated 25th July 2011 authored by the District Land Adjudication and Settlement Officer. In the said letter, the Settlement Officer confirmed that the suit property was allocated to Kalume Charo, whom PW1 informed the court that he was his father.

40. PW1 also referred the court to the evidence that was produced in Kilifi PMCC No. 211 of 2009, and more specifically the evidence of DW6.

41. According to the evidence of Mr. Arthur Musau, an employee of the Ministry of Lands, the suit property was allocated to Mr. Karisa Kacharo and not the Plaintiff's father as per the nominal roll.

42. It is therefore clear from the evidence by Pw1 that he is seeking for the cancellation of of the Title Deed that was issued to the Defendant on the ground that it was fraudulently issued to him.

43. The question I should determine first is whether such an order can issue by way of an Originating Summons, and more so where the Originating Summons is not converted into a Plaint.

44. It is now settled that the sole object of the procedure of an Originating Summons is to provide simplicity of the process and to eliminate prolonged pleadings.

45. Indeed, a suit can only be commenced by way of an Originating Summons where the law expressly provides so or where the matter before the court is a simple one with undisputed facts. In the case of **Mukesh Man Chand Shah & Anoter Vs Priyat Shah & Another, Mombasa Civil Appeal No. 39 of 2014, the Court of Appeal** held as follows:-

“Before we consider how the provisions apply to the question before us, we need to emphasise that it is perfectly well settled, and indeed ingrained in practice as repeatedly stated by a legion of judicial authorities that unrestricted use of originating Summons procedure is discouraged. It follows that the application by Originating Summons has never been a substitute for initiating claims involving contentious issues of facts looking at the history of its evolution.”

446. In the same case, the court held as follows:-

“The sole object of the procedure has always been to provide simplicity of the process and to eliminate prolonged pleadings. All the actions identified in Order 37 are to be brought by Originating Summons in a simple Form No. 26 and 27 of Appendix A.

47. In the case of **Wakf Commissions Vs Mohamed Bin Umayya Bin Abdulmanji Bin Mwijab & Another, Mombasa Civil Appeal No. 83 of 1983, Hancox JA** held as follows:-

“The foregoing authorities are sufficient to show as Mr. Malik eventually accepted, that complex issues of disputed facts such as one raised here, are not appropriate for decisions by way of an originating summons. It may be, as Windham CJ said in Kalsumbai Vs Abdulhussein, that the question to be determined is covered by the letter of sub-rule (g) of Rule (1) of the order that those are not the only points to be considered in deciding whether to proceed by way of originating summons or by regular action.”

48. In **Kiburitiri Vs Kibutiri (1983) KLR 62, the Court of Appeal** held that in cases where complex issues and contentious questions of fact and law are raised, the Judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit “because the scope of inquiry which is made and dealt with on an originating summons is limited.”

49. This court followed the above decisions of the Court of Appeal in the case of **Cyril J Haroo & Another Vs Uchumi Services & Others (2014) eKLR** and held as follows:-

“It therefore follows that cancellation of a title deed or Certificate of Lease is not a simple issue which can be decided by way of an originating summons thus the provisions of order 37 Rule 8.”

50. The suit property herein was registered pursuant to the provisions of the Registered Land Act (repealed).

51. The Title Deed having been issued to the Defendant, the same can only be cancelled by the court pursuant to section 143 (1) of the RLA (repealed).

52. Although Order 37 Rule 8 of the Civil Procedure Rules allows for the filing of Applications under the Registered Land Act to be made by Originating Summons, the same Rule prohibits the commencement of suits by way of Originating Summons in respect to claims made under Sections 120, 128, 133, 138, 143 and 150 of the Registered Land Act.

53. Therefore, other than the fact that the issue of the Defendant having obtained the Title Deed fraudulently being complex in nature, the law expressly prohibits the court from dealing with a suit filed pursuant to the provisions of section 143 of the RLA which allow the court to cancel titles by way of an Originating Summons.

54. Consequently, and as I held in the case of **Cyril J . Haroo (supra)**, this court would be acting injudiciously and without proper and explicable foundation if it proceeds to determine the issue of cancelling the Defendant's Title Deed by way of Originating Summons.

55. Although Order 37 Rule 7 of the Civil Procedure Rules allows a party to make an application under Rule 38 of the Limitation of Actions Act by way of Originating Summons, the evidence before me does not support the claim for adverse possession.

56. I say so because the Defendant was registered as the proprietor of the suit property on 4th May 2007. By the time this suit was filed, twelve years had not lapsed from the date of registration.

57. In the circumstances, and for the reasons I have given above, I strike out this suit with costs.

Dated, signed and delivered in Malindi this 22nd day of July, 2016.

O. A. Angote

Judge