



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.184 OF 2014 (OS)

JOSEPH KITUNGA BAYA & 64 OTHERS.....APPLICANTS

=VERSUS=

SIMON MUKUHA.....RESPONDENT

R U L I N G

Introduction:

1. The Application before me is the one dated 2nd October 2014 seeking for the following orders:

(a) That the Honourable Court be pleased to issue a temporary order of injunction to restrain the Respondent by himself, his agent, or any one claiming right through him from entering further taking possession or in any other manner interfering with the premises therein known and described as PLOT NO. M13C MORE PARTICULARLY LR NO. 8513 ON LAND SURVEY NUMBER 180645 MALINDI MEASURING 44 ACRES OR THEREABOUTS pending the hearing and final determination of this suit.

The Plaintiffs'/Applicants' case

2. The Plaintiffs' case is that they have lived on the suit property without interruption since the year 1962.

3. The 1st Plaintiff has deponed that initially, the suit premises measured 20 acres but after the recession of the shoreline, the acreage of the land increased to 44 acres; that all along, they continued to till the land and planted crops like casuarinas and cashew nuts among others and that they started agitating for the title documents in the year 1994.

4. It is the Plaintiffs' case that a committee was established to look into the issue of the title document in respect of the suit property. According to the Plaintiffs, they were given the title document by the government for land known as Kilifi/Kibokoni Block M13D which is different from the suit property.

5. According to the Plaintiffs, the suit property was allocated to the Saima Inv. Ltd although they were the ones who were in occupation and are still in occupation; that the Defendant has never taken possession of the suit property and that they are the ones entitled to the suit land and not the Defendant.

The Defendant's/Respondent's case:

6. The Defendant deponed that he is a Director of Gashka Enterprises, the registered proprietor of the suit property, having purchased the same from the previous owner, Saimar Limited.

7. It is the Defendant's deposition that the Applicants have never set foot or settled on the suit property and that the Applicants have not stated when they entered on the suit property.

8. According to the Defendant, it is only 39 people who were tilling and farming the suit property and that he paid them between Kshs.100,000 to Kshs.240,000 each to look for land elsewhere for tilling and farming.

9. It is the Defendant's deposition that the Applicants' sole intention is to trespass on the suit property and the court should not aid them.

Submissions:

10. The Plaintiffs'/Applicants' advocate submitted that adverse possession is the possession of land inconsistent with the title of the true owner; that the Applicants have both factual possession of the suit land as well as the requisite intent to possess the same.

11. The Plaintiffs'/Applicants' advocate submitted that the Plaintiff's possession of the suit land was open, peaceful and without interruption from the purported owner and that the continued acts of tilling the suit property was a clear intention of dispossessing the owner of the suit property.

12. The Plaintiffs' advocate further submitted that the Plaintiffs depends on the proceeds from the suit premises for a living unlike the Defendant and that unless the status quo is maintained, they are likely to suffer irreparable damage.

13. The Defendant's counsel submitted that possession is an important element in the proceedings of this nature. Counsel submitted that the Plaintiffs are not in possession of the said parcel of land and that the Applicants do not seem to know the land that they are claiming.

14. The Defendant's counsel submitted that proceedings for adverse possession can only be brought by an adverse possessor against the registered owner of the land; that the suit property is registered in the name of a company and not the Defendant and that the suit is defective.

Analysis and findings:

15. The Plaintiffs have sued the Defendant seeking to be declared proprietors of the suit property on the grounds that since 1963, they have openly and peacefully enjoyed occupation of the said land. The Plaintiffs are seeking for injunctive orders pending the hearing of the suit.

16. In the Replying Affidavit, the Defendant has denied that the Plaintiffs have dispossessed the registered proprietor of the suit property of the land. It is the Defendant's case that in any event, the Plaintiffs have sued the wrong party.

17. In the Replying Affidavit, the Defendant has deponed that he is a director of Gashka Enterprises, the registered proprietor of the suit property.

18. Pursuant to the provisions of Order 1 Rule 9 of the Civil Procedure Rules, a suit cannot be defeated for misjoinder or nonjoinder of a party.

19. Although the registered proprietor of the suit property is Gashika Enterprises, the fact that the Plaintiffs have sued a director of the said company cannot in itself render the Application for injunction incompetent. The Plaintiffs still have an opportunity to amend the Originating Summons to include the company as a Respondent in the suit. Suffice to say that if the injunctive order is issued, it will not be in vain because it is only the directors of the registered proprietors of the said company who can be served

with such an order.

20. The Defendant has admitted that at the time of the purchase of the suit property, there were 39 persons who were tilling and farming the suit land. It is his deposition that the said 39 persons were compensated by being paid between 100,000 to Kshs.240,000. According to him, none of the said persons are amongst the Plaintiffs.

21. The Defendant has not stated how the 39 people were identified as the only people who were tiling the suit property. The Respondent did not annex any minutes to show the deliberations that were undertaken before the 39 people were identified and compensated.

22. The issue of whether the Applicants have been on the suit property since 1963 continuously, exclusively and peacefully can only be determined during the hearing of the Originating Summons. Indeed, some of the people who were compensated might be key witnesses in the trial.

23. Having admitted that some people were utilizing the suit property, this court cannot categorically state at this stage that it is only the 39 people who were utilizing the land and compensated who were in physical possession of the land.

24. In the circumstances, it is my view that the status quo prevailing now should subsist by allowing the Application dated 3rd October 2014, because, prima facie, the Defendant has admitted that indeed the registered proprietor recognised that the suit property was being utilized by a group of people as at the time of the purchase. Whether the group was made up of only 39 people or not will be determined at trial

25. For those reasons I allow the Application dated 2nd October 2014 as prayed.

Dated and delivered in Malindi this 12th day of **June**, 2015.

O. A. Angote

Judge