



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.205 OF 2014

1. KADZO ANGORE KAZUNGU

2. SAFARI KAZUNGU CHOME.....PLAINTIFFS/APPLICANTS

=VERSUS=

ABDALLA SALIM OMAR.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. The Notice of Motion before me is the one dated 3rd November 2014. In the Application, the Plaintiff is seeking for the following orders:-

(a) That the Respondent by himself or his servants, agents or hirelings be restrained from evicting, disposing and interfering with the Applicant's peaceful occupation, use and possession of a portion of sub-division No.2348 (original No. 1854/1) Section II MN which portion measures 589 ft by 260 ft by 150 ft by 144 ft by 30 ft pending the hearing and determination of this Application interpartes (sic).

(b) THAT the Orders given in respect of prayer 2 above be registered against the title being sub-division No.2340 (original No.1854/1) Section II MN.

(c) THAT the Respondent be condemned to pay the Applicant costs of this suit (sic).

The Plaintiffs'/Applicants' case:

2. According to the 1st Plaintiff/Applicant, the Defendant/Respondent is the registered proprietor of sub-division number 2448 (original number 1854/1) section II MN (the suit property).
3. It is the 1st Plaintiff's deposition that she occupied the suit property with her late husband during the presidency of the late Jomo Kenyatta; that when her husband died, she left them on the suit property and that the suit property has three houses, coconut, mango and cashew nut trees.
4. It is the Applicant's case that the Defendant is using the orders he obtained in land case number 2 of 2014 to evict her and her family from the suit property and that she was not a party to that suit.
5. It is the deposition of the Applicant that the Defendant's right to recover the suit land has been extinguished by operation of the law since the original owner did not recover it within 12 years from the time she occupied it.

The Defendant's/Respondent's case:

6. The Defendant deponed that it is not true that the Applicants have resided on the suit property for more than twelve years; that the Agreement that the Applicants are relying on was not signed by Kazungu Chome; that there is no evidence that Shaban Swedi bought the suit property from Mohamed Ahmed Kassim and that the said Momahed Ahmed Kassim was in any event not the owner of the suit property.
7. It is the Defendant's deposition that when he bought the suit property, the Plaintiffs were not staying on the land and that he bought the suit property on 27th June 2008.
8. It is the Defendant's case that when the squatters invaded the suit property in the year 2011, he instituted ELC No. 2 of 2011 which was heard and determined and that, Charo Kazungu Chome who bears the same name as the Applicant herein elected not to testify.
9. The Defendant's advocate filed brief submissions which I have considered.

Analysis and findings:

10. The suit before me is for adverse possession. Although this court conclusively dealt with the issue of adverse possession in Malindi ELC No. 2 of 2011 in which it ordered for the eviction of the 1st, 2nd, 3rd and 5th Defendants after rejecting the Defence of adverse possession, the Applicant's case is that they were not parties to that suit.
11. Although the 1st Defendant in ELC No. 2 of 2011 is known as Charo Kazungu Chome, no evidence has been placed before me by either party to show that Charo Kazungu Chome is related to the Applicant.
12. In the circumstances, this court cannot at this stage make a finding on the relationship of the 1st Defendant in ELC No. 2 of 2011 and the Plaintiff herein.
13. The question of whether this suit is res judicata will therefore be dealt with at the hearing after viva voce evidence is called.
14. Due to the fact that there is no evidence before me to show that the Plaintiffs were aware of ELC No. 2 of 2011 and considering that the purpose of an injunction is to maintain the status quo pending the hearing of the suit, I shall allow the Plaintiff's Application strictly for the purpose of maintaining the status quo prevailing now.
15. For those reasons, I allow the Application dated 3rd November 2014 in the following terms:

(a) The Respondent is hereby restrained from evicting, disposing and interfering with the Applicant's peaceful occupation, use and possession of a portion of sub-division No.2348(original number 1854/1) Section II MN measuring 589 ft by 260 ft by 150 ft by 144 ft pending the hearing and determination of the suit.

(b) The Applicants or their agents are hereby restrained from putting up any new structures on the suit property pending the hearing of the suit.

(c) Each party to bear his or her own costs.

Dated and delivered in Malindi this 18th day of September 2015.

O. A. Angote

Judge