



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 149 OF 2013 (O.S)

IN THE MATTER OF PORTION NO. 129M MALINDI

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 PLAINTIFFS
HAVE OBTAINED TITLE OVER THE SAID PARCEL OF LAND BY ADVERSE POSSESSION**

BETWEEN

MARY KAVUVU MALUKI.....PLAINTIFF

=VERSUS=

1..HAMOUD RASHID AZZAN

2. STEPHEN KAI.....DEFENDANTS

RULING

Introduction

1. The Plaintiff's Application is dated 26th August 2013. The Plaintiff is seeking for the following orders:

(a) That there be a temporary injunction restraining the Defendants/Respondents herein from entering into, trespassing into, demolishing the Plaintiff's structure thereon and/or dealing with the Plaintiff's/Applicants peaceful occupation and possession of the suit premises within Land Parcel M. 129 situated in Makao Mapya Malindi pending hearing and determination of this suit.

(b) That the OCPD and the OCS Malindi to ensure compliance of the orders herein.

(c) That costs to this application be provided for.

2. The Application is based on the grounds that the Plaintiff is the owner of land portion number M 129 having purchased it in 1998 and that he has been in occupation and possession of the same since then; that the Defendants intend to demolish the Plaintiff's structure and that the Defendants should be restrained from carrying out any demolition.

The Plaintiff/Applicant's case:

3. According to the Plaintiff's affidavit, she is the rightful owner of the suit property measuring 100 X 100 feet having purchased it from one Charo Kalama Ngoro in 1998; that the said Charo Kalama Ngoro was born and raised on the suit property and that he has been in possession of the land for over 12 years.
4. The Plaintiff deponed that she was informed in the year 2004 that the 1st Defendant was claiming to be the owner of the land; that in the year 2012, she embarked on developing the land by putting up a semi-permanent structure which is occupied by his agent.

1st Defendant's Case:

5. The 1st Defendant filed his Replying Affidavit on 12th September 2013 and deponed that plot number M129 Malindi has been subdivided into various plots and sold to various people including subdivision number 167 and 195 which were sold by his late father in the year 2005 to two individuals, Saleh Aziz Maamun and Faiza Ahmed who took possession of the same.
6. According to the 1st Defendant, until July 2013, there was no permanent structure on the two plots now in dispute but there was and still stands an old makuti structure; that the original plot number M129 Malindi measured over 100 acres and that the Plaintiff's suit is bad in law and should be struck out.
7. The Defendant also filed a preliminary objection dated 2nd October 2013 and stated that the Originating Summons and the Application does not disclose any cause of action against the Defendants.

2nd Defendant's case:

8. The 2nd Defendant swore a Replying affidavit on 30th August 2013 and deponed that he is neither the owner of the suit property nor is he constructing on it; that he was only a witness to the purchase of plot number 195 and 167 which were sub-divisions of M129 Malindi.
9. The Plaintiff's advocate filed his submissions on 6th November 2013 while the Defendants' advocate filed his submissions on 14th February, 2014 which I have considered.

Analysis and findings:

10. The Plaintiff's Application is premised on the Originating Summons dated 26th August 2013. In the said summons, the Plaintiff is seeking to be declared the proprietor of a portion of land measuring 100 X 100 feet within portion number M129 which she has acquired by adverse possession.
11. The only document annexed on the Supporting Affidavit of the Summons and the Notice of Motion is a Sale Agreement between the Plaintiff as purchaser and Charo Kalama Ngoro as the vendor dated 29th March 1998. Also annexed is a photograph showing a semi-permanent structure allegedly constructed by the Plaintiff in the year 2012.
12. The Originating Summons was filed pursuant to the provisions of Order 37 Rule 7(D) and Section 38 of the Limitation of Actions Act.
13. It is trite law that for one to succeed in a claim for adverse possession, the copy of the title or the

- extract of the title should accompany the Originating Summons, or at least be in the Plaintiff's bundle of documents showing the registered proprietor of the suit property. That is the clear reading of Order 37 Rule 7 of the Civil Procedure Rules.
14. In the absence of the copy of the extract of the title, this court cannot ascertain at this stage the registered proprietor of the suit property for the purpose of computing time to ascertain whether the Plaintiff has, prima facie, been in possession of the suit property as against the real owner of the suit property for more than twelve years as stipulated under Section 38 of the Limitation of Actions Act.
 15. The requirement to show the registered owner of the suit property becomes more pertinent in this particular case considering that the Defendants have denied that they are the registered owners of the land.
 16. In the circumstances, I find that the Plaintiff has not established a prima facie case with chances of success for the orders of injunction to issue as against the Defendants.
 17. For the reasons I have given above, I dismiss the Plaintiff's Application dated 26th August 2013 with costs.

Dated and Delivered in Malindi this 24th Day of February, 2014.

O. A. Angote

Judge