



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.238 OF 2013 (OS)

MWATANDO MWAGAMBO WASANGA.....PLAINTIFF/APPLICANT

=VERSUS=

1. NGARUKO MWANGOME

2. MUYE MWANGOME

3. BOGOSHA NDAGO

4. GAMBO KISOLA

5. NDAGO MWAGOME

6. DZOMBO GULANI

7. MUNKGAME ANGOME SHUMA

8. GAMBO MUYE

9. CHARO SHUTU

10. BALOZI SHUTU

11. MULJI DEVRAJ & BROSS LTD.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 20th December 2013 seeking for the following reliefs:

(a) That pending the hearing and determination of this suit an injunction do issue by order restraining the Defendants whether by themselves, their children, agents, servants, employees and indeed all others who may be claiming through them from subdividing, alienating, selling, entering, cultivating, mining or excavating therein or in any other manner whatsoever interfering with the Plaintiff's otherwise peaceful

possession of the suit parcels names; Chonyi/Galanema/55,56,123, 189, 126, 309, 308, 368 and 313.

(b) The Defendants do bear the costs of the suit.

2. The Application is premised on the grounds that the Applicant has acquired adverse rights over the suit parcel of land and that those rights need to be protected pending determination of the suit and that the extraction and mining of manganese mineral on parts of the suit parcels of land particularly parcel number Chonyi/Galanema/308,309 and 368 is depriving the Applicant's resources.

The Plaintiff's/Applicant's case:

3. The Plaintiff has deponed that he is the proprietor of Chonyi/Galanema/27 which is his ancestral land that the land comprised of not less than 70 acres and it has been intact save for the recent incursion by some of the Respondents.
4. The Plaintiff deponed that during the adjudication and registration in the Chonyi/Galanema area, several people using dubious means managed to get themselves secretly registered as proprietors of several parcels of land out of his original land.
5. It is the Plaintiff's deposition that about one year ago, some of the Respondents moved into parts of his land claiming that the suit land was theirs and that was the first time that he learnt that they had gotten themselves registered as proprietors of several parcels of land within his land.
6. According to the Plaintiff, he has lived in and worked on the suit properties and since the Respondents never took possession within 12 years of their registration, their titles got extinguished.
7. In his Supplementary Affidavit, the Plaintiff has deponed that had he known earlier that the Defendants were the registered proprietors of the suit properties that were in his possession, he would have moved the court much earlier; that the Respondents are members of his clan but they are not entitled to the suit property and that if excavation continues, the land in question will be damaged beyond restoration.

The Respondents' case

8. The 7th Defendant/Respondent filed a Replying Affidavit on his own behalf and on behalf of the 3rd and 8th Defendants. According to the 7th Defendant/Respondent, all the Defendants, except the 9th, 10th and 11th Defendants are related; that the 1st, 2nd, 4th, 5th and 6th Defendants are all deceased and the suit property belongs to all the Defendants and the Plaintiff.
9. The 7th Defendant set out the list of the people that were registered as proprietors of the suit properties after the adjudication process that was started in 1972 and that the 9th and 10th Defendants are non-suited as they are not the registered owners of Chonyi/Galanema /313.
10. The 11th Respondent filed its Replying Affidavit on 10th February 2014. The 11th Defendant's site manager deponed that the 11th Respondent is a construction company currently constructing the Kaloleni-Kilifi road; that they are excavating "murrum" from parcel of land number Chonyi/Galanema/126 for the construction of the road and that the registered owner has died.
11. The 11th Respondent denied that it is mining manganese as alleged and that they have not purchased the suit property.

Analysis and findings:

12. The Plaintiff's Application is premised on his Originating Summons dated 20th December 2013. In the Originating Summons, the Applicant has prayed for a declaratory order that the Plaintiff has acquired title by adverse possession over all of the following parcels of land, namely, Chonyi/Galanema/55,56,123, 189, 126, 309, 308, 368 and 313 and is therefore entitled to be issued with certificates of titles thereto.
13. The Plaintiff has annexed on the Supporting Affidavit of the Originating Summons the extracts of

- the titles that he wants registered in his name. Parcel number 55 is registered in favour of Muye Mwagombe, 2nd Defendant, Parcel number 56 is in the name of Ngaruko Mwangome, the 1st Defendant, parcel number 123 is in the name of Bokoshe Ndago, the 3rd Defendant, parcel number 189 is in the name of Gambo Kisola, the 4th Defendant, parcel number 126 is in the name of Ndogo Mwangome, the 5th Defendant, parcel number 309 is in the name of Dzombo Gulani the 6th Defendant, parcel number 308 is in the name of Munga Mwagambo Shumaa, the 7th Defendant.
14. There is no title registered in the names of the 8th, 9th and 10th Defendants. The 11th Defendant has been sued because it is extracting murrum on plot number 126. The claim for adverse possession cannot therefore succeed in respect to the 8th, 9th and 10th Defendants in the absence of the extracts of title.
 15. The Plaintiff has not annexed the extract of titles for parcel of land number 368 and 313 on the Originating Summons dated 20th December 2013 as required under Order 37 Rule 7(2) or the Notice of Motion. In the absence of the extract of titles in respect to the parcel numbers 368 and 313, the order of injunction cannot be issued in respect to those parcels of land. In deed the 7th Defendant has annexed on his Replying Affidavit the title deed for Chonyi/Galanema/313 which shows the registered owner to be Garawa Sanga Barawa, who is not a Defendant in this suit.
 16. The 7th Defendant deponed that the 1st, 2nd, 4th, 5th and 6th Defendants are all dead. The Plaintiff has not refuted this claim. In fact, the Plaintiff did not file an affidavit of service to show that the people who are now said to be dead were served with the current Application.
 17. In the absence of an affidavit of service to show how the 1st, 2nd, 4th and 6th Defendants who are said to be dead were served with the current Application, and in view of the fact that a suit cannot be filed against a dead person, I find and hold that an injunctive order cannot be issued against the said Defendants or the suit property in whose names they are registered. Consequently, the Application for injunction fails in respect to parcels of land number 55, 56, 189 and 309 which are registered in favour of the 1st, 2nd, 4th and 6th Defendants who are said to be dead. The registered proprietor of parcel of land number 126, the 5th Defendant, is also said to be dead. In the absence of the affidavit of service showing that the Defendant said to be dead was served, the order for injunction in respect to that suit property fails too.
 18. The Application for injunction can therefore only proceed as against the 3rd and 7th Defendants who are the registered proprietors of parcels of land number 123 and 308 respectively.
 19. For an injunction to issue, the Plaintiff must show that he has a prima facie case with chances of success and that he is likely to suffer irreparable damages that may not be compensated in damages.
 20. According to the deposition of the Plaintiff, the Defendants have never taken possession of the suit properties since they were registered as the owners until about one year ago when some respondents moved into part of what he claims to be his land.
 21. The Plaintiff deponed that had he known that the properties had been registered in the names of the Defendant's, he would have moved the court much earlier.
 22. In the case of **Haro Yonda Juaje Vs Sadaka Dzeno Mbauro-Malindi HCCC NO. 106 of 2007 (OS)**, I held that one cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land, and that the registered owner has never been in possession of such land.
 23. In the said case, I held that the assertion by a claimant that he was not aware that the land was registered in favour of some person against whom time could start running means that the claimant did have the *animus possidendi* to acquire the land. That is what section 13 of the Limitation of Action Act requires for one to succeed in a claim for adverse possession.
 24. The computation of time for a claim of adverse possession can therefore only start running from the time that the claimant dispossessed the true owner of the suit property or from the time the true owner discontinued his possession. One can only be dispossessed of his land or discontinue his possession if he was in possession of the land in the first place, which seems, according to the Plaintiff's own deposition, was not the case.
 25. In the case of **WAMBUGU VS NJUGUNA (1983) KLR 173**, the Court of Appeal held as follows:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

26. The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the *animus possidendi* to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite *animus possidendi* to acquire land by adverse possession by showing the circumstances under which he dispossessed the true owner or the circumstances under which the true owner discontinued his possession.
27. One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averments are that the titles which were issued to the Defendants fraudulently acquired, then his cause of action would be for the rectification of titles by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession.
28. For the reasons I have given above, and on the basis of the Plaintiff's own depositions that the Defendants acquired the title documents in respect to the suit properties fraudulently, and that the Defendants have never taken possession of the parcels of land since they were registered as proprietors, I find that the Plaintiff has not established a prima facie case with chances of success.
29. In the circumstances, I dismiss the Application dated 20th December 2013 with costs.

Dated and delivered in Malindi this 6th Day of **March**, 2014.

O. A. Angote

Judge