



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 78 OF 2014

1. MOHAMED BWANA OBO ATHMAN
2. SWALEH ATHMAN BULO
3. PETER KINYANJUI
4. SAKINABAI AMIRALI
5. FATUMA OMAR
6. MOHAMED BAKARI KUCHI
7. KHADIJA MZEE
8. FATUMA SHARIFF
9. HASSAN BAUSI
10. STAMBULI SHALLY
11. DAVID MWANDIKWA
12. JOSPEH KYALO
13. JOSEPHAT MUSYOKA
14. CHRISTOPHER MWENDAKA MUKITI
15. ABDALLA MOHAMED SAID
16. MARYAM SWALEH AHMED
17. BEATRICE MUUSI KASINA
18. SAID KIDALA
19. FRANCIS NJENGA MWANGI
20. JUMA ALI
21. CHRISTINE CHAO
22. ALI GUBO
23. OMAR BAKA
24. BWARAHATI ALI MOHAMED
25. AHMED MOHAMED OBO.....PLAINTIFFS/APPLICANTS

=VERSUS=

KENYA AIRPORT AUTHORITY.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. The two applications before me are dated 25th April, 2014 and 26th May, 2014. The Application dated 25th April 2014 was filed by the Plaintiffs seeking for an injunction restraining the Defendants from interfering in any manner including fencing off of portion number 21 Lamu registered as CR.35747 and with the Plaintiffs' quiet enjoyment of the same pending the hearing of the suit. The Defendant's

Application dated 25th April 2014 seeks to discharge the interim orders of injunction.

The Plaintiffs' case

2. According to the Affidavit of the 1st Plaintiff, him, together with the other Plaintiffs are the owners, occupiers and or beneficiaries of an interest of the suit property and that they are entitled to the suit property having acquired it by way of prescription and or adverse possession since they have been in occupation without interruption from 1964.

3. It is the Plaintiffs' case that on 2nd November 2012, the Defendant agreed to compensate the Plaintiffs before the Defendant could deal in any manner with the suit property.

4. However, it was deponed, in disregard of the agreement, the Defendant has commenced fencing the suit property effectively blocking the Plaintiffs from accessing the suit property thus denying them from preparing their farms for farming purposes.

The Defendant's case

5. Mr. Mohammed Lippi, the Officer in Charge of Manda Airstrip, swore an Affidavit and stated that the Defendant is the legal and beneficial owner of the suit property having been conferred with Grant Number CR35747; that a person cannot in law claim adversely against the Government and that the Plaintiffs' suit is a non-starter in law and the orders sought cannot issue.

6. According to the Defendant, the Plaintiffs have over time encroached on the suit property; that the Plaintiffs have actually made fencing of the airstrip and the completion of the runway rehabilitation impossible and that on 18th October 2012, the Respondent commissioned the Ministry of Lands to carry out a valuation for compensation of improvements owned by people within the Manda Airport area.

7. The Defendant's Officer in Charge of Manda Airstrip has deponed that the Ministry carried out the valuation and set out precisely the amounts payable to each squatter; that the 2nd Plaintiff was paid Kshs.1,450,000 and that the Government has promised to allocate the squatters alternative land to enable the airport expand.

8. The Defendant's representative finally deponed that it is in the interest of the public that the Airstrip is expanded due to the economic benefits that the expansion will bring and that the Defendant has already issued a Notice to Airmen (NOTAM) for use of the new stretch of the runway.

9. According to the Defendant's representative, it is in the public interest taking into account the prevailing security, a challenge facing the country, that the security around the Manda Airstrip be beefed-up and fencing of the suit property and the relocation of the squatters is the first step of ensuring safety and security in the area.

Submissions

10. The Plaintiffs' advocate submitted that there is an existing Memorandum of Understanding dated 29th December 2011 between the National Government in which it was agreed that fencing of the suit property will not be done until the dispute is resolved and the affected people are compensated fully.

11. The Plaintiffs' advocate finally submitted that in any event, the Plaintiffs have proved that the Respondent acquired the suit property sometimes on 15th March 2012 well after they (the Plaintiffs) had acquired and developed the said land and therefore they have a cause of action capable of success as against the Defendant.

12. The Defendants' Advocate submitted that this suit is incompetent because it has been filed contrary to the provisions of Order 1 Rule 8; that the suit has not been brought in the interest of the 2nd, 9th, 11th,

14th, 17th, 18th 19th and 20th Plaintiffs and that the 1st Plaintiff has not annexed a signed authority from the other Plaintiffs to institute the present suit.

13. Counsel submitted that in any event, a person cannot claim adversely against the Government and that the Applicants continual occupation of the suit property and claim of ownership therefore is in itself unconstitutional.

14. Counsel finally submitted that the Respondent offered to compensate the Plaintiffs and that the Plaintiffs have not challenged the veracity of the valuation report.

Analysis and findings

15. The Plaintiffs are seeking for the orders of injunction as against the Defendant. An injunction can only be granted if the claimants show that they have a prima facie case with chances of success and if they show that unless the injunction is granted, they will suffer irreparable injury that cannot be compensated by way of damages. If the court is in doubt about the first two principles, it is required to determine the Application on a balance of convenience (**See Giella Vs Cassman Brown, (1973) EA 358**).

16. According to paragraph 4 of the Complaint, the Plaintiffs commenced the suit in which they were representing all the residents of Manda Island pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

17. Although the Complaint as drawn has twenty five Plaintiffs, the Verifying Affidavit annexed on the Complaint was sworn by the 1st Plaintiff alone. The said Verifying Affidavit did not make any reference to either the other 24 Plaintiffs or the residents of Manda Island. There is also no evidence that the other Plaintiffs authorized in writing the 1st Plaintiff to swear the Verifying Affidavit on their behalf or on behalf of the residents of Manda Island as pleaded at paragraph 4 of the Complaint contrary to the provisions of Order 4 Rule 3 of the Civil Procedure Rules. Order 4 Rule 3 of the Civil Procedure Rules provides that where there are several Plaintiffs, one of them, with the written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

18. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides that where there are more Plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and the authority shall be in writing signed by the party giving it.

19. The 1st Plaintiff did not state on whose authority he signed the Verifying Affidavit and the Supporting Affidavit in support of the current Application.

20. In view of the fact that it was averred at paragraph 4 of the Complaint that the suit was a representative suit, in the absence of the written authority by the residents of Manda Island, the suit as currently filed is a non-starter.

21. The Plaintiffs claim in the Complaint is that they are owners of the suit property by prescription or by way of adverse possession.

22. The Grant annexed on the Supporting Affidavit shows that the land in question is Government land. The said land was registered in favour of the Defendant on 14th June, 2002 as CR35747/1 and not on 15th March, 2002 when the Grant was signed. That is the date that the suit property was registered in favour of the Defendant. This suit was filed on 25th April 2014, a few days before the lapse of twelve (12) years from the date when the suit property was registered in favour of the Defendant. The claim of adverse possession pursuant to Section 7 of the Limitation of Actions Act had therefore not crystallised as at the time the suit was filed.

23. In any event, pursuant to the provisions of Section 42 of the Limitation of Actions Act, one cannot

lay a claim of adverse possession against the Government.

24. The suit property was unalienated government land before it was registered in favour of a body wholly owned by the Government. In view of the provisions of section 42 the Limitation of Actions Act as read together with Article 62 (1) (b) of the Constitution, the Plaintiffs cannot succeed in law with a claim of adverse possession against the Government or the Defendant.

25. I say so because land registered in favour of a State organ is defined as public land by the Constitution. Such land therefore is not subject to the Limitation of Actions Act.

26. For the reasons I have stated above, I find and hold that the Plaintiffs have not established a prima facie case with chances of success. In any event, the Plaintiffs have not contested the valuation of the land that they claim they are occupying and have agreed to be compensated accordingly. Consequently they will not suffer any irreparable loss that cannot be compensated by way of damages.

27. In the circumstances, I dismiss the Plaintiffs' Application dated 25th May 2014 with Dated and delivered in Malindi this **12th** day of **September, 2014**.

O. A. Angote

Judge