



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 45 OF 2012

IN THE MATTER OF: LAND TITLE NO. KILIFI/JIMBA/114

AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

BETWEEN

MWENDA KALAMA MASHA.....PLAINTIFF

=VERSUS=

- 1. THE COMMISSIONER OF LANDS**
- 2. THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT**
- 3. THE LAND REGISTRAR KILIFI**
- 4. THE HON. ATTORNEY GENERAL.....DEFENDANTS**

J U D G M E N T

Introduction:

1. This suit was commenced by an Originating Summons filed pursuant to the provisions of Order 37 Rules 1(9) and 8 of the Civil Procedure Rules.
2. In the Originating Summons dated 9th November 2012, the Applicant is seeking for the following orders:

(a) That the Honorable Court be pleased to issue orders to the District Land Registrar Kilifi, to register and issue title deed in respect to Plot No. KILIFI/JIMBA/114 in the name of the Plaintiff/Applicant herein as the administratrix of the Estate of KADZO SHUTU MOLE

(now deceased).

(b) THAT in the alternative the Honourable Court be pleased to order that the deceased KADZO SHUTU MOLE has become entitled as owner of land title No. KILIFI/JIMBA/114 by virtue of adverse possession and that the Registrar of Land Kilifi be therefore ordered to register the applicant MWENDA KALAMA MASHA as the administratrix of the Estate of KADZO SHUTU MOLE (now deceased) as the rightful/or lawful owner of title No. KILIFI/JIMBA/114.

(c) costs of the suit.

3. The Respondents filed a Replying Affidavit opposing the Originating Summons.
4. When the matter came up for directions, the parties agreed to dispose of the suit by way of affidavit evidence and written submissions.

The Plaintiff/Applicant's case:

5. According to the Applicant's Supporting Affidavit, he is the intended administrator of the Estate of Kadzo Shutu Mole; that the said Kadzo Shutu Mole who is his late mother is the one entitled to land known as Kilifi/Jimba/114 (the suit property) and that his late mother died on 15th November 2005 before she was issued with a title deed in respect to the suit property.
6. It is the Applicant's case that he has been in occupation of the suit property having been born there and that when the Ministerial Task Force on land issues in Coast Province visited the suit property, they confirmed that it is the family of Kadzo Shutu Mole which had a homestead on the suit property.
7. According to the Applicant, the suit property is still registered in the name of the Government and that it is only fair that the said land be registered in favour of her late mother. In the alternative, the Applicant has deponed that he is entitled to the land by virtue of the doctrine of adverse possession.

The Defendants'/Respondents' case:

8. Ms Winnie Namahya, a state counsel, deponed in her Replying Affidavit that indeed the suit property is Government land; that the said land has not been allocated to anyone else and the Originating Summons is scandalous, frivolous and vexatious and should be dismissed with costs.

Submissions:

9. The Applicant's advocate submitted that the suit is not frivolous or scandalous because the Applicant is trying to enforce her right to own and enjoy the suit property and that the suit property was allocated to her mother before she died.
10. The Respondents' counsel submitted that one cannot claim adverse possession over Government land; that the Plaintiff has not demonstrated that the suit property was allocated to her late mother and that the applicant should apply to the National Land Commission to be allocated the suit property.

Analysis and findings:

11. The Plaintiff/Applicant is asking this court to compel the Respondents to issue a title deed to his late mother because, firstly the "Task Force" recommended that it is her late mother who is entitled to the suit property and secondly because he has been staying on the suit property for more than twelve years.
12. It is not disputed that the suit property is registered in the name of the Government. The said land has not been allocated and remains unalienated Government land.
13. Unalienated Government land has been defined at Article 62 (1) (a) to be public land. Such land is now vested in the county government and is administered on behalf of the county by the National

- Land Commission (See Article 62 (2) (a) of the Constitution).
14. It is only the National Land Commission, in consultation with the Kilifi county government that can allocate the suit property to the Applicant, or anybody else and not the Respondents.
 15. The procedure on how such land can be allocated and to whom is provided for under Section 12 of the Land Act. Under that section, the National Land Commission may, on behalf of the National or County Government, allocate public land by way of public auction or by an application confined to a targeted group of persons or by way of public request.
 16. That is the procedure that the Applicant should follow if he feels strongly that he is entitled to the land. It is the National Land Commission which will make a decision as to whether he is entitled to the said land or not.
 17. Until the National Land Commission makes a determination as to who is entitled to the suit property, this court cannot direct it on how or to whom it should allocate the suit property.
 18. The report of the special Task Force on Kilifi Jimba and Chembe Kibabamshe that the Applicant is relying on has no force of law either under the new constitutional dispensation or the repealed one. The recommendations of the Task Force are not binding on the former office of the Commissioner of Lands or on the National Land Commission or on any office dealing with the allocation of unalienated government land. Consequently, this court cannot grant the orders being sought based on the recommendations of that report.
 19. It is trite law that a party cannot bring a suit for adverse possession as against the government over its land (see section 41(a) (i) of the Limitation of Actions Act.). The Plaintiff's claim cannot succeed notwithstanding the many years he has stayed on the suit property which is unalienated government.
 20. In the circumstances, I find and hold that the Applicant is not entitled to the orders that he has sought in the Originating Summons.
 21. For those reasons, I dismiss the Originating Summons dated 9th November 2012 with costs.

Dated and delivered in Malindi this 28th day of November, 2014.

O. A. Angote

Judge