



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 53 OF 2014

WANJE NYAU MWALUNGO.....PLAINTIFF/RESPONDENT

=VERSUS=

MERRY BEACH LTD.....1ST DEFENDANT/APPLICANT

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....2ND DEFENDANT

COUNTY LAND REGISTRAR KILIFI.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Introduction:

1. The Application before me is the one dated 11th August 2014 filed by the 1st Defendant. In the Application, the 1st Defendant is seeking for the following orders:

(a) The Plaintiff's suit be struck out with costs.

(b) Costs of the Application be provided for.

The 1st Defendant's/Applicant's case:

2. According to the affidavit of the 1st Defendant's representative, the 1st Defendant acquired the suit property on 10th July 1996 and that the Plaintiff or his deceased father had twelve (12) years from July 1996 to file suit to recover the said land.

3. The 1st Defendant's company secretary further deponed that under section 7 of the Limitation of Actions Act, no action may be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

4. It is the Defendant's case that the court has no jurisdiction to hear and determine a suit

which is time barred and that allegations that there were embargoes placed on the suit property is irrelevant, immaterial, extraneous an abuse of the court process.

The Plaintiff's/Respondent's case:

5. According to the affidavit by the Plaintiff, he was unable to conduct an official search on the suit property for a long time because the files had been taken to Nairobi main registry and all dealings within Kilifi/Jimba and Chembe Kibabamshe section were restricted by an embargo.

6. It is the Plaintiff's deposition that when he realised that the 1st Defendant had trespassed on his land, he was advised to obtain letters of administration; that he filed succession cause number 21 of 2011 and that when the 1st Defendant opposed his suit he discovered that the suit property had been registered in its favour.

Submissions:

7. The parties' advocates made their oral submissions. According to the Defendant's advocate, it is not true that the Plaintiff became aware that the suit property was registered in favour of the 1st Defendant in the year 2011. Counsel submitted that in one of his affidavits, the Plaintiff stated that he was chased away from the suit property in the year 2009.

8. Counsel submitted at length on the legality of the task force report which dealt with the issue of allocation of land within Chembe/Kibabamshe and submitted that the Plaintiff's name is not in that report; that according to the report, it is alleged that there were people on the plot since 1930 which was way before the Plaintiff's father was born.

9. On the other hand, the Plaintiff's advocate submitted that there are issues of fact raised in the Plaintiff which ought to go to trial; that the Plaintiff raises triable issues and that it is a matter of judicial notice that the suit property had an embargo.

Analysis and findings:

10. The only issue raised in the current application that I am supposed to determine is whether the suit is time barred in view of the provisions of section 7 of the Limitation of Actions Act. That is what the Defendant's application is all about.

11. The Plaintiff's claim is that the suit property was at all material time ancestral land and that the late Nyau Wanje Walungo was the first squatter to live and develop the same.

12. The Plaintiff has averred in his Plaintiff that he is the legal administrator of the Estate of the late Nyau Wanje Walungo and that he has been issued with a certificate of confirmation of grant; that his father has been in actual possession of the suit plot for a very long time and that he has been utilizing it to the exclusion of any other person.

13. Counsel submitted that while an embargo was subsisting in respect to the suit property, it was discovered that the suit property had been registered in the name of the 1st Defendant.

14. The Plaintiff is seeking for a declaration that the registration of the suit property in the name of the 1st Defendant is null and void, amongst other orders.

15. The Plaintiff is also seeking to have the suit property registered in his name, on behalf of his late father because, according to the Plaintiff, the 1st Defendant had the suit property fraudulently registered in its name.

16. The Plaintiff does not state when the Plaintiff discovered that the suit property had been

fraudulently registered in the name of the 1st Defendant and not in the name of his father.

17. According to the Plaintiff's averment in the Plaint, he only discovered that the suit property had been registered in the name of the 1st Defendant after the embargo was lifted.

18. Section 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

19. The Plaintiff's right of action, as I understand it, is based on the alleged fraudulent acquisition of the suit property by the 1st Defendant. In that case, the period of limitation did not begin to run until when the Plaintiff or his late father discovered the alleged fraud (see Section 26 of the Limitation of Actions Act).

20. I have looked at the pleadings annexed on the Defendant's Further Affidavit in Malindi Succession Cause Number 21 of 2012. Those pleadings do not show when the Plaintiff discovered about the suit property having been registered in favour of the 1st Defendant.

21. Considering that the pleadings before me do not show how or when the Plaintiff or his father became aware that the suit property was registered in favour of the 1st Defendant, I cannot, at this stage, make a finding that the suit is time barred. That issue can only be dealt with at a full trial once viva voce and documentary evidence has been tendered.

22. In the circumstances, and for the reasons I have given, I dismiss the 1st Defendant's Application dated 11th August, 2014 with costs.

Dated and delivered in Malindi this 7th day of **November**, 2014.

O. A. Angote

Judge