



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 42 OF 2011

JOHNSON KAZUNGU NYAU.....PLAINTIFF/RESPONDENT

=VERSUS=

MALINDI MASKETEERS.....DEFENDANT/APPLICANT

R U L I N G

Introduction

1. Before me is the Defendant's Application dated 18th March 2013. The Defendant/Applicant is seeking for the following orders

(i) THAT this Honourable Court be pleased to struck out the Plaintiff's suit for being an abuse of the court process.

(ii) THAT the cost of this Application be provided for.

Defendants/Applicant's case

2. The Defendant/Applicant has deponed that it is the registered absolute proprietor of Chembe/Kibabamshe/362 (the suit property); that it is an innocent purchaser for value having purchased the said plot on 19th June 2002 and that the Plaintiff has never been registered as the owner of the suit property.
3. The Defendant/Applicant finally deponed that the Plaintiff's suit is an abuse of the process of the court and deserves to be struck out; that as an administrator of the Estate of Nyau Wanje Mwalugo, the Plaintiff should have moved the court by way of an Originating Summons as required under Order 37 Rule (1) of the Civil Procedure Rules.

Plaintiff's/Respondent's case

4. The Plaintiff/Respondent filed a Replying Affidavit on 28th June 2013 and deponed that the Defendant/Applicant has no proprietary interest in the land because his title was obtained fraudulently; that there are people who have been living on the suit property as squatters for many years and that he has been residing on the suit property with his father before his demise.
5. The parties agreed to dispose of the Application by way of written submissions which I have considered.

Analysis

6. The Defendant's Application has been brought pursuant to the provisions of Order 2 Rule 15(d) of the Civil Procedure Rules, 2010. Under the said Rule, the court may order to be struck out or amended any pleadings on the grounds that it is otherwise an abuse of the process of court.
7. In the case of **African Continental Bank DLC Vs Damien IkeChukwa Ninzi, Sc No.35 of 2001, the Supreme Court of Nigeria** the Supreme Court of Nigeria defined abuse of the court to include a ***situation where a partly improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.***
8. The Plaintiff has averred at paragraph 3 of his Complaint that he is the owner of the suit property which he acquired since 21st May 2012 when he was issued with a certificate of confirmation of grant to administer his late father's estate.
9. The Complaint at Paragraph 4 states that the Plaintiff's father had been in occupation of the suit property for the last ten years and has enjoyed peaceful occupation since he was allocated the land by the Task Force. On that basis alone, the Plaintiff is seeking for a permanent injunction as against the Defendant and for a declaratory order that he is the rightful owner of the suit property.
10. The averments in the Complaint were repeated in the Replying Affidavit.
11. The claim by the Plaintiff is that his father was allotted the suit property by "a task force" whose name he does not indicate. The Plaintiff further claims that his father has been on the suit land for 10 years.
12. It is trite law that one can only claim land by way of adverse possession if he has dispossessed the owner or has taken possession of the land from the owner for more than 12 years. That is not what the Plaintiff is claiming.
13. The Plaintiff has admitted in his Complaint and Replying Affidavit that his late father was in possession of the suit land for 10 years and not for more than 12 years. Consequently, the Plaintiff cannot claim the land by way of adverse possession.
14. The Plaintiff has also averred that his father was allocated the suit property by "the task force" and he has been in occupation since then for 10 years. The Plaintiff has not indicated the task force that allocated his father the suit property and whether the said task force had the legal mandate to allocate land in the first place.
15. The Defendant/Applicant annexed on its Affidavit the Title Deed showing that it was registered as the proprietor of the suit property on 19th June 2002.
16. The copy of the register annexed on the Supporting Affidavit shows that the property was registered in the name of Talwa Agencies on 13th March 2000 before it was sold to Daniel Ricii on 10th April 2002 for Kshs.2,500,000. The said Daniel Ricii transferred the suit property to the Defendant/Applicant on 19th June 2002.
17. It is not for the Plaintiff to state in his Replying Affidavit, without adducing any evidence, that the title deed which was issued to the Defendant was fraudulently acquired without showing his interest in the suit property.
18. When a claimant moves the court on the basis that he is entitled to be declared as an owner of a property, he must show in his pleadings how that proprietary interest arises. The Plaintiff has not done so in his Complaint and Replying Affidavit.
19. Although a claim which can be revived by an amendment should always be sustained, the court cannot entertain claims that have no basis in law. Such claims are a waste of judicial time and should be dismissed *in limine*.
20. A party who wants his proprietary rights protected by the court must show those rights and how they arose in his pleadings. Considering that the Plaintiff has not shown his proprietary interest in the suit property in his Complaint, I find that the Complaint is an abuse of the court process. The suit, as currently framed, is only meant to harass, irritate and annoy the Defendant/Applicant and interfere with the administration of justice. The suit has no basis at all.
21. In the circumstances, and for the reasons I have given above, I strike out the Plaintiff's suit with costs.

Dated and Delivered in Malindi this 31st day of **October**, 2013

O. A. Angote

Judge