Gichuhi (Suing as the Legal Representative of the Estate of Wanjiku Waititu) v Kihumba (Enviromental and Land Originating Summons E008 of 2023) [2023] KEELC 21743 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21743 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023

A OMBWAYO, J

NOVEMBER 24, 2023

BETWEEN

JANET MUKUHI GICHUHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WANJIKU WAITITU) ..... PLAINTIFF

AND

WANJIIRU KIHUMBA ..... DEFENDANT

RULING

1. Wanjiru Kihumba (hereinafter referred to as the defendant/applicant) came to court vide application dated 19th October 2023 seeking orders that the Originating Summons herein be struck out with costs as the Originating Summons hereby filed violates the provisions of Section 38 of the *limitation of Actions Act*, as Janet Mukuhi Gichuhi (hereinafter referred to as the plaintiff/respondent) has not annexed a title deed showing that the defendant is the proprietor of the suit parcel, that she wants to acquire by way of adverse possession.

2. According to the applicant, the suit filed, violates the mandatory provisions of order 37 Rule 7 (2) of the *Civil Procedure Rules*, 2010, as a certified extract of the title deed has not been annexed to the supporting affidavit, and that is fatal to the case.

3. The originating summons as filed, is incompetent as the plaintiff cannot purport to acquire land through adverse possession, where the land has no title deed. The land in question is not registered, and an order of adverse possession, can only be made against a Defendant, who is a registered proprietor of the suit property. Procedural aspects of an action claiming adverse possession are found at Section 38 (10 and (4) of *Limitation of Action Act* Chapter 22 Laws of Kenya and Order 37 rule 7 of the *Civil Procedure Rules*, 2010 .

4. On her part, the respondent/plaintiff Janet Mukuhi Gichuhi's states that the suit property Plot No. 604 Temiyotta Scheme was acquired by her deceased Mother the late Wanjiku Watitu (deceased) who entered into the suit land in 1986 following a purchase and sale of the suit land by Wanjiru Kihumba, the then registered owner of the suit land. The Defendant failed to execute the transfer to enable the title to be transferred from her name to that of the late Wanjiku Watitu.

5. The late Wanjiku Watitu moved the High Court of Kenya at Nakuru, in Civil Suit No. 341 of 1991 between herself and the Defendant/Applicant herein seeking the following orders:

    a. Specific performance of the said agreement;

    b. An order that the Defendant do all such acts and execute all such documents as may be necessary to transfer the 1.5 acres of land from the said plot number 604 Temoyetta Scheme to the Plaintiff;

    c. Damage breach of Contract in lieu of or in addition to specific performance;

    d. Costs;

    e. Any other or further relief that this honorable court deems fit.

6. The High Court in Nakuru on 3rd March 1993 made an order of specific performance directing the Defendant to specifically perform the sale agreement entered between them and the Plaintiff.

7. The late Wanjiku Watitu obtained a decree dated 29th April 1993 in relation of the judgment. Due to frequent violence and skirmishes in the location, the Defendant was not easy to locate as she moved from one place to another without a known place of abode.

8. Further, the late Wanjiku Watitu however soon thereafter became sick and was frequently in and out of the hospital till her death on 19th August 2018 that barred the execution of the judgment. Her late mother took possession of the suit land in 1986 and lived there until her demise.

9. Her mother left her on the suit land where she has continued to occupy and utilize to date, a total occupancy period in excess of over 30 years. The Defendant had full knowledge of her occupancy and possession and that her occupancy has been open peaceful, continuous and uninterrupted.

10. I have considered the application discerned all documents on record including the replying affidavit and do find that there is an existing judgment in favour of the plaintiff. The decree was issued on 29th April 1993. It is clear that the judgment has expired as the *Limitation of Actions Act* Cap 22 Laws of Kenya section 7 provides that a judgement shall not be enforced after a period of 12 years. The judgment in Nakuru HCC No. 341 of 1991 expired on 29th April 2005 and therefore the same cannot be executed. Time for adverse possession started running on 29th April 2005 after expiry of the judgment and matured 12 years thereafter that is on 29th April 2017.

11. Section 7 of the *Limitation of Actions Act* Cap 22 of the Law of Kenya provides that: -

    7. Actions to recover land

    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.

12. This implies that the defendant cannot move to recover the land occupied by the plaintiff as they are estopped due to lapse of time.

Section 38(1) of the *Limitation of Action Act* provides:-

> 38. Registration of title to land or easement acquired under *Act*(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

Section 38(4) provides

> 38. Registration of title to land or easement acquired under Act (4)
>
> The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

13. I do find that though the court found that the plaintiff is entitled to the portion of land and ordered for specific performance the plaintiff did not execute the judgment and decree. The plaintiff should have applied for leave to execute the decree out of time by extending time to execute the decree already issued.

14. However, this is a unique case where the court has already made a decision as to the ownership of the plot in dispute in Nakuru High Court Civil case number 4 of 1991.

15. The defendant has applied for the striking out of the originating summons on the grounds that the extract of title has not been availed. Striking out of pleadings should be done in the clearest of all cases.In The *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.
>
> In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the same court expressed itself thus:
>
> > A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

16. Similarly, in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption

and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

17. Though there is no evidence that the suit property is registered, there is evidence that the plot belongs to the defendant and that the plaintiff is in possession and therefore the court cannot strike out the Originating Summons when clearly there are triable issues. The upshot of this is that the application lacks merit and is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF NOVEMBER 2023.

A O OMBWAYO

JUDGE