



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 1029 OF 1982 (OS)

JOACKIM NGUGI KIARIE PLAINTIFF

-VERSUS-

G. Z ULYATE & 6 OTHERS DEFENDANTS

CONSOLIDATED WITH HCC NO. 568 OF 1990

AGRI HARDWARE (EA) LTD PLAINTIFF

-VERSUS-

JOHN MUKIRAE & 8 OTHERS..... DEFENDANTS

CONSOLIDATED WITH HCC NO. 507 OF 1981

JOHN MUKIRAE

DANIEL NJOROGE..... PLAINTIFFS

VERSUS

L. WILSON

MATHEW ALEXANDER BLACK DEFENDANTS

CONSOLIDATED WITH HCC NO. 879 OF 1989

PATRICK GITAU MBUGUA & 3 OTHERS..... PLAINTIFFS

-VERSUS-

RULING

1. On 1st August 2013 the court issued orders in favour of the plaintiff in the following terms:-

1. **That the land registrar be and is hereby ordered to dispense with the production of the old title deed for land reference No. 336/17 so that the transfer process can proceed justifiably.**
2. **That the land registrar be and is hereby directed to use the decree as a valid instrument of transfer and make the necessary entries in the registry.**

The defendant/respondents vide a notice of motion application dated 8th August 2013 sought orders to stay the execution of the judgment/decision of Mbogholi Mshagha, J delivered on 2nd August 2012 and the above orders issued by Gitumbi, J. on 15th August 2013. The court by a ruling delivered on 23rd May 2014 dismissed the application by the defendant seeking stay of the judgment and the orders issued by the court on 1st August 2013.

2. The subject of this ruling is the plaintiffs Notice of Motion application dated 18th June 2014. The application is brought under section 1A and 1B and section 99 of the Civil Procedure Act, Cap 21 Laws of Kenya and seeks inter alia an order that:-

“The orders granted by this honourable court on 1st August 2013 be amended and specifically prayer number two to include the words – by adverse possession and occupation so as to read as follows:- THAT the Land Registrar be and is hereby directed to use the decree as a valid instrument of transfer by adverse possession and occupation and make the necessary entries in the register.”

3. The plaintiff grounds the application on inter alia the following grounds set out on the body of the application:-

1. **That the court had already determined the matter in favour of the plaintiff/applicant and issued orders dated 1st August 2013 but the transfer could not be effected by the land registrar as directed by the court unless there was an indication that the said transfer was to be done in view of adverse possession.**
2. **That the judgment in this matter was delivered on 2nd day of August 2012 where the judge observed that the plaintiff/applicant’s possession and occupation of the suit premises was adverse to the title holder.**

The application is also supported on the annexed supporting affidavit sworn by the plaintiff/applicant on 18th June 2014 where he depones that upon presenting the orders to the land registrar he was advised to have the order amended/rectified to show that the transfer was being made on account of the plaintiff/applicant having been in adverse possession of the suit property.

4. The 2nd to 7th defendant/respondents filed grounds of opposition to the plaintiff’s application dated 29th June 2014 and one **Patrick Gitau Mbugua** the 3rd defendant filed a replying affidavit dated 4th September 2014 on his own behalf and on behalf of the other defendants in opposition to the plaintiff’s application. It is the defendants position that Section 99 of the Civil Procedure Act, Cap 21 of the Laws of Kenya on which the plaintiff’s application is predicated has no application as it only provides for amendment of orders on account of clerical or arithmetic mistakes. The defendants aver that the order of 1st August 2013 was in accordance with the decree issued on 10th September 2012 and amending the same would render the same to be inconsistent with the decree. The defendants argue that the plaintiff was granted the orders that he sought in the originating summons and the instant application is but an

attempt to amend his prayers as per the originating summons which the plaintiff could only do during the trial and before judgment.

5. **Mr. John Mukirae Kinungi** one of the plaintiffs in HCCC No. 507 of 1981 (one of the suits consolidated) has also filed a replying affidavit dated 2nd December 2014 in opposition to the plaintiff's application which raises similar grounds as the ones raised by the defendants. The thrust of the argument by the plaintiffs in HCCC No. 507 of 1981 is that a party is bound by its pleadings and aver that the order issued by the court on 1st August 2013 was in conformity with what the plaintiff/applicant had sought by his pleadings and was in line with the decree that was issued on 10th September 2012.

6. Parties filed written submissions to canvass the application by the applicant. The plaintiff/applicant's submissions dated 4th November 2014 were filed on the same date. The 2nd – 7th defendants submissions dated 27th November 2014 were filed on 28th November 2014 while the plaintiffs in HCCC No. 507 of 1981 submissions dated 2nd December 2014 were filed on 17th December 2014.

7. I have reviewed and considered the plaintiff's application, the affidavits sworn in support and in opposition thereto and the submissions made by the parties and the issue for determination is whether the court has the jurisdiction to entertain the application by the plaintiff and whether the court can amend and/or vary the order of 1st August, 2013 in the manner sought in the plaintiff's instant application.

8. The parties do not dispute that judgment was given by **Mboghli Msagha, J.** on 2nd August 2012 in favour of the plaintiff/applicant and that a decree was issued on 10th September 2012 consequent to that judgment. In the originating summons the plaintiff inter alia sought an order that:-

“That the plaintiff Joakim Ngugi Kiarie be registered as the proprietor of the suit premises LR No. 336/17 absolutely as the proprietor thereof.”

Under Order 2 of the decree issued on 10th September 2012 it was ordered:-

“That Joakim Ngugi Kiarie should be registered as the proprietor thereof.”

Why did the judge so order? While court orders ought not to be given in vain, the orders have to have a basis. The land registrar it would appear required that the basis for requiring the plaintiff to be registered as the owner of the suit property be expressed in the order. Did the judge provide the basis for ordering the plaintiff to be registered as the owner of the suit property? I think the judge did in his judgment at page 9 when he stated thus:-

“Proof of a case of this nature is on a balance of probability. A party claiming land on the basis of adverse possession has to prove that he has used this land which he claims as of right. There must be evidence of no force, no secrecy and no-evasion. They must also show exclusive and uninterrupted possession before the filing of a claim, See Kimani Ruchine & Another –vs- Swift Rutherford Co. Ltd & Another (1980), KLR 10. A party must also establish that the owner has lost his right to the said parcel of land or has discontinued possession thereof. See Little dal –vs- Liverpool College (1900) 1ch 19 at page 21.

Going by all the material presented before me, I am persuaded that the plaintiff in High Court Civil Case No. 1029 of 1982 i.e Mr. Joakim Ngugi Kiarie has presented a case that justifies the orders he seeks. His possession and occupation of the suit premises was adverse to the title holder. Competition in respect of that occupation is non-existent. The defendants should therefore be restrained from interfering with that position. I find he i.e Mr. Joakim Ngugi Kiarie should be registered as the proprietor thereof...”

9. From the above observation by the trial judge it is patently clear that the judge made a finding that the plaintiff was entitled to be registered as proprietor of the suit property by reason of the fact that he had proved he was in adverse possession of the suit land against the title holder. Thus, the judge made a finding that the plaintiff was an adverse possessor and was for that reason entitled to be registered as owner of the suit land in place of the registered owner. It is the execution of that judgment that the plaintiff has sought and the orders granted in favour of the plaintiff on 1st August 2013 were intended to effectuate the execution of the judgment of the court made on 2nd August 2012. This court vide its ruling made on 23rd May 2014 dismissed the defendants application seeking a stay of execution of the orders of 1st August 2013, the judgment and decree arising from the judgment. Consequently there is no order staying execution of the judgment and decree of the court.

10. The defendants have contended that the plaintiff's application lacks competence as the orders sought are suited for a review application and not an application for amendment. The defendants have submitted that the court lacks the jurisdiction to deal with the application and have referred the court to the case of **Seven seas Technologies Ltd –vs- Eric Chege (2014) eKLR** to support the view that where a court lacks jurisdiction it ought not to deal with a matter. In the case of **Owners of Motor Vessel "LillianS" –vs- Caltex Oil (Kenya) 1989) KLR, Nyarangi JA** while commenting on the question of jurisdiction stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. With respect, in the present matter I do not consider that the issue of jurisdiction arises. The suit has been determined and a judgment and decree have been issued. At stake is the execution of the decree and orders emanating from the judgment. I have looked at the judgment, the decree issued on 10th September, 2012 and the order granted on 1st August 2013. The three are consistent that the plaintiff ought to be registered as owner of the suit property. The land registrar, who the order of 1st August 2013 directed to implement the judgment and decree by registering the plaintiff as the owner of the suit property has demanded a clarification of the order of 1st August 2013 so that the basis upon which the plaintiff is to be registered as owner is clear. In my view that clarification is contained in the judgment by **Mbogoli Msagha, J.** that the plaintiff was an adverse possessor of the suit property and for that reason he ought to be registered as owner in place of the registered owner. The plaintiff was the successful party in the litigation and the court in my view made a clear and unambiguous judgment. The decree as extracted may not necessary have clearly conveyed the decision of the court but the judgment is there and that clarification is clearly evident therein. Order 21 Rule 7 provides for the contents of decree and is the following terms:-

7(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.”

The relief granted to the plaintiff in the present suit is not in doubt and neither is the basis for giving the relief in doubt. Order 21 Rule 8 provides for the settlement of the terms of the decree in case of any dispute.

12. The respondents have submitted that Section 99 of the Civil Procedure Act, Cap 21 Laws of Kenya under which the plaintiff premised the application is inapplicable to this matter since there is no clerical or arithmetical mistake or error arising from the judgment, decree or order that needs to be corrected. However the same provision also provides for amendment in case there was an omission and it is my view that the judge having made a finding that the plaintiff was an adverse possessor and was for that reason entitled to be registered as owner of the suit property, it was an omission not to include the reason

for ordering the plaintiff to be registered as owner of the suit property in the decree. I would in the premises allow for amendment/variation of the order dated 1st August 2013 in the manner proposed by the plaintiff in the present application.

13. The upshot is that I allow the plaintiff's application dated 18th June 2014 in terms of prayer (2) thereof with no order as to costs.

Ruling dated and signed at Kisii this 6th day of October 2015.

J. M MUTUNGI

JUDGE

Ruling **delivered** at **Nairobi** this 23rd day of **October 2015.**

L.GACHERU

JUDGE

In the presence of:

M/s Ben Bella h/b for Mr. Kinuthia for the plaintiff

N/A for the 1st to 7th defendants

L.GACHERU

JUDGE