



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HIGH COURT CIVIL CASE NO.242 OF 2009

MUTHOKI MULI PLAINTIFF

VERSUS

ESTHER KASALU DEFENDANT

RULING

The plaintiff commenced this suit by way originating summons dated and filed in court on 8th August, 2009. Essentially the plaintiff's claim against the defendant is anchored on adverse possession. He prays in the main that he be registered as proprietor of all that piece or parcel of land known as **plot Block No.8914** title deed **No.12023** under Ngelani Ranching Unity located in Athi River District by way of adverse possession.

In the grounds in support of the Originating summons, hereinafter “**(the O.S)**” the plaintiff claims that the defendant and or her agents, **Philip Masila** and **Agnes Masila** are in the process of evicting her from a portion of land she has occupied and developed for more than 40 years. That all that piece of land described as plot No.8914 title deed **No.12023** under Ngelani Ranch Unity hereinafter “**the suit premises**” was acquired by both the plaintiff and defendant and other members of Ngelani Ranching Unity through share contribution but the defendant and her agents were bent on denying her portion of the suit premises. The plaintiff together with her husband contributed directly to the ranch and unless the orders sought are granted, she stood to suffer irreparable damage and loss.

The affidavit in support of the originating summons reiterates in the foregoing. Suffice to add that the plaintiff is 70 years old, married under Kamba Customary Law to one, **Muli Muoka** deceased. In or about 1964, her deceased husband paid for shares in Ngelani Ranching Unity hereinafter, “**the company**” which shares were reduced to land as dividends. The company bought the suit premises located in Athi River District and all members were given their respective portions of land. The plaintiff was given the suit premises which she occupies to date. She had lived on the same for over 40 years without interference and had brought up thereon all her children. However, in or about the year 2007, the company called a general meeting where it was resolved that each member who had contributed should be given his or her portion of land and registered as proprietor thereof. In the year 2008 all members were given their respective portion of land following the subdivision. However, during the subdivision, the defendant denied that the plaintiff and her husband had contributed towards the shares and instead brought in strangers by the names of **Philip Masila** and **Agnes Masila** who never made any contributions

and who are her relatives. She claimed that they should be given a portion of the suit premises as well. On 7th April, 2009, the dispute was referred to the area chief for arbitration and he ruled that the plaintiff should get all 11 acres, defendant 21 acres, whereas **Philip Masila** and **Agnes Masila** should get 20 acres each out of the suit premises. To the plaintiff, the suit premises belonged to her and the defendant alone and should therefore have been subdivided among themselves equally and no portion should have been given to persons who never contributed towards the shares in the company.

The O.S. summons attracted grounds of opposition by the defendant which were filed on 6th October, 2011. In the main the defendant alleged that the plaintiff had no legal capacity to take out the O.S. against her, the claim and relief sought could not be determined by way of O.S. between the parties and finally, that the O.S. was incompetent and fatally defective. Contemporaneously with the filing of the grounds of opposition aforesaid, the defendant also took out a notice of preliminary objection to the effect that the O.S. as taken out and filed was incompetent and bad in law.

The O.S. came before me for interpartes hearing on 8th November, 2011 and though the plaintiff had been served with the hearing notice of the preliminary objection, she failed to turn up. I accordingly allowed the defendant to urge her preliminary objection the absence of the plaintiff notwithstanding since she had been served, if the affidavit of service on record is anything to go by.

The defendant elected to argue his preliminary objection by way of written submissions. I have carefully read and considered the same.

It is evident that the O.S. is brought under section 38 of the Limitation of Actions Act which provides inter alia:

“where a person claims to have become entitled by adverse possession to land registered under any of Acts cited in Section 37, 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.”

From the foregoing it is evident that if the plaintiff is to succeed in her claim, she must demonstrate that the defendant is the registered proprietor of the suit premises and the suit premises must be registered under either the **Government Lands Act, Registration of Titles Act, Land Titles Act or Registered Land Act**. This is what section 37 of the **Limitation Actions Act** contemplates. In the circumstances of this case, it is apparent that the suit premises are still registered in the name of Ngelani Ranching Unity which is not a party to this suit. The Plaintiff has therefore failed to demonstrate that the suit premises are registered in the name of the defendant as required by law. Further section 38(1) of the same Act envisages that the plaintiff must declare under which Act, the title of the land in question is registered. Again the Plaintiff has failed in this regard rendering the O.S. fatally defective.

The O.S. as already stated was supported by the affidavit of the plaintiff sworn on 4th August, 2009. It is a mandatory requirement that the plaintiff must annex to the supporting affidavit a certified extract of the title to the land in question. See order 37 rule 7 of the Civil Procedure rules. The affidavit in support of the O.S. did not meet this requirement as well. The plaintiff did not annex a certified extract of the title to the suit premises that she is seeking to acquire by way of adverse possession.

All in all, the plaintiff has failed to meet the set requirements for an O.S. for adverse possession and the same should not be allowed to proceed to hearing. The O.S. is deemed incompetent and bad in law. Accordingly it is struck out with costs to the defendant.

Dated and delivered at Machakos, this 16th day of January, 2012.

ASIKE-MAKHANDIA

JUDGE