



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO. 125 OF 2009

1. SAMPULI SALIM MWANYONJE

2. SWALEH SALIM MWANYONJEPLAINTIFFS/RESPONDENTS

-VERSUS-

1. MARTHA WANGUI MURIITHI

2. ELIJAH WAICHANGURU MURIITHIDEFENDANTS/APPLICANTS

RULING

The defendant's application lacks good form, as it appears, first, as a Chamber Summons dated **5th August, 2010** and filed on **10th August, 2010** and then again, as a Chamber Summons dated **14th August, 2010** and filed on **28th October, 2010**. I have taken guidance from the terms of Article 159(2)(d) of the **Constitution of Kenya, 2010** and entertained this application, to the intent that it be resolved on merit alone.

The defendants moved the Court under Order VI, Rule 13(1)(d) of the former edition of the Civil Procedure Rules, s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), and s.7 of the Limitation of Actions Act (Cap.22, Laws of Kenya). The application carries one main prayer: "*THAT the Court be pleased to strike out the plaintiffs' suit.*"

The grounds given are two: (i) that the suit offends the provisions of the Limitation of Actions Act; and (ii) that the suit is an abuse of Court process.

Martha Wangui Muriithi, who makes depositions on her own behalf, and avers that 2nd respondent has died, states that her late husband, one **Ishmael E. Muriithi**, purchased the suit parcel of land from one **Salim Swalee Manjonze** on **29th September, 1973**; the said property was registered in the deceased's name on **15th November, 1974**; upon the death of the deceased, the suit property was registered in the joint names of the two defendants as sole proprietors, the two then being the personal representatives of the deceased; the deponent believes to be true her Advocate's advice that any action in respect of ownership of the suit property started running from **15th November, 1974**, and lapsed on **15th November, 1986**.

The plaintiffs, through their Advocates, *M/s. S. Ndege & Co. Advocates* filed their grounds of opposition (dated **24th November, 2010**) on **29th November, 2010**; and they thus contend:

(i) the plaintiffs' suit is not an abuse of Court process, as it is brought pursuant to the provisions of Order 11, Rule 7 of the Civil Procedure Rules;

(ii) s.7 of the Limitation of Actions Act does not apply to the plaintiffs' suit, as it is not a claim for land, but a claim that seeks declaratory reliefs;

(iii) the defendant's application is an abuse of Court process, for being based on a misunderstanding of the law.

Counsel for the defendant/applicant submitted that the respondents, whose suit was commenced by plaint on **4th May, 2009**, are in quest of "*declarations....to be recognized as having registrable interests...on the land.*"

Counsel urged that since ownership of the suit property vested in the applicant on **19th November, 1987**, by the Limitation of Actions Act (Cap.22) and the Civil Procedure Rules, any claim by the plaintiffs should have been lodged in accordance with the law of *adverse possession*. For the application of the law of adverse possession, counsel cited the High Court decision (**Karanja, J**) in **Violet Omusula Sikanyi v. Vincent Kamari** [2006] eKLR.

Counsel submitted that the plaintiffs' claim was against the safeguarded interest of persons *bona fide* registered as owners, and bearing clean title evidencing ownership: **Mbira v. Gachuhi** [2002] 1EA 137(HCK). In **Mbira v. Gachuhi**, counsel highlighted the following paragraph (in the Judgment of **Kuloba, J**) [editor's summary, p.138]:

"Where there were two persons on a piece of land, one of whom was the registered proprietor, and each asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser.....Possession and user of land for the requisite statutory period did not in themselves give rise to a claim of adverse possession. The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises."

Counsel urged that the foregoing principle was applicable in this instance; and that on that account, the plaintiffs lack *locus standi*.

The defendant urged that the suit was an abuse of Court process, for it's being used "not in good faith and for proper purposes, but as a means of vexation, or oppression....": **Diamond Trust Bank Kenya v. Peter Mailanyi & 2 Others**, Nairobi H.C.C.C. No. 177 of 2002 [2006] eKLR (**Emukule, J**).

For the plaintiffs/respondents, counsel relied on the terms of Order II, Rule 7 of the earlier edition of the Civil Procedure Rules:

"No suit shall be open to objection on the ground that a merely declaratory Judgment or Order is sought thereby and the Court may make a binding declaration of right whether any consequential relief is or could be claimed or not."

Counsel submitted that the suit herein is not open to objection by the defendant; for the applicant had "*not shown that the plaintiffs are not entitled to seek the reliefs sought in the plaint*"; and that "*this Court is competent to adjudicate and make declaratory Orders such as have been sought by the plaintiffs*"; counsel relied on the Court of Appeal decision in **Corporate Insurance Company Ltd. v. Elias Okinyi Ofire**, Civil Appeal No.12 of 1998.

Learned counsel, in contesting the application, submitted that "*a prayer for [a] declaration is not a claim for land in which the suit is time-barred under section 7 of theLimitation of Actions Act [Cap.22]*"; and that the defendant has not "*shown any provisions in the law of [limitation]...that declaratory reliefs in the manner pleaded....have a statutory time-limit.*" Counsel discounted the defendant's reliance on certain cases (**Violet Omusula Sikanyi v. Vincent Kamari**; and **Kenya Commercial Bank Ltd v. Sarah**

Njeri Muchene, HCCC No. 993/2003) which are concerned squarely with *adverse possession*.

The plaintiffs aver that their suit by plaint dated **4th May, 2009** is not an adverse possession suit, contrary to the claim by the defendant; indeed, the defendant proceeds entirely on that footing, and seeks the striking out of the suit for failure to comply with the procedural law of adverse possession. Since frivolous, or merely vexatious proceedings tend to betray themselves, I have examined the suit papers, to obtain *prima facie* impressions.

The plaintiffs assert that, in the adjudication process covering the suit land, their father, one **Salim Swalehe Mwakilimu**, had been confirmed as the person entitled to ownership rights; and such a determination was based on the history of the said property and its continuous user by the plaintiffs' forebears. The plaintiffs plead that the suit property had been wrongly registered in the names of the defendants, and complaints in this regard, had been placed on record; they state that "*the registration of the suit property in the names of the deceased, Ishmael Elijah Muriithi is illegal, null and void...*"; they state their perceived signals of illegality, and movethe Court to make *declarations* regarding the status of the suit properties; they seek declarations on the *registration status* of the suit lands; they seek *injunctive* relief against the defendants.

Since the *plaintiffs* have not presented their case as a case of *adverse possession*, the defendants cannot contest that case within the framework of legal principles regulating adverse possession. I agree with counsel for the plaintiffs, in the circumstances, that the adverse-possession authorities invoked by the defendant have no relevance.

Secondly, and more importantly, it has become quite clear to me that the plaintiffs, by their plaint, have brought before this Court a weighty grievance which touches on *constitutional rights* of property ownership; and connects with fundamental practical considerations relating to sources of livelihood. Such cannot be a frivolous case, and, when it is properly lodged at the High Court's Registry, the Court is to discharge its primary dispute-settlement obligation ordained under **Article 159** of the **Constitution of Kenya, 2010** which thus stipulates:

“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) justice shall be done to all, irrespective of status;

.....

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

The protection of *property rights* under Article 40 of the Constitution's Bill of Rights, is one of the principles and purposes forming pillars of the Kenyan *grundnorm*; and it is thus, in my opinion, obvious, the plaintiffs' case is to be accorded a fair day in Court.

The defendants' application herein is dismissed, with costs to the plaintiffs.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 24th day of February, 2012.

**MAUREEN ODERO
JUDGE**