



**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP.281, LAWS OF KENYA)**

**-AND-**

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT (CAP. 22, LAWS OF KENYA)**

**-AND-**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES ENACTED THEREUNDER**

**IN THE MATTER OF: PLOT NOs. 271 (ORIG.NO.150/1), SECTION IV MAINLAND NORTH; 272 (ORIG.NO. 150/2), SECTION IV MAINLAND NORTH & 273 (ORIG.NO. 150/3), SECTION IV MAINLAND NORTH & 274 (ORIG. NO.150/4), SECTION IV MAINLAND NORTH**

**-BETWEEN-**

**JOHN NGUGI MUTURA.....PLAINTIFF**

**-AND-**

**VROS PRODUCE LIMITED.....DEFENDANT**

**RULING**

Against the background of the Originating Summons suit dated **30<sup>th</sup> April, 2010**, the *defendant* moved this Court by Chamber Summons dated **12<sup>th</sup> November, 2010** and brought under Order XXV, Rules 1, 5, 6 and 7(1) of the earlier edition of the Civil Procedure Rules. The application carries three prayers:

- (i) THAT the plaintiff do provide security for the defendant's costs to the tune of Kshs.5,522,483/00 or any other amount the Court may deem just and sufficient;*
- (ii) THAT the security so provided be deposited in a joint bank account in the names of the plaintiff's and the defendant's Advocates;*
- (iii) THAT in default of the plaintiff furnishing security for cost, the suit herein be dismissed with costs.*

The defendant rests his interlocutory prayers on the following grounds:

- (a) the plaintiff has indicated that he owns no land;
- (b) the plaintiffs' means of making good any Orders as to costs is in doubt;
- (c) the plaintiff's suit is frivolous and an abuse of Court process;
- (d) the defendant stands to suffer heavy costs in defending the suit;
- (e) the plaintiff, who has substantially benefited from the defendant's generosity, has now turned against the defendant.

The evidentiary basis of the application is in the supporting affidavit sworn by **John Ng'ang'a**, the defendants' property director, on **12<sup>th</sup> November, 2010**. He deposes that "*the land in dispute measures approximately 200 acres and [the] value of one acre is Kshs.1,500,000/= which means that the value of [the] subject-matter in dispute is Kshs.300,000,000/00*"; and that, on that basis, "*the minimum cost of litigation for each party is Kshs.5,522,483/00*".

The deponent avers that the plaintiff's suit has no cause: "*No injury or damage has been caused to the plaintiff yet he has dragged the defendant to Court.*"

In the plaintiff's replying affidavit dated **17<sup>th</sup> February, 2011** he claims entitlement to land by *adverse possession*; significantly, he thus deposes: "*I have been in open, continuous and uninterrupted possession and occupation of the suit premises since 1977 and have carried out substantial development activities thereon over the years hence my claim for adverse possession.*" The deponent thus avers: "*I wish to categorically deny that I have been on the suit properties on the magnanimity of the defendant and state that my claim is not based [on] any loss and/or damage but [on] my statutory and constitutional right to own property.*"

The deponent asserts his ordinary entitlement to legal rights and to the service of the judicial process, in this instance: "*my claim has a strong foundation in law [so as] to warrant judicial time for [the] ventilation of the same...*" He emphasizes that point in his conclusion to the sworn statement: "*I verily believe my application herein is not in any way frivolous or an attempt to abuse the process of this honourable Court as alleged...*"

Learned counsel, **Mr. Musyoki** for the defendant/applicant, submitted that the plaintiff, by the evidence on record, has been the defendant's tenant-at-will; and so his attempt is only "*to bite the hand that feeds him*". Counsel urged that the doctrine of *adverse possession* was inapplicable in this instance, and that the plaintiff should be regarded as a vexatious litigant.

Counsel invoked earlier decisions of the High Court in support of his client's case. In **Aggrey Peter Thande v. ABN Amro Bank & Another**, Nairobi MCC Civ. Case No. 20 of 2005 [2005] eKLR (**Ransley, J**), the following passage appears:

***"I am of the view that this is a case where there is some doubt not only as to the merits of the respondent's case but also that if he fails he will be unable to pay costs..."***

***"I therefore, order the respondent to pay by way of security for costs a sum of Kshs.100,000/= to be deposited in an interest-earning account in the names of the parties' Advocates with a reputable bank within 30 days from today."***

Relevant principles for deciding a matter such as the instant one, are set out also in **Cancer Investments Ltd. v. Sayani Investments Ltd.**, Nairobi HCCC No. 854 of 2004 [2010] eKLR (**Mwera, J**):

***"...Has 1<sup>st</sup> defendant laid out concrete grounds on which to base a reasonable belief that the plaintiff***

*may be unable to pay costs in the event it loses this case?*

***“It needs no repeating that ordering security for costs is in the discretion of the Court. But the Court must be shown that there is reason to believe that a party would be unable to pay the other’s (applicant’s) costs if the suit is successful or is lost. The Court also has discretion to set the level of the security if one has to be posted.***

***“In the present case the 1<sup>st</sup> defendant is only apprehensive that it may not recover costs in the event the suit is dismissed. Being apprehensive is not what it takes to get an order for security for costs. There should be [a] demonstration with evidence laid, portraying the respondent as a party in such dire financial straits that paying the costs will be difficult. The applicant did not so demonstrate and, again on that point, this application must be dismissed.”***

Learned counsel, **Mr. Kinyanjui** for the plaintiff/respondent, contested the application: on the grounds that it lacks merit, and is inappropriate in view of the nature of the suit – *adverse possession* claim. The design of such a suit is to dispossess the defendant totally of the subject property, and hence, it was urged, it cannot be compromised by the defendant’s apprehensions regarding his costs in the event the suit is lost. Counsel contested the evidentiary material for the defendant which depicted the plaintiff as a “tenant-at-will”. Counsel submitted that the plaintiff’s evidence was decisive, taking the form of both possession and occupation, supported by photographs showing long occupancy and development of the suit properties; in the circumstances, the defendant could be left clutching mere title- paper, whereas the reality of possession-akin-to-ownership rests with the plaintiff; the case was not one for compromise through process-impediment founded on the defendant’s apprehensions about the likely costs. Counsel discounted the claim that the plaintiff was not the “owner” of any landed property; for, value is based not on bare land, but on *developments* thereon – of which the plaintiff has plenty, developed over a long period of adverse possessory-occupation.

Counsel urged that none of the authorities invoked, would help the defendant’s case; for by Article 40 of the **Constitution of Kenya, 2010** the plaintiff had safeguards for *his rights to acquire and own private property*; in the circumstances, he should not be subjected to constraining security-for-costs, as a condition to pursuing his adverse-possession claim.

The defendant apprehends that in the event the plaintiff’s adverse possession suit of **30<sup>th</sup> April, 2010** is lost, the defendant’s likely substantial costs may remain unpaid; and so he asks the Court to apply its discretion to *limit* the plaintiff’s right of pursuit of his case. The defendant/applicant goes further to estimate the value of the suit properties, and on that basis to calculate likely litigation costs in respect of which the applicant stands to lose, due to the plaintiff’s possible impecuniosity.

The plaintiff contests the application, fundamentally, on the basis of Article 40(1) of the **Constitution of Kenya, 2010** which thus stipulates:

***“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –***

***(a) of any description; and***

***(b) in any part of Kenya”.***

The plaintiff’s suit is founded on the elaboration of the foregoing constitutional principle in the statutes of Parliament, specifically, the Limitation of Actions Act (Cap.22, Laws of Kenya). The plaintiff pleads (Originating Summons suit of **30<sup>th</sup> April, 2010**) “*[he] has since the year 1977 been in open, peaceful, continuous and uninterrupted occupation of the subject parcels of land*”, and that he has “*planted trees and fruit trees and has over the years been cultivating crops and has also constructed permanent residential houses on the subject parcels of land.*” The plaintiff pleads that, two decades after he took occupancy of the suit properties, the *defendant/applicant* was given title documents for the lands in question; and he is contesting the defendant’s claims, seeking the registration in his own name of the

properties he has been occupying.

At this interlocutory stage, learned counsel, **Mr. Musyoki** for the applicant, has contested the argument based on Article 40 of the Constitution; he urges: “*The Constitution does not give rights only to the plaintiff; the defendant too has rights to acquire and own property.*”

As it was not argued before this Court that any element of the law of adverse possession is inconsistent with the guarantees of the Constitution, I presume the consistency of the two bodies of law, and posit that the adverse possessor claims by valid law, that mode of acquisition.

A claim in adverse possession has the unique character of standing in diametric opposition to the claims of a party who attributes his own ownership to the issuance of certain letters or documents by the lands registry; and on this account an adverse-possession claim should not, in general, be constrained by the *defendant’s* conveniences, or apprehensions such as those in respect of his likely costs. A claim in adverse possession is in nature a *peculiar claim*, in which each party stakes all, and each party trusts the *judicial process* to run its full course and to make a determination according to law. It is, in my opinion, inappropriate to constrain the plaintiff, in such circumstances, by requiring him to lodge a security for costs in favour of the defendant.

***I therefore disallow the defendant’s application herein. The costs shall be in the cause.***

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 20<sup>th</sup> day of February, 2012.**

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**M.A. ODERO  
JUDGE**