



REPUBLIC OF KENYA

IN THE HIGH COURT

ATMERU

Civil Suit 117 of 2009

SALESIO MATI MWIRICHIA.....PLAINTIFF

VERSUS

GEOFFREY N. THUITA.....DEFENDANT

**J U D G M E N T**

The plaintiff filed this originating summons on 2/09/2009 against the defendant, Geoffrey N. Thuita, for determination of the following questions:

- 1. Has the plaintiff been in open continuous and exclusive possession of the whole of the land parcel No.SOUTH THARAKA/TUNYAI'A'/283 for over 12 years?***
- 2. Whether the plaintiff should be registered as the legal owner of L. R. No.SOUTH THARAKA/TUNYAI'A'/283.***
- 3. Whether the defendant should be ordered to transfer L. R. NO.SOUTH THARAKA/TUNYAI'A'/283 to the plaintiff and in default the executive officer of this Honourable Court should be empowered to sign all the requisite documents to effect transfer of L.R.SOUTH THARAKA/TUNYAI'A'/283 to the plaintiff.***
- 4. Whether the Defendant should be ordered to pay the costs of this suit.***

The plaintiff's originating summons was supported by the plaintiff's affidavit dated 31<sup>st</sup> August, 2009. The plaintiff through an application dated 8<sup>th</sup> September, 2009 sought an order for the originating summons to be served by way of substituted service. That on 23<sup>rd</sup> September, 2009 court granted leave to serve the defendant by way of substituted service through advertising the suit in one of the widely read newspapers.

That on 22<sup>nd</sup> July, 2010 the plaintiff served the originating summons by advertising the same on page 52 of the Daily Nation Newspaper of Thursday. The defendant failed to appear and file defence within 15 days from the date of the advertisement. The plaintiff subsequently filed a request for judgment on 25<sup>th</sup> August, 2010. That following plaintiff's request for interlocutory judgment, the same was entered in favour of the plaintiff against the defendant on 30<sup>th</sup> August, 2010.

The plaintiff's suit was subsequently set down for formal proof on 21/5/2012. The plaintiff in support of the suit gave evidence and called no witness.

PW1 introduced himself as a farmer. He averred that L.R. South Tharaka/Tunyai "A"/283 is his own land. That the land is registered in the name of Geoffrey N. Thuita. PW1 produced search certificate as exhibit No.1. The search certificate shows that South Tharaka/Tunyai "A"/283 was on 12.8.1988 registered in the name of Geoffrey N. Thuita and the same is approximately 4.4 hectares.

The plaintiff averred that he does not know the defendant, one Geoffrey N. Thuita. The plaintiff testified that he entered into the suit land in 1969. That he was born at the suit land and his parents died whilst in occupation of the suit land. That the plaintiff's parents are both buried at the suit land. The plaintiff further testified that no one has ever asked him to move out of the suit land which is about 10 acres in size.

The plaintiff further averred that adjudication took place whilst he was still in occupation. He testified that he was not registered because he was unable to give money to the committee. He averred the land was registered on 12<sup>th</sup> August, 1988. The plaintiff testified that when he went to collect the title deed he found the land was registered in the name of the defendant.

He testified that all along he knew the land was his though he was not registered as the proprietor of the suit land.

The plaintiff testified that he has 5 mud houses thatched with iron sheet, on the suit land. That he also has Mukima trees, Acacia trees and Bananas and uses the land for growing maize and beans. That his family stays on the suit land. He has livestock on the land and the suit land is fenced all round.

Under Order 37 rule 7(1) and (2) of Civil Procedure Rules it is provided:-

***"7. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.***

***(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed."***

The application for an order of adverse possession is clear that it ought to be made by originating summons and supported by an affidavit in which a certified copy of extract of the title to land in question has to be annexed. In the instance case the application is properly brought before the court but the certified extract of title to the land in question has not been annexed. The failure to annex certified extract of the title to the land in question is not incurably defective. The annexing of certified extract of title to the land in question to the supportive affidavit is merely intended to ascertain that the land subject of the originating summons exists and is in the name of the defendant. A certified extract of title to the land in question or Green card or official search can be produced before judgment either through a further affidavit or in evidence in chief.

On the other hand under Article 159(1), (d) of the Constitution of Kenya it is provided:-

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

In view of Article 159(1)(d) of the Constitution of Kenya the provisions of Order 37 Rule 7(2) of Civil Procedure Rules requiring certified extract of the title to the land in question be annexed to supportive affidavit is a procedural requirement and the Constitutional requirement is that justice be administered without undue regard to the procedural technicalities. I find that by refusing to proceed to determine this matter simply because certified extract of title to the land in question was not attached to the supportive affidavit though produced in evidence in chief would amount to denying justice rather than doing substantive justice to the party in this matter. This court looks unless precluded by law, to substance and

reality rather than the form and procedural technicalities.

I am therefore satisfied though the plaintiff did not attach certified extract of the land in question to his supportive affidavit he has produced official search of title to the land in question and has satisfied the court as to the land in question and as to the ownership of the same.

In case of **Public Trustee – Vs – Wanduru(1984) KLR 314** Court of Appeal held:-

***“The appellant had acquired an indefeasible title to the land by being in continuous, uninterrupted and exclusive adverse possession of it for twelve years.”***

The issues for determination in this suit are as follows:-

- 1. Has the plaintiff been in open continuous and exclusive possession of the whole of the land parcel No.SOUTH THARAKA/TUNYAI”A”/283 for over 12 years?***
- 2. Whether the plaintiff should be registered as the legal owner of L. R.No.SOUTH THARAKA/TUNYAI’A’/283?***
- 3. Whether the defendant should be ordered to transfer L. R. NO.SOUTH THARAKA/TUNYAI’A’/283 to the plaintiff and in default the executive officer of this Honourable Court should be empowered to sign all the requisite documents to effect transfer of L.R.SOUTH THARAKA/TUNYAI’A’/283 to the plaintiff?***
- 4. Whether the Defendant should be ordered to pay the costs of this suit?***

The plaintiff in his unchallenged evidence testified that he was born in 1969 at the suit land. That he found his parents in occupation and upon their death they were buried at the suit land. The plaintiff in his evidence has testified that he has been in open, continuous, uninterrupted occupation of the suit land since 1969. That he has never seen the defendant nor does he know him and no one has threatened him to vacate from the suit land. He testified that he believes the land is his.

In view of the foregoing this court has no doubt that the plaintiff has been in open, continuous and exclusive possession of L.R. south Tharaka/Tunyai “A”/283 for a period of over 12 years.

The other issue is whether the plaintiff should be registered as legal owner of L.R. No.South Tharaka/Tunyai ”A”/283.

Under Section 38(2) and (3) of the Limitation of Actions Act(Cap.22) it is provided:-

***“38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the 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.***

***(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”***

In view of the fact that the plaintiff has applied for registration of the portion of the suit land and having satisfied the court that he has become entitled by adverse entitlement, I find that the plaintiff ought to be registered as legal owner of South Tharaka/Tunyai”A”/283.

Further I find that the plaintiff ought to be registered as proprietor of the suit land in place of the defendant. The defendant cannot by virtue of Section 7 of the Limitation of Actions Act bring a successful action against the plaintiff herein.

Section 7 of the Limitation of Actions Act provides:-

***“7. 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.”***

In the circumstances of this case judgment is hereby entered in favour of the plaintiff as follows:-

***1. The plaintiff has acquired title to land reference South Tharaka/Tunyai”A”/283 through continuous, uninterrupted and exclusive adverse possession for a period over 12 years.***

***2.The plaintiff Salesio Mati Mwirichia, be and is hereby ordered to be registered as the proprietor of L.R. SOUTH THARAKA/TUNYAI”A”/283 in place of the registered proprietor of the land one GEOFREY N. THUITA.***

***3.That order (2) above be registered with the District Land Registrar and upon registration of the same the plaintiff be registered as the proprietor of Land L. R. South Tharaka/Tunyai “A”/283 be effected forthwith.***

***4. There will be no orders as to the costs.***

DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JUNE, 2012.

**J. A. MAKAU**

**JUDGE**

***Delivered in open court in presence of:***

1. Mr. B. G. Kariuki for the plaintiff(Absent)

2. N/A for the defendant.

**J. A. MAKAU**

**JUDGE**