



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**Civil Case 186 of 2009**

**MARGARET**

**MONYANI.....PLAINTIFF**

**VERSUS**

**AGNES NALIKA**

**WANABISI.....DEFENDANT**

**RULING**

This is an application by the defendant in the suit to have the suit against her struck out. The application as expressed to be made under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15(1) of the Civil Procedure Rules. The application is made on the premise that the applicant acquired title to the suit land on 25<sup>th</sup> November, 2008 and twelve (12) years have not lapsed since title to the suit land was issued and therefore the plaintiff's claim of adverse possession is incompetent. For that reason, according to the applicant, the suit is frivolous vexatious and an abuse of the process of the court. The application is supported by the affidavit of the applicant sworn on 27<sup>th</sup> October, 2011. The gist of the affidavit is that the plaintiff cannot claim entitlement to the suit land by adverse possession since the required twelve (12) years have not lapsed from the time the applicant was issued with title to the suit land.

The application is opposed on the basis of a replying affidavit sworn by the plaintiff on 28<sup>th</sup> November, 2011. It is deponed in the affidavit, *inter alia*, that the plaintiff acquired the suit land in or about the year 1997 and has enjoyed quiet and peaceful possession thereof since then to date having built and lived thereon with the knowledge of the applicant and that time started running in 1997 and not in 2008 when the applicant acquired title.

When the application came up before me for hearing on 25<sup>th</sup> January, 2012 counsel agreed to file written submissions which were duly in place by 9<sup>th</sup> May, 2012. Counsel substantiated the stand-points taken by their clients in their respective affidavits.

I have considered the application in the light of the pleadings, the affidavits on record and the rival submissions of counsel. Having done so, I take the following view of the matter. At the outset, I must state that I am conscious that this is an interlocutory application and given the position I have taken, it is

incumbent upon the court not to make any definitive findings which in my view are the province of the trial court. Notwithstanding the self administered caution, I ask myself whether the plaintiff's suit is so obviously unsustainable and/or is frivolous and vexatious and/or is otherwise an abuse of the process of the court in light of the fact that the applicant became the registered proprietor of the suit land on 25<sup>th</sup> November, 2008 shy of a year before this suit was filed. Obviously if that registration is the only consideration, the plaintiff's claim to be entitled to the suit land by adverse possession would clearly be unsustainable. There are other consideration however, such as the plaintiff's averment that she acquired the suit title in or about the year 1997 and that she has been in possession thereof since to date which possession has been peaceful uninterrupted and open. She has also averred that the registration of the suit land in the name of the applicant was fraudulent and illegal. Although no particulars of fraud or illegality are given, those averments cannot conclusively be determined on affidavit evidence. That view is buttressed by the fact that the plaintiff has deponed, *inter alia*, that the applicant had knowledge of her interest in the suit land before she obtained title to the same. Even if the plaintiff's pleading may be inadequate, the only remedy is not in striking it out; particulars can be sought and even amendment made.

Besides my above observations, authorities are not unanimous on computation of the period of adverse possession. In **Maweu -Vs- Liu Ranching & Farming Cooperative Society Limited [1985] KLR 430**, the Court of Appeal held, *inter alia*, as follows:-

**“2 By virtue of section 37 and 38(1) of the Limitation of Actions Act (cap 22) an action based on adverse possession was maintainable by the appellants notwithstanding that a certificate of title had been issued after the suit land was registered under the Registered Land Act (Cap 300).”**

It is significant that there the High Court had held that a certificate of title issued under the Land Titles Act (Cap 282) was conclusive evidence of the matters contained therein and that any period of adverse possession prior to the acquisition of title to the land even if proved was irrelevant for the purpose of the appellant's case. **Platt Ag J A** stated as follows in that case:

**“adverse possession is a fact to be observed upon the land. It is not to be seen in a title even under Cap 300. Any man who buys land without**

**knowing who is in possession of it risks his title, just as he does if he fails to inspect his land for twelve (12) years after he has acquired it.....”**

And in **Githu -Vs- Ndeete (1984) KLR 776**, the same court of appeal, differently constituted, held as follows:-

**“1. The mere change of ownership of land which is occupied by another person under adverse possession does not, interrupt such persons adverse possession .....**”

Lastly, **Ringera J**, as he then was, held as follows in **Wasui -Vs- Musumba (2002)KLR 396:-**

**“3. If the applicant had been in adverse possession of the land for 12 years prior to subdivision, the proprietors of new titles would not have been able to shake off his rights”.**

In the end the plaintiff has persuaded me that her case is not manifestly unsustainable and that it is not an abuse of the process of the court. Her claim is therefore not frivolous or vexatious. The applicants application dated 27<sup>th</sup> September, 2011 is for dismissal and I order that it be and is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF JUNE, 2012**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

**Mr. Karani for the Respondent**

**F. AZANGALALA**

**JUDGE**

**6<sup>TH</sup> JUNE, 2012**