



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Suit 52 of 2012

IN THE MATTER OF: PARCEL OF LAND MEASURING 50FT x 100FT BEING PORTION OF THE PARCEL OF LAND KNOWN AS SUBDIVISION NUMBER 14362 (ORIGINAL NUMBER 11736 & 11739) OF SECTION I MAINLAND NORTH AS DELIENATED ON LAND SURVEY PLAN NUMBER 275060 CREATED PURSUANT TO CONSOLIDATION OF CR 38212 AND 38215 REGISTERED AS CR 44049/2

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT, THE APPLICANT HAS OBTAINED OWNERSHIP OF THE ABOVE

STATE PLOT/LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

RASHID JUMA BEDZIMBA.....PLAINTIFF/APPLICANT

V E R S U S

1. ABDULKADIR HASSAN AZIZ

2. MOHAMED HASSAN ABDULAZIZ

3. SADA HASSAN ABDULAZIZ.....DEFENDANT/RESPONDENTS

RULING

- (1) By an Originating Summons dated 30th March 2012, **RASHID JUMA BEDZIMBA** (the Plaintiff) seeks to be declared the owner of a parcel of land measuring 50ft by 100ft said to be part of that land described as Subdivision 14362 (the suitland) having acquired the same by way of adverse possession.
- (2) The Plaintiff's Originating Summons is resisted by the Defendants by way of a replying affidavit sworn by the 3rd Defendant on 23rd April 2012. In addition the summons has met an objection filed by the defendants on 26th April 2012 which raises the following points-
 - “(a) There is no Plot known as CR No. 44049 registered in the names of the three Respondents jointly.***
 - (b) The Originating Summons has failed to comply with the Provisions of Order 37 Rule 7(2) and***
 - (3) making it fatally defective and incapable of being heard and determined.***

(c) The photocopy of Title annexed to the affidavit is not a certified extract of title as required under Order 37 Rule 7(2). Furthermore the third Respondents name does not appear anywhere on the Title CR No. 44049.

(d) The Originating Summons and application should therefore be dismissed with costs.”

The Defendants argued this Court to dismiss the Originating Summons with costs. The Preliminary Objection is the subject of this decision.

(3) When Counsel for the parties appeared before me on 26th April 2012, the Plaintiffs Counsel sought and obtained leave to file a supplementary affidavit. That affidavit was filed on 22nd June 2012 in which the Plaintiff sought to comply with Order 37 Rule 7(2) of The Civil Procedure Rules by introducing what he called a “*certified copy of the Certificate of Title.*”

(4) There is the enduring proposition enunciated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd [1969] EA 696** in respect to Preliminary Objections Sir Charles Newbold P said-

“A Preliminary Objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (my emphasis)

This Court will determine the objection on the assumption that the facts as pleaded by the Plaintiff and the evidence as presented by Plaintiff in the affidavits in support of the Originating Summons are correct.

(5) Order 37 Rule 7(2) of The Civil Procedure Rules provides as follows-

“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.”

One reason for this requirement, I would think, is that proceedings for adverse possession can only be maintained against the title holder or current registered proprietor of the land in question. A certified extract of title extracted on the date or just before the date of commencement of the Originating Summons would reveal the status of title holding or registration.

(6) It was submitted by the Defendants Counsel, and this Court accepts, that another reason why it is imperative to attach a Certificate extract of the title was stated by the Court of Appeal in **Titus Mutuku Kasuve -Vs- Mwaani Investment Ltd & Others (Civil Appeal No. 35 of 2002)** [2004]eKLR as follows-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, Rule 3 D(2) of Order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the Originating Summons. In this case, the appellant did not annex the certified extracts of land title L.R. Nos 1756 and 1757 before the sub-division or even after the sub-division.” (my emphasis)

(7) The suitland is registered under that Registration of Titles Act (now repealed). These proceedings were however filed prior to the coming into force of The Land Registration Act 2012 (which commenced on 2nd May 2012) and one must, as suggested by Counsel for the Defendants, look at Section 23(2) of the Repealed Act to find out what would amount to a certified extract of title contemplated by Order 37 Rule 7(2). That Section reads-

“A certified copy of any registered instrument, signed by the Registrar and sealed with his seal of office, shall be received in the same manner as the original.” (my emphasis)

(8) This Court has looked at the copy of Certificate of Title annexed to the affidavit of the Plaintiff sworn on 22nd June 2012 and must agree with the Defence that the document annexed thereto is neither signed nor sealed under the hand of the Registrar. What then must the Court do in these circumstances? This Court has stated why it is necessary to have the certified extract of title annexed to the Originating Summons. That requirement is mandatory and is not merely a technical requirement because it goes to the root of proving the subject matter of the proceedings and the person whose ownership must be displaced. What this Court must consider is whether the Plaintiff has exhausted the opportunity of laying such a foundation. This suit has yet to be heard. In fact directions as to hearing have not been given under the provisions of Order 37 Rule 16 of The Civil Procedure Rules. Had the issue of non-compliance arisen at the close of the hearing of the case (either by affidavit evidence or viva voce) then the Court would have no choice but to dismiss the suit as the Plaintiff would not have sufficiently proved his claim.

(9) I turn now to the issue that no plot known and described as Subdivision No. 14362 (CR No. 44049) is registered in the names of the three Defendants. The Court is asked to look at the copy of the Certificate of Title Number CR. 44049 as a confirmation of this. A copy of the Title is the Plaintiffs own document and is annexed on two of his affidavits. (*Annexure 'RJB1' in the affidavit of 12th April 2012 and annexure 'RJB2' in the affidavit of 22nd June 2012*).

(10) This Court, looking at the copy of Title, notes that land described as No. 14362 has been subdivided with resultant subdivisions. It is also evident that the 1st and 2nd Defendants were the registered owners of 14362 before the subdivision. It would also seem that new Certificates of Titles have been issued where the subdivided portions have been transferred to third parties. What is unclear and will require resolution after receipt of evidence is whether after the excision of the subdivided portions there still remains any land described as Number 14362 and which may form the subject matter herein.

(11) In respect to the 3rd Defendant, he says this in the affidavit sworn on 23rd April 2012-

“4. That it is true *that the Applicant used to be our ground tenant paying Ground rent having leased from us a space to build a House.*

5. That such arrangement was known to both the Plaintiff and three of us and the Plaintiff was paying Ground Rent.

6. That upon completion of the subdivision and the title deeds coming out, all persons who had Houses on our Plot were given an opportunity to buy the space where their Houses stood or to remain tenants.

8. That the plaintiff refused to co-operate and failed to give out his proposal to buy the space where his house stands and the Plot was transferred to another person such that we do not have a title to the said Plot.

12. That the Plaintiff is being mischievous such that even if the property still belonged to the three Respondents the Plaintiff status is that of a tenant and as such he has a duty to pay rent when demanded.” (my emphasis)

(12) There is no evidence whatsoever that the 3rd Defendant is or was ever registered as proprietor of Plot No. 14362. But there are certain facts that are unclear. These include-

§ When in paragraph 4 above, the 3rd Defendant refers to “our ground tenant” what interest does, or did, he have in the land on which the house occupied by the Plaintiff stands?

§ What is the current plot number of that land?

(13) As the pleadings stand the Plaintiff may have a difficulty establishing that the house he alleges to

occupy stands on Plot No. 14362 and that the plot is owned or registered in the names of the three Defendants. Yet it would be too drastic a measure for this Court to throw out the Plaintiffs claim before all pertinent issues are resolved by way of evidence. This Court gives the Plaintiff a chance to either succeed or fail in the strength of complete evidence.

(14) The upshot is that the Preliminary Objection is hereby dismissed with costs.

Dated and delivered at Mombasa this 19th day of September, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Mogaka for the Plaintiff
Oddiaga for the Defendants
Court clerk - Moriasi

F. TUIYOTT
JUDGE