



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 171 of 2008

INLAND BEACH ENTERPRISES LIMITED PLAINTIFF

VERSUS

SAMMY CHEGE 1ST DEFENDANT

MR. KHAEMBA 2ND DEFENDANT

MISHI SAID MWANGOLO 3RD DEFENDANT

RAMAH MWANGOLO 4TH DEFENDANT

SELEMANI MATANO 5TH DEFENDANT

BINTI MWANGOLO 6TH DEFENDANT

SAID MWANGOLO 7TH DEFENDANT

KABWERE JUMBE 8TH DEFENDANT

WILLIAM SHIVACHI 9TH DEFENDANT

HEZRON INDIAZI 10TH DEFENDANT

JACOB MALUKI 11TH DEFENDANT

SAMMY KILONZO 12TH DEFENDANT

OSCAR MWADIMA 13TH DEFENDANT

PASCAL MWAKAZI 14TH DEFENDANT

ALL ILLEGAL OCCUPANTS ON PLOT

L.R. NO. MN/VI/3661, MOMBASA 15TH DEFENDANT

AND

OSMAN AHMED KAHIA INTERESTED PARTY

RULING

Background:

(1) The Plaintiff's suit is a claim for trespass and mandatory injunction orders for eviction of 14 named Defendants and a class of **“all other illegal occupants of the suit property”**, a result of Plaintiff's expressed difficulty in identifying all the occupants of the suit property, LR No. MN/VI/3661, Miritini, measuring 7.887 ha. The Plaintiff obtained leave to serve the Defendants by advertisement in the Standard Newspaper and Court Notice board and summons were published in the Standard on 2nd December 2010. In default of appearance, interlocutory judgment in default was sought and obtained on 12th January 2011 and the matter proceeded for formal proof on 31st March 2011, when the Plaintiff's director testified. There was no service of the hearing notice for the 31st March 2011.

(2) The court delivered its Judgment on 5th May 2011 against all the named 1-14 Defendants declining to issue orders against the class of illegal unnamed occupants on the suit plot. On 12th May 2011, the Plaintiff filed a Notice of Motion seeking police assistance in evicting the Defendants and for Kenya Power and Lighting Company to disconnect power supply to the suit plot, which order was obtained on 18th May 2011.

(3) The 1st Defendant filed a Notice of Motion dated 21st May 2011 seeking stay of execution, the setting aside of the Judgment and leave to defend the suit. A similar application filed by the 3rd, 4th, 5th, 6th and 7th Defendants dated 19th May 2011 was withdrawn upon an oral application on 23rd August 2011.

(4) By a Notice of Motion dated 25th May 2011, the Interested Party successfully applied to be joined in the suit together with a further prayer for leave to present a counter-claim or cross-action for adverse possession of some 1.2-acres of the suit property which he claims to have occupied since 1995.

The Issues:

(5) The 1st Defendant's application dated 21st May 2011 and the Interested Party's application dated 25th May 2011 were heard together with Counsel for the parties, respectively Mr. Mutubia for the Plaintiff, Mr. Attanacha for the 1st Defendant and Mr. Mogaka for the Interested Party making oral submissions before the court, citing relevant authorities.

In arriving at a decision on the applications before the court, three issues present for determination as follows: -

- (a) whether interlocutory judgment can be granted in a suit for prayers for declaration and injunction;
 - (b) whether notice to the defendants should be given for hearing after entry of interlocutory judgment; and
 - (c) whether a claim in adverse possession may be made by way of counter-claim in answer to a suit for trespass to land.
- (6) **Whether interlocutory judgment may be entered in a claim for trespass and injunction.**

As the request for interlocutory judgment was made in the year 2011 after the coming into effect of the Civil Procedure Rules, 2010, it is this regulatory regime that is operational. However, nothing turned on this because the relevant provisions are in exact terms as the predecessor edition of the Civil Procedure Rules. See the provisions of Order 10 and Order 9A, respectively of the new and old Civil Procedure

Rules. There has been some misunderstanding among practitioners as to the extent of application of the provisions for interlocutory judgment in default of appearance and defence, and I wish to clarify that the authority to enter interlocutory judgment only exists in respect of five situations, as follows: -

(a) where the Plaintiff makes a liquidated demand only (Order 10 rule 4 (1)), in which case the court enters judgment for the liquidated demand and interest thereon from the filing of the suit to the date of judgment and costs;

(b) where the Plaintiff makes a liquidated demand together with some other claim, where the court shall enter judgment for the liquidated demand and interest but the award of costs shall await judgment upon the other claim (Order 10 rule 4 (2));

(c) where the Plaintiff makes a liquidated demand with or without some other claim against several Defendants one or more of whom fails to appear, in which case the court may enter judgment for the liquidated demand, interest or costs and execute the decree against the one failing to appear without prejudice to the Plaintiff's right to proceed with the action against the Defendants who have appeared. (Order 10 rule 5);

(d) where the Plaintiff contains a claim for pecuniary damage only or for detention of goods with or without a claim for pecuniary damages, where the court shall enter judgment and the Plaintiff shall set the suit down for assessment of damages or the value of goods and damages as the case may be (Order 10 rule 6); and

(e) where the Plaintiff for pecuniary damages or detention of goods with or without pecuniary damages is against several Defendants one or more of whom default in appearance, where the court shall enter interlocutory judgment against the Defendant failing to appear and the damages or value of goods and damages shall be assessed at the same time as the hearing against the other Defendants (Order 10 rule 7).

In all other suits not specifically provided for as above, where the party served does not appear, the Plaintiff may set down the suit for hearing, (Order 10 rule 9). Accordingly the suit herein for trespass and injunction is in the category of other suits for which interlocutory judgment could not have been granted and the same must be set aside *ex debito justitiae*. I note the decision of Ibrahim, J. to the same effect in the case of **Andrew Washington Nyaga v. Co-operative Merchant Bank, HCCC No. 1095 of 2002** and the Court of Appeal decision in **Mint Holdings Ltd. v Trust Bank Ltd. Civil Appeal No. 249 of 1999**, both cited by counsel for the Interested Party.

(7) Whether notice of hearing should be given after entry of interlocutory judgment.

Counsel for the Plaintiff sought to rely to Order 9B rule 1 (2) of the old Civil Procedure Rules for the proposition that there is no requirement for service on a Defendant who has not entered appearance. However, as I held above, the applicable provisions to the applications before the court are the 2010 Civil Procedure Rules, in which no such distinction on Defendants who have or have not appeared is made. Order 12 of the Civil Procedure Rules which replaced Order 9B of the old Rules provides for service of a hearing notice and the court is only entitled to proceed *ex parte* upon being satisfied that the hearing notice was duly served (Order 12 rule 2 (b)). Even if Order 10 rules 4 - 9 on interlocutory judgment do not expressly require service of hearing notice after entry of interlocutory judgment, it is conceivable that the Defendant who has defaulted in entering appearance may properly cross-examine the Plaintiff's witnesses and adduce evidence to rebut the Plaintiff's case for damages or quantum thereof during the assessment of damages or formal proof proceedings. In such circumstances, it would not be in the interest of justice to hold the hearing in clandestine environment without notice to the affected Defendants. Such rule would be in contravention of the Defendants' right to fair hearing contrary to Articles 50 and 159 of the Constitution. I, accordingly, hold that there is an obligation to serve a hearing notice upon all Defendants (or Plaintiffs if hearing is fixed by the Defendants) even after entry of interlocutory judgment on the Plaintiff or Counter-claim.

However, where as in this case there is no authority to enter interlocutory judgment, the service of hearing

notice is mandatory in the usual manner as provided for in Order 12 of the Civil Procedure Rules.

(8) Whether a claim in adverse possession may be made by way of counter-claim in response to a suit for trespass to land.

Order 37 rule 7 of the Civil Procedure Rules provides that an application for adverse possession under section 38 of the Limitation of Actions Act shall be made by Originating Summons. Under rule 19 thereof the court has power to order that the proceedings do continue as if the case had been begun by Plaintiff **“if it appears to the court at any stage of the proceeding that the proceedings should for any reason be continued as if the cause had been begun by filing a Plaintiff.”** Under sub-rule 3 of Rule 19 it is provided that **“this rule applies notwithstanding that the cause could not have been begun by filing a Plaintiff.”**

These provisions mark the flexibility of the Originating Summons procedure consistent, in my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings. This position was constitutional and statutory underpinning through, respectively, Article 159 principle of substantive justice without undue regard to technicalities of procedure and the overriding objective under section 1A of the Civil Procedure Act. As held in *Re Giles (2) (1890) 43 Ch. D 391*, the procedure of Originating Summons is provided for simple matters to be settled by the Court without the expense of bringing an action and not for resolution of seriously disputed facts. See also *Kulsumbai v. Abdulhussein (1957) EA 699 per Windham, CJ*.

Where a person in adverse possession seeks to initiate a claim for title to the property, he would be compelled by Order 37 rule 7 to file an Originating Summons, subject to the power of the court to order, under rule 19, that the proceedings do continue as if by Plaintiff if it considers it fit especially where dispute is more appropriately dealt with by way of vice voce rather than affidavit evidence of the Originating Summons procedure.

Where the person in adverse possession has been sued for trespass and eviction by the registered owner by way of Plaintiff, the person would, in my view, be entitled to set up in his defence his claim to the suit property by reason of adverse possession. That must be the logical conclusion for the overriding objective principle which seeks fair, proportionate and expeditious disposal of civil disputes at affordable cost and the substantial justice principle of Article 159 of the Constitution of Kenya 2010. Any other holding would lead to costly, protracted and unfair procedure where the person claiming adverse possession is denied a lawful defence and consequential orders in a suit originated by way of a Plaintiff and required to bring at substantial cost in time, money and opportunity proceedings under the Originating Summons procedure of Order 37 rule 7. In cases such as the present where there are several Defendants, it may lead to a multiplicity of proceedings filed over the same property by the several adverse possession claimants. That cannot be a proportionate use of the judicial resources under the overriding objective principles of section 1B of the Civil Procedure Act as amended in 2009.

I am aware of two conflicting decisions of the Court of Appeal on the matter, one holding that a claim to title by adverse possession by way of a cross-claim is misconceived (*Ndatho v. Itumo & 2 Ors. (2002) 2 KLR 637*) and the other recognizing as a triable issue, and upholding, a counter-claim on adverse possession (*Maweu v. Liu Ranching & Farming Cooperative Society Ltd. (1985) KLR 430, 439*). In allowing the appeal from a decision of the High Court which had dismissed the appellant's defence and counter-claim based on adverse possession, Hancox, JA (as he then was) said *obiter*:-

“I would therefore allow the appeal, set aside the order of the High Court and direct that the trial should proceed. I draw attention to the fact that under Order XXXVI rule 3D (1) of the Civil Procedure Rules an application under section 38 should be made by way of Originating Summons. However, the application for an order of transfer in the instant case was made by way of counter-claim and not by Plaintiff. This point was not argued before us, but it would seem appropriate particularly if evidence has to be led for the issues between the parties to be decided in the present suit, rather than that the appellants should be put to the expense of bringing separate proceedings.”

Although the decisions were made before the Statute Law (Misc. Amendments) Act of 2009 incorporating the overriding objective of the Civil Procedure Act and the promulgation of the Constitution of Kenya, 2010 and therefore not useful guides today on the interpretation of the procedure for litigating a claim in adverse possession, I find the reasoning of the **Maweu** case superior to the rigid technicality of the **Ndatho** case.

I would therefore hold that the Interested Party may set up their respective adverse possession claims against the Plaintiff's suit for trespass. The possession by the 1st Defendant and the Interested Party is not denied and it is indeed the basis of the Plaintiff's suit for trespass and eviction of the Defendants. What is to be determined at the full trial is the extent and period of their adverse possession in terms of section 38 of the Limitation of Actions Act Cap. 22

Findings

(9) A claim in adverse possession is a complete answer to a sit for trespass to land if it can be shown by the person claiming adverse title that he has been in possession of the suit property in circumstances adverse to the registered proprietor's title for a period of 12 years as provided for under section 38 of the Limitation of Actions Act, since, as Platt, Ag. JA (as he then was), in **Maweu** case, supra, observed **“adverse possession is the anti-thesis of title”**.

(10) Considering the respective merits of the parties in accordance with the leading decision for setting aside of ex parte judgment in **Mbogo v. Shah (1968) EA 93**, I find that the adverse possession claim by the Interested Party set up serious triable issues for determination at the trial. There is also an issue raised by the 1st Defendant as to the Plaintiff's title to the property in the allegation that the land is government property, which he has occupied with the consent of the government since 1987.

As regards the standing of the Interested Party, his adverse possession claim to the suit property makes him a proper party as a Defendant in the suit in terms of Order 1 rule 10 of the Civil Procedure Rules. As a person in alleged adverse possession, he has *locus standi* to seek his joinder to the suit in order to protect his interest in the land. The Plaintiff has obtained eviction orders and an order for disconnection by the Kenya Power Lighting & Company of electricity connection to the property and there is a reasonable apprehension on the part of the interested party that his possession and enjoyment of the property may be disrupted by the Plaintiff's execution of the court order despite the exception of the class of **“all other illegal occupants of the suit property”** from the terms of the Judgment of 5th May 2011.

(11) Accordingly, for the reasons set out above, I make the following orders on the two applications, respectively, by the 1st Defendant dated 21st May 2011 and by the Interested Party dated 25th May 2011: -

(a) The Interlocutory Judgment of 12th January 2011 is set aside *ex debito justitiae*

(b) The Judgment of 5th May 2011 is set aside.

(c) The 1st Defendant and the Interested Party as a Defendant joined under Order 1 rule 10 of Civil Procedure Rules have leave of the court to defend the suit and to plead their respective claims including any adverse possession claim by way of counter-claim to the Plaintiff's suit herein.

(d) The Plaintiff is restrained from evicting the 1st Defendant and the Interested Party from the suit property pending the hearing and determination of the suit.

(e) Costs in the cause.

Dated and delivered on this 31st day of October 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mutubia for the Plaintiff

No appearance for the Defendants

Mr. Mogaka for for the Interested Party

Miss Linda Osundwa - Court Clerk