



No.304

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 254 OF 2009

GEORGE ARWONGA KOMBO PLAINTIFF
VERSUS
JACKSON ONDARI KOMBO DEFENDANT

RULING

1. By the application dated 30th November 2010, the Defendant/Applicant, Jackson Ondari Kombo prays that the plaint herein dated 24th November 2009 be struck out as the same does not disclose any reasonable cause of action. The applicant also prays that the plaintiff's suit be dismissed with costs.
2. The application is supported by the grounds on the face thereof, namely that:-
 - (a) *The claim for adverse possession as stated at paragraph 7 of the plaint is wrongly instituted and/or commenced.*
 - (b) *There is no averment in the plaint that consent of the Land Control Board for the sale/purchase transaction was obtained, and in the absence of consent of the Land Control Board, the plaintiff's claim cannot be sustained.*
 - (c) *The defendant is the registered owner of the suit land (see paragraph 3 of the plaint).*
 - (d) *The plaintiff's claim in the plaint is denied by the Defendant vide his defence dated 10th May 2010.*
 - (e) *There is no amount of amendment that will cure the defects in the plaint.*
3. The applicant's application is brought under the provisions of **Order VI Rules 13 (1) (a) (2)** and **16 of the[old] Civil Procedure Rules, Cap 21 Laws of Kenya.**
4. The application is opposed vide the grounds of opposition dated 25th May 2011 namely that:-
 1. *The applicant's application dated 30th November 2010 is incompetent, non-starter, null and void and orders sought are incapable of being granted.*
 2. *The plaint dated 24th November 2009 is in good faith and discloses reasonable cause of action and ought not to be determined on merit (sic).*
 3. *The respondent ought not to plead evidence in the plaint.*
 4. *The applicant in his defence has not denied the fact that the respondent has been in quiet possession and occupation for over (12) years.*
 5. *The respondent would not have made an averment that consent of the Land Control Board was obtained as the applicant refused to receive the last instalment.*
 6. *The applicant cannot proof (sic) the allegations that any amendment to the respondent's pleadings shall be incurable.*

7. *The respondent's claim has overwhelming chances [of] success.*

5. Briefly, the facts giving rise to this application are that by plaint dated 24th November 2009, the plaintiff/respondent George Arwonga Kombo sued the defendant/applicant seeking the following reliefs:-

- (i) An order declaring the plaintiff as the absolute owner of the suit land by the plaintiff's adverse possession for over 40 years.
- (ii) An order to the defendant for specific performance of the contract and facilitate transfer in favour of the plaintiff.
- (iii) Any other relief the honourable court may deem fit and just to grant.

6. The plaintiff's claim is premised on the allegation that on or about 31st May 2008 or thereabout the defendant sold the suit premises to the plaintiff for the sum of Kshs.280,000/= out of which the defendant received a sum of Kshs.242,000/= on execution of the sale agreement, the balance of the purchase price of Kshs.38,999/= was to be paid later, but for some reason the defendant refused to receive the said balance, hence these proceedings. According to the plaint the defendant remains the registered absolute proprietor of the suit land known as L.R. NO.

WEST MUGIRANGO/BONYAMATUTA/115, being an agricultural parcel of land within the meaning of the Land Control Act, Cap 302, Laws of Kenya. The plaintiff/respondent also alleges at paragraph 4 of the plaint that he has been in full control, possession and management of the suit land with the full consent of the defendant for over 40 years without any intervention. Paragraph 7 of the plaint sets out the plaintiff's claim against the defendant/applicant.

7. The defendant/applicant filed defence and counterclaim dated 10th May 2010 in which he denied the plaintiff's allegations of having been in full control, possession and management of the suit premises for over 40 years. The defendant also denies that he sold the suit land to the plaintiff/respondent and avers that the plaintiff's claim is misconceived and fatally defective. He prays that the plaintiff's suit be dismissed with costs.

8. In the counter-claim, the defendant prays for an order of eviction of the plaintiff from the suit land and also seeks a permanent injunction restraining the plaintiff by himself, his servants, agents/employees from trespassing onto or in any manner whatsoever interfering with the suit land. The defendant also prays for costs and interest at court rates.

9. By agreement of the parties, this application was canvassed by way of written submissions. The defendant/applicant has raised three (3) main arguments in his submissions:-

1. That the plaintiff's claim as set out in paragraph 7 of the plaint is wrongly instituted. It was argued that a claim for adverse possession ought to have been brought under the provisions of section 38 of the Limitation of actions Act, Cap 22 Laws of Kenya and Order XXXVI Rule 3 (1) of the [old] Civil Procedure Rules, Cap 21 Laws of Kenya.

Order XXXVI Rule 3 (1) of the [old] Civil Procedure Rules, which is now found under **Order 27 Rule 7 of the Civil Procedure Rules, 2010** reads:-

“An application under section 38 of the Limitations of Actions Act, shall be made by Originating Summons. The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

It is argued that for failure to comply with the rules, this application must fail.

2. That the plaintiff did not obtain Land Control Board consent for the sale transaction and accordingly a claim based on such transaction cannot be sustained.

In this regard, reliance was placed on the provisions of **section 6 (1) of Cap 302** which require certain

transactions in land under the Act to be supported by the Land Control Board consent of the local Land Control area/division in which the particular parcel of land is situated. It is also contended that since land control Board consent is a material fact in this whole transaction the same should have been pleaded. The defendant/applicant also contended that since there is no Replying Affidavit to the application, the defendant's averment that no such consent was obtained remains uncontested.

3. That the plaint as drawn is incurably defective.

It is contended that the defects/deficiencies in the plaintiff's plaint are not mere technicalities but that they go to the root of the plaintiff's claim and that the suit should be dismissed.

10. The defendant/applicant relied on two (2) authorities namely **Ndatho –vs- Itumo & 2 others [2002] 2 KLR 637** and **Abubakar Herezo Bwana –vs- Twahir Mohamed Salim Said & 2 others [1991] 2 KAR 262**. In the **Ndatho case**, the Court of Appeal held, *inter alia*, that **“a claim to title by adverse possession is to be brought by way of an originating summons under order XXXVI Rule 3 (d) of the Civil Procedure Rules”** and further that **“a claim to title by virtue of adverse possession by way of a cross claim is misconceived.”** In the **Abubakar Herezo case**, the Court of Appeal held, *inter alia*, that **“While there existed jurisdiction under Order 36, r.10 of the Civil Procedure Rules to continue proceedings begun by originating summons as if they had been commenced by a plaint in an appropriate case, there did not exist any jurisdiction for the reverse procedure, that is to say to continue proceedings begun by plaint as though they were commenced by originating summons, even assuming such a course was appropriate in the instant case.”**

11. In response to the defendant's submissions, the plaintiff contends that he has been managing the suit land for over 50 years, during which time; the defendant/applicant was living in the settlement schemes. The plaintiff also concedes that no land control board consent was ever obtained since the defendant/ applicant who is a brother to the plaintiff refused to take the plaintiff to the area Land Control Board for consent. According to the plaintiff, he is asking for only 0.046 hectares out of the suit land. However, the plaintiff/respondent did not address the big issue of jurisdiction challenging his suit.

12. I have now carefully considered the application and the grounds in support thereof. I have also noted that though the plaintiff filed grounds of opposition to the application, he did not file a Replying Affidavit. I have also carefully considered the law and the issue that arises for determination is whether the plaintiff's claim to title by adverse possession is properly before this court, having come by way of a plaint. It is my considered view that this claim by the plaintiff is not properly before this court because whether the claim was brought under the old or the new Civil Procedure Rules, the same ought to have come by way of Originating Summons upon which directions would then later be taken to convert the Originating Summons into a plaint for purposes of proceeding with the case.

13. It is not in dispute that the plaintiff's claim against the defendant is in adverse possession. The plaintiff states variously that he has been in control possession and management of the suit land for over 20, 40 or 50 years. He also contends that he bought the suit land on or about 31st May 2008. If indeed he bought the suit land only on or about 31st May 2008, his claim for adverse possession in this case is obviously premature. There is therefore no reasonable cause of action in adverse possession.

14. Even if it were to be accepted that the plaintiff has had control, possession and management of the suit land for over 20, 40 or 50 years, the procedure adopted by him in bringing the claim by way of a plaint is obviously wrong and as was held in the **Abubakar Hezero case** (above), there is no jurisdiction by which these proceedings can be reversed so as to continue with the plaint herein as if it had begun by way of originating summons. For this reason which goes to the root of the plaintiff's claim, the applicant's application must succeed.

15. Accordingly, the plaint herein dated 24th November, 2009 be and is hereby struck out as it discloses no reasonable cause of action. The suit is accordingly dismissed. The Defendant/ Applicant is now at liberty to set down his counterclaim for hearing and final determination.

16. The Defendant/Applicant shall have the costs of this application.

17. It is so ordered.

Dated and delivered at Kisii this 26th day of January, 2011

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mrs. Oange (absent) for Plaintiff/Respondent

Mrs. Asati (present) for Defendant/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.