



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 150 OF 2008 (OS)

M'NKANATA M'NANJAU.....APPLICANT

VERSUS

MUTUAMWARI NJIIMARESPONDENT

RULING

The plaintiff M'Nkanata M'Nanjua filed the Originating Summons seeking for determination that he had acquired title by adverse possession of 10 acres of parcel number *Abogeta/Lower Kiringa/128* (suit property) belonging to the defendant Mutuamwari Njiima. What is for consideration in this ruling is the Chamber Summons dated 26th October 2009. That Chamber Summons was heard by courts *ex parte* on 29th October 2009 when interim orders were issued that an inhibition order do issue on the suit property. The Chamber Summons further seeks that the defendant be restrained from evicting the plaintiff from the suit property and be restrained from committing, waste or interfering with the plaintiff's occupation of the suit property until the suit is heard and determined. When the application came before me for hearing *inter partes* on 16th March 2011, the learned advocate for the plaintiff had filed an affidavit of service showing that the defendant had on 11th January 2011 been served with a Chamber Summons dated 26th October 2009 and with the originating Summons. The date of service as stated above should be keenly observed. This is because the Chamber Summons dated 26th October 2009 was fixed for hearing at the High Court registry on 18th January 2011 for hearing before court on 16th March 2011. If the Chamber Summons was fixed for hearing on 18th January 2011 at the High Court registry, the Chamber Summons that was served on the defendant on 11th January 2011 could not have indicated its hearing date because that date by then had not been fixed. It follows that the defendant could not have been aware of the hearing date, that is, 16th March 2011. This is because he was served with Chambers Summons which did not indicate its date of hearing. Further, for the plaintiff to get the orders that she seeks by way of Chamber Summons, she needs to demonstrate on a *prima facie* basis that her case has probability of success. As stated before, the plaintiff's claim is one of adverse possession. It was held in the case **Mbira Vs Gachuhi** [2002] 1 EA where the court stated:-

- a) *That there had been absence of possession by the true owner through abandonment.*
- b) *That the adverse possessor had been in actual possession of the piece of land;*
- c) *That the adverse possessor had no colour of right to be there other than his entry and occupation;*
- d) *That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
- e) *That there was a sufficient animus to dispossess and an animus possidendi;*
- f) *That the statutory period, in this case twelve years, had elapsed.*
- g) *That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*
- h) *That the nature of the property was such that, in the light of the foregoing, adverse possession would result.*

Special note should be made of (d) above. The plaintiff in the affidavit of service to the Originating Summons stated that he had been in occupation of 10 acres of the suit property for 36 years. In that time, he deponed that he had made extensive development thereon. He further deponed:-

“That I did so with the permission of the defendant who allowed me to farm and later to build family houses.”(Underlining mine)

It is on that basis that the plaintiff seeks for his prayers in the Originating Summons. It is obvious that since the plaintiff entered the suit land with the permission of the defendant, that the plaintiff is a licensee. A licensee cannot claim to be in adverse possession of the owner of the property. This was clearly stated in the case **Samuel Nyakenogo and Samwel Orucho Onyaru** Civil Appeal No. 24 of 2004 where the Court of appeal stated:-

“Time can run in favour of a tenant at will by virtue of Section 12 of the Limitation of Actions Act but it cannot run in favour of a licensee, therefore a licensee has no possession (Hughes Vs. Griffin [1969] 1 WLR 23).”

This was also stated in the House of Lords case **J.A. Pye (Oxford) Ltd vs. Graham** [2002] UKHL 30 where the Court stated:-

“The question is simply whether the defendant squatter had dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.” (Underlining mine.)

The plaintiff by his own averments in his affidavit stated that he entered on the suit property with the permission of the defendant. He is therefore a licensee. It is for that reason that I find the plaintiff has not demonstrated on a *prima facie* basis that his case has high probability of success. I grant the following orders:-

1. *Chamber Summons dated 26th October 2009 is hereby dismissed with no orders as to costs.*
2. *The order issued in this case on 27th October 2009 for inhibition of a parcel number Abogeta/Lower Kiringa/128 and for injunction against the defendant is vacated and discharged.*

Dated, signed and delivered at Meru this 18th day of May 2011.

MARY KASANGO
JUDGE