



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 32 OF 2010

JOSEPH ADOO.....1ST PLAINTIFF
HESBON OTIENO.....2ND PLAINTIFF
JULIUS ONEGE.....3RD PLAINTIFF
UPENDO JUA KALI SELF HELP GROUP.....4TH PLAINTIFF

VERSUS

DAUDI KIPTUGEN.....DEFENDANT

RULING

In a plaint filed on 25th February, 2010, the plaintiffs claimed various orders including, a declaration, a vesting order, consent to apply for transfer and an injunction restraining the defendant from trespassing, alienating, annexing or in any other manner disturbing the plaintiffs peaceful occupation of Land Parcel Number Eld Mun Block 7/154 (hereinafter “the suit land”).

Simultaneously with the plaint, the plaintiff filed a chamber summons expressed to be brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules seeking a temporary injunction to restrain the defendant, his agents or servants from selling, disposing off, evicting, constructing or any in other way dealing with the suit land pending the hearing of the suit. The application was made on the main grounds that the plaintiffs are purchasers of 2 acres of the suit land; that the defendant disposed of parts of the suit land to third parties without the consent knowledge or authority of the plaintiffs; that the defendant is planning to carry out developments and construction on the suit land and that unless the injunction is granted they will suffer irreparable damage.

On 8th march, 2010, the defendant filed a defence through M/s. Limo and Company Advocates. In the defence, he denied the plaintiff’s claim and averred further that he had lawfully terminated the plaintiffs’ tenancies over the suit land as provided for in law and that the reliefs sought by the plaintiff are untenable in law. In paragraph 9 of the defence, the defendant averred that the plaintiff’s suit is incompetent and bad in law and he would at the earliest opportunity raise a preliminary objection to the entire suit.

In an affidavit filed in opposition to the chamber summons, the defendant deponed, *inter alia*, that he is the registered proprietor of land parcel No. Eldoret/Municipality Block 7/154 and that the plaintiffs have been his tenants since 2003 and were paying rent until last year when they stopped; that he took steps to terminate the tenancy through the rent tribunal and there is **Eldoret Misc. Cause No. 308 of 2008**; that the suit land does not belong to Leah Chelagat as the plaintiffs contend but it belongs to him solely.

On 30th March, 2010, the defendant's advocates filed a notice of preliminary objection on the following grounds:-

- 1) That the plaintiffs have violated the provisions of Order 35(sic) rule 3D of the Civil Procedure Rules.**
- 2) That the plaintiffs have no cause of action against the defendant.**
- 3) That the court's jurisdiction has not been properly invoked and the proper forum should be the Rent Tribunal owing to the relationship between the plaintiffs and the defendant.**

At the interpartes hearing of the Preliminary Objection, counsel for the defendant clarified that his objection was based on Order XXXVI Rule 3D and new Order 37 Rule 3d. Counsel submitted that the suit is based on adverse possession and should therefore have been commenced by an originating summons. For that proposition counsel invoked the Civil Procedure Rules and several decisions of the High Court and the Court of Appeal.

The preliminary objection was resisted by the plaintiffs. Their counsel submitted that the court's jurisdiction had been properly invoked. In his view the dispute between the parties cannot appropriately be resolved in an originating summons which, according to counsel, is designed for uncomplicated matters. He too, relied upon various decision of the High Court and the Court of Appeal.

I have now considered the pleadings and the rival arguments. I have also given due consideration to the authorities cited. Having done so, I take the following view of this matter. The foundation of the plaintiffs' claim is 5 and 6 of the plaint. They read as follows:

"3. The plaintiffs are the Chairman, Secretary and Treasurer of the 4th plaintiff operating, at Eld/Mun Block 7/154 then registered in the name of Leah Jelagat (deceased) as the legal registered owner since 1982 to date.

5. The plaintiffs contend that they have been in undisturbed occupation of the parcel of land for the last 27 years where they have operated Jua Kali sheds unmolested by the owner having quit occupation to date

6. on or about 31st of August 2009 the defendant wilfully moved the business rent tribunal with intent to evict the plaintiffs from land parcel Eld/Mun Block 7/154 as they have been in constructive occupation for more than 12 years undisturbed occupation."

A plain reading of the reliefs sought in paragraphs 7, 8 and 9 of the plaint shows that they have their roots in paragraphs 3, 5 and 6 aforesaid. It is also plain that those paragraphs 3, 5 and 6 aforesaid plead adverse possession. It is only the phrase "*adverse possession*" which was not used otherwise the basis of the entire claim is adverse possession. I am therefore persuaded by the defendant that the plaintiff indeed make their claim for the suit and by way of adverse possession. Have they properly invoked the jurisdiction of the court? To answer this question the provisions of order XXXVI Rule 3D of the Civil Procedure Code and the Limitation of Action Act (Cap 22 Laws of Kenya) are pertinent.

Section 38 of the latter reads as follows:-

“38(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts in Section 37, or land comprised in a lease registered under any of those Acts he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.....”

And section 37 of the same Act reads as follows:-

“37.... This Act applies to land registered Under the Government Lands Act the Registration of Titles Act, the Land Titles Act or the Registered Land Act in the same manner and to the same extent as it applies to land not so registered.....”

The defendant has exhibited a copy of his certificate of lease marked as “DKI” and a copy of the certificate of search in respect of the suit land marked “DK4”. The two documents show that the suit land is registered under the Registered Land Act (Cap 300 Laws of Kenya).

As already found, the plaintiffs claim to have become entitled, by adverse to the suit land, which land is registered under the Registered Land Act. The plaintiff’s claim therefore clearly falls under the provisions of Order XXXVI Rule 3D of the Civil Procedure Rules which rule reads as follows:-

“3D (1) An application Under Section 38 of the Limitation of Action Act shall be made by Originating Summons.”

The plaintiffs in my view cannot escape the operations of the above provisions of the law whose language is plain and requires no magnifying glass for comprehension. There is also case authority for this view.

In **Kenyenga -Vs- Ombwori (2001)KLR 103**, the Court of Appeal held as follows:-

“By virtue of Order 36 Rules 3D of the Civil Procedure Rules, claims for adverse possession are brought by way of originating summons. Failure to comply with this mandatory provision makes a suit in contestably bad in law.”

If I can be allowed to use the language of their lordships in **Kenyenga -Vs- Ombwori (supra)**, the plaintiffs failure to comply with the mandatory provisions of order 36 rule 3D of the Civil Procedure Rules makes their suit incontestably bad in law. I say so, notwithstanding the decision of the court of appeal, differently constituted, in **Chogera -Vs- Kimani & 2 others (2005) 2 KLR 214**. There, an appeal had been lodged against a High Court decision awarding the suit land to the respondent on the basis of a trust which should have been pleaded by way of originating summons but was pleaded by way of a plaint. In dismissing the appeal the court held as follows:-

“(2) Regarding the procedure the issue of trust had arisen from the pleadings and in the evidence adduced. Moreover, the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant.”

I feel free not to follow that decision because of the following distinguishing features. The case was not based on adverse possession. No objection was raised before the trial that an improper procedure had been applied. The parties adduced evidence in support of their respective claims and the challenge against the procedure used was taken for the first time on appeal. The dispute also involved members of the same family. In my view those were peculiar circumstances which distinguish that case from the case herein.

The case of **Wakf Commissioners -Vs- Mohamed Bin Umeya Bin Abdulmaji Bin Mwijabu (1984)**

KLR 346, is also distinguishable from our case.

There, a suit was commenced by way of Originating Summons. The plaintiffs claimed mismanagement and lack of prudence in the administration of an estate by the commissioners. A preliminary objection was raised to the effect that the issues raised were not suitable to be tried by way of originating summons. The objection was overruled but allowed on appeal. The Court of Appeal found that the dispute there went beyond the scope of an originating summons. The facts herein are vastly different. This case involved a claim based on adverse possession. It therefore falls under the purview of Order XXXVI Rule 3D of the Civil Procedure Rules which prescribes the procedure to be applied. The rule makes no distinction between simple and complex disputes. Once the claim is based on adverse possession it matters not that the evidence to prove the same may be complex.

The plaintiffs placed further reliance on the case of **Karaha Bodas 4C -Vs- Pertamina Energy trading Ltd and Another Singapore (2006) 4LRC 56**.

That case considered Singapore procedure. I am not certain that the case involved interpretation of provisions similar to ours. Be that as it may, the case did not involve a claim based on adverse possession. The facts are also clearly distinguishable. The case, in any event, is only of persuasive value.

Finally, the parties are unanimous that they are litigating before the Business Premises Tribunal. They should not be allowed to maintain parallel proceedings in different forums. That is against public policy.

In the end and for the reasons given in my above analysis the preliminary objection is allowed. The plaintiff's suit is struck out with costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JUNE, 2011-07-01

F. AZANGALALA

JUDGE

Read in the absence of the parties and their advocates since the date was given in court.

F. AZANGALALA

JUDGE

29TH JUNE, 2011