



**Ndonye & 2 others v Land Registrar Machakos & another (Environment & Land Case E021 of 2021) [2022] KEELC 3506 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3506 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E021 OF 2021**

**A NYUKURI, J  
JULY 27, 2022**

**BETWEEN**

**PETER KIAMBA NDONYE ..... 1<sup>ST</sup> PLAINTIFF**

**SIMON KIMEU KYUU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPHAT KYALO SAMMY ..... APPLICANT**

**AND**

**LAND REGISTRAR MACHAKOS ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before court is Preliminary Objection dated 17<sup>th</sup> September 2021 filed by the 1<sup>st</sup> Defendant who has sought for dismissal of the Plaintiffs' Originating Summons dated 26<sup>th</sup> August 2021 on grounds that the suit offends;
  - a. Order 37 Rule 7 of the *Civil Procedure Rules*.
  - b. Section 13 of the *Limitation of Actions Act*.
  - c. Section 26 (c) of the *Limitation of Actions Act*.
  - d. Section 7 of the *Limitation of Actions Act*.
  - e. The maxim *Nec vi, nec clam, nec precario*.
2. The background of the suit is that the Plaintiff allege to be in actual occupation of Land Parcel No. Machakos/Nguluni/2XXX. (Suit Property). The 1<sup>st</sup> Plaintiff alleges that he purchased the suit



property in 1984 and took possession thereof and that thereafter he sold part thereof to the 2<sup>nd</sup> Plaintiff in 2012, who then took possession, developed and lives thereon to date. His main complaint is that the 2<sup>nd</sup> Defendant fraudulently transferred the suit property to the 1<sup>st</sup> Defendant. He contends that the two Plaintiffs have acquired the suit property by way of adverse possession and seeks to be registered as proprietor of the suit land in the place of the 1<sup>st</sup> Defendant by virtue of Adverse Possession on grounds that they have openly, peacefully and continuously occupied the suit property for a period of over 37 years. They also seek for permanent injunction to restrain the Defendants from interfering with their peaceful possession of the suit property.

3. The 1<sup>st</sup> Defendant filed a replying affidavit to the Originating Summons. His case is that he owns and occupies Parcel No. Machakos/Nguluni/XXX measuring 0.36 Ha which is adjacent to the suit property, having purchased and occupied the same in 1997. He stated that the 2<sup>nd</sup> Plaintiff bought the entire suit land in the year 2012 and took possession of the same from them and therefore the 1<sup>st</sup> Plaintiff's possession stopped in 2012 and therefore he cannot claim the suit property on adverse possession. According to the 1<sup>st</sup> Defendant, he was registered as proprietor of the suit land in 2009 hence the time in favour of the 1<sup>st</sup> Plaintiff started running in 2009 and stopped running in 2012 when the 2<sup>nd</sup> Plaintiff occupied the entire parcel. His position is that there was a mistake at the Lands Office which registered the suit land in his name and registered his land in the 1<sup>st</sup> Defendant's name and that he is in the process of rectification.
4. The preliminary objection was canvassed by written submissions. On record are the 1<sup>st</sup> Defendant's submissions filed on December 10, 2021 as well as the Plaintiffs' submissions filed on January 17, 2022.

### Submissions

5. The 1<sup>st</sup> Defendant's counsel submitted that Order 37 Rule 7 of the [Civil Procedure Rules](#) require that an application for registration as proprietor by adverse possession shall be by way of Originating Summons which should be supported by an affidavit to which a certified extract of the title to the suit land has been annexed. Counsel submitted that the Plaintiffs failed to attach a certified copy of the register of the suit property and therefore the Originating Summons are defective and ought to be struck out. To buttress that argument, reliance was placed on the cases of *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira* [2009] eKLR, *Elijah Gachugi Ndegwa vs. County Lands Registrar Lamu & 4 Others* [2020] eKLR and *Ephantus Mihigo Ngotho vs. John Kongwalei Sawe & Another* [2018] eKLR.
6. It was further contended for the 1<sup>st</sup> Defendant that there is no evidence of a contract of sale of land produced by the Plaintiff contrary to Section 3 (3) of the [Law of Contract Act](#) and therefore the Plaintiffs cannot sustain a suit on account of a sale transaction which does not exist. Counsel argued that as the Plaintiffs' claim of adverse possession is predicated on a non-existent sale, the same must fail.
7. Counsel also argued that the Plaintiffs had not proved the maxim of *nec vi, nec clam, nec precario* against the 1<sup>st</sup> Defendant. Counsel relied on the case of *Munyaka Kuna Company Limited vs. Bernardo Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (deceased))* [2018] eKLR. It was counsel's position that the 12 year period had not won in favour of the 2<sup>nd</sup> Plaintiff.
8. Lastly, counsel relied on Section 26 (c) of the [Limitation of Actions Act](#) to argue that the Plaintiffs' suit is premised on a mistake and hence the time does not run until the Plaintiffs discover the mistake.
9. Counsel for the Plaintiff submitted that the main issues raised in the Preliminary Objection are whether the Plaintiffs have proved title by adverse possession and whether mere technicalities should be used to deny the Plaintiff a fair hearing. Reliance was placed on the cases of *Wambugu vs. Njuguna* [1983] KLR 173 and *Mtana Lewa vs. Kabindi Ngala Mwangadi* [2015] eKLR to argue that to prove adverse



possession, the claimant must demonstrate peaceful, open and continuous possession of over 12 years; and that the possession should not have been through force, not in secrecy and without the permission of the owners, thus the maxim *nec vi, nec clam, nec precario*. According to counsel, the Plaintiffs have shown that they have been in peaceful, continuous occupation of the suit property for over 12 years.

10. Further, the Plaintiffs' counsel argued that the Plaintiffs had attached PKN-2 being a copy of the register of the suit property showing that the suit property is registered in the name of the 1<sup>st</sup> Defendant on July 23, 2009, which shows that occupation by the Plaintiffs is more than 12 years. It was counsel's position that the Plaintiffs have proved their case on a balance of probability and that the preliminary objection ought to be dismissed.
11. According to the Plaintiffs, the preliminary objection is a mere technicality that should not deny the Plaintiffs substantive justice. Counsel relied on the case of *Anchor Limited vs. Sports Kenya* [2017] eKLR, which this court has considered. It was counsel's contention that striking out pleadings should be exercised with extreme caution, and be done where the case is obvious. The court was referred to the case of *D. T. Dobie Company (Kenya) Ltd vs. Muchina* [1982] KLR 1 and *Coast Projects Ltd vs. M. R. Shah Construction (K) Ltd* [2004] 2 KLR 119 for the said proposition. It was counsel's view that this suit does not offend the provisions of the law cited in the preliminary objection.
12. Counsel also submitted that the suit herein is not premised on mistake as submitted by the 1<sup>st</sup> Defendant's counsel but rather on fraud, which the parties herein were aware of.

### **Analysis and Determination**

13. Having considered the preliminary objection, the submissions as well as the pleadings on record, the issues that arise for determination are;
  - a. Whether the preliminary objection is valid; and
  - b. Whether the preliminary objection is merited.

A preliminary objection can only be raised on a pure point of law See *Mukisa Biscuits Ltd vs West End Distribution Co. Ltd* [1969] EA 696. I note from the grounds in the preliminary objection that they are all points of law. I therefore find and hold that the preliminary objection is valid and properly taken.

14. The 1<sup>st</sup> Defendant has argued that the 12 year period has not run in favour of the Plaintiffs as the suit property was registered in his name in 2009, the 1<sup>st</sup> Plaintiff occupied the property upto 2012 when he sold the same to the 2<sup>nd</sup> Plaintiff and ceased occupying the same and therefore his occupation ceased. It is not in dispute that the 2<sup>nd</sup> Plaintiff's occupation of the suit property began in 2012. This suit was filed on August 3, 2021. Therefore, the position is that the period between 2012 and 2021 is 9 years which is a period less than 12 years.
15. It is trite law that for a claim of adverse possession to succeed the Applicant must show that the period of his/her occupation is over 12 years and that the said occupation was without force, not in secrecy and without permission. In the case of *Kasuve vs. Mwaani Investments Ltd & 4 Others* 1 KLR 184; it was held as follows;

“In order to be entitled to land by adverse possession, the claim must prove that he has been in exclusive possession of the land openly and as if right without interruption for a period of 12 years either after disposedly the owner or by discontinuation of possession by the owner on his own volition.”



16. As the 2<sup>nd</sup> Plaintiff has been on the land for only 9 years having taken possession thereof in 2012, the period of 12 years has not lapsed and therefore he cannot make any claim under adverse possession. In that respect therefore, the 2<sup>nd</sup> Plaintiff's suit need not proceed to trial and the same is struck out.
17. The 1<sup>st</sup> Defendant alleges that the 1<sup>st</sup> Plaintiff took possession upto 2012 and ceased in the said possession. On the other hand, the 1<sup>st</sup> Plaintiff states that he only sold part of the land to the 2<sup>nd</sup> Plaintiff and that they are both in possession. As the issue as to whether the 1<sup>st</sup> Plaintiff is still in possession or not, is a matter of fact that is disputed and not a pure point of law which can be determined at the preliminary stage, the same must fail.
18. The 1<sup>st</sup> Defendant has also raised the issue as to whether the Plaintiff attached a certified copy of the register to the Originating Summons. I have considered the documents attached to the Originating Summons and I note that the Plaintiffs attached a copy of a sale agreement and a copy of the official search. In addition, although this suit was filed on August 31, 2021, the attached official search is dated 3<sup>rd</sup> October 2011.
19. Order 37 Rule 7 of the *Civil Procedure Act* provides as follows;
  1. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
  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.
  3. The court shall direct on when and in what manner the summons shall be served.
20. The requirement to have a certified extract of the title to the land in question attached to the supporting affidavit is couched in mandatory terms. As indicated above, no such certified extract of the title of the suit property has been attached to this application. Even the attached search cannot be of any assistance to the Plaintiffs who rely on it, as the same is over 10 years old, having been issued on October 3, 2011. This state of affairs is disturbing because as can be seen from the record, a similar suit filed by the Plaintiffs herein being Kangundo ELC No. E001 of 2020 (Peter Kiamba Ndonye and Simon Kimeu Kyuu vs. Josephat Kyalo Sammy and the Land Registrar Machakos) which sought orders as those sought by the Plaintiffs herein, but was dismissed for reasons inter alia, that the extract of title was not attached to the plaint.
21. As a claim under adverse possession is intended to have the claimant registered in the place of the registered proprietor, failure to attach a certified copy of the register is not, in my view, a mere technicality, but goes to the root of the jurisdiction of the court as the court should only proceed with the trial on satisfaction that the Defendant is the person named as proprietor in the Register of the title in question at the time of filing suit. A search and a register of title are two different documents and should not be used interchangeably as the register shows the history of the title, while the search shows the registered proprietor as at the date of the search.
22. In the premises, I find that the preliminary objection is merited. I allow the preliminary objection and strike out the Plaintiffs' suit with costs to the 1<sup>st</sup> Respondent.
23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**



## **JUDGE**

### **In the presence of;**

Mr. Mutunga for the 1<sup>st</sup> Defendant/Applicant

Mr. Odhiambo for the Plaintiffs

Ms Josephine Misigo – Court Assistant

