



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE NO. 92 OF 2009 (O.S.)

NGARI NGURU APPLICANT

VERSUS

JOSPHAT MACHARIA KARACHI 1ST RESPONDENT
STEPHEN MUYA CHEGE 2ND RESPONDENT

R U L I N G

On 2nd June 2009 the Applicant filed this suit by way of originating summons under section 38 of the Limitation of Actions Act (Cap.22) and Order 36 rule 3D of the Civil Procedure Rules seeking that he be declared to have become entitled by adverse possession to land parcels NTHAWA/RIANDU/1544 and 1545 on account of having been in continuous and exclusive possession of the parcels for a period of over 12 years. He asked that an order be given to the District Land Registrar Mbeere to register him as the sole proprietor in place of the 1st and 2nd Respondents, respectively, whose titles in the parcels had been extinguished.

In the supporting affidavit he stated that the 2 titles are a sub-division of NTHAWA/RIANDU/1207 which was, before registration, part of land owned by Nditi clan of which he is a member. He stated that during land adjudication he was awarded the portion comprised in 1207. He further stated that since 1990 he has been in continuous, exclusive, open and peaceful occupation of the portion on which he has lived with his family and which he has extensively developed. In January 2009, the Respondents begun laying claim to the land and that was when he went to the lands office and conducted a search only to discover that the land had in 1979 been registered in the name of the 1st Respondent who had subsequently sub-divided it into 1544 and 1545. The 1st Respondent had on 28th September 1981 become the registered owner of 1545 and the 2nd Respondent had on 26th May 1982 become the registered owner of 1544.

The Applicant immediately filed a suit for injunction at Siakago in SPM CC No. 13 of 2009, but, on discovering that he could only make his claim in the High Court, withdrew the suit and filed the present claim. The Respondents had in the meantime sued him in Siakago SPM CC NO.14 OF 2009 for eviction. He claimed that the Respondents' claim and interest in the respective parcels had become extinguished in 2002.

The 2nd Respondent filed a replying affidavit on 1st March 2010 to say that he had bought 1544 from the 1st Respondent following which there was a consent of the Land Control Board and eventual transfer. He stated that he was a *bona fide* purchaser for value without notice. On 17th September 2008,

he had sold the parcel to Henry Mwangi Ndungu and Joseph Muiruri Kamundu following a sale agreement (“SMC 3”).

On 1st March 2010, the 1st Respondent swore an affidavit in support of a chamber application under Order 9A rule 8 and Order 9B rule 1(1) of the Civil Procedure Rules seeking to be allowed to defend the originating summons. In the affidavit, he denied that parcel 1207 ever belonged to Nditi clan. He stated that he had bought the parcel from one James Njagi Mwoga on 20th February 1972 and on 11th January 1978, he became the first registered proprietor. On 28th December 1981, he sub-divided the parcel into 1544 and 1545 and sold the former to the 2nd Respondent. He stated that upon the acquisition of 1207, he took possession of it and occupied it and that in 1983 charged the same to Kenya Commercial Bank. Between 1982 and 2008, however, he was sick and immobilized and could not visit the land. He subsequently found out that the Applicant and one Igoki Nguru had trespassed on the land and that was when he filed the suit in SPM CC NO.14 OF 2009. He denied that the Applicant had any claim to the land or that his claim to the same had become extinguished.

On 17th August 2010, the Applicant filed the present application under Order 6A rule 4 seeking to be allowed to amend the originating summons. The reasons for the amendment are contained in the supporting and supplementary affidavit: that the 1st Respondent had since sub-divided 1545 into parcels 4079 (which he had transferred to his daughter Susan Nyambura Macharia), 4080 (which he had transferred to his daughter Esther Muthoni Macharia), 4081 (which he had transferred to his son Cyrus Karachi Macharia) and 4082 (which he had left in his name). The Applicant had also since found out that 1544 had been transferred into the names of Henry Mwangi Ndugu and Joseph Muiruri Kamundu. The draft amended originating summons has indicated that the Applicant claims all the sub-divisions of what was originally 1544 and 1545.

The 1st Respondent swore a replying affidavit to oppose the application. He, however, agreed that he had disposed of part of 1545 in the manner stated by the Applicant. He denied that the Applicant had any claim to any of the parcels. The 2nd Respondent did not file any replying affidavit or grounds of opposition to oppose the application, but filed written submissions through his counsel in which he sought to challenge the application on legal grounds. The parties had agreed to dispose of the application by way of written submissions. I have considered these submissions.

At the time when the Applicant came to court his claim was in respect of 1544 and 1545. He stated that the former was in the name of the 2nd Respondent and the latter in the name of the 1st Respondent. The parcels were the product of 1207 which had been registered in the name of the 1st Respondent. It was when the 2nd Respondent filed a replying affidavit to the originating summons that he disclosed that he had since sold 1544 to 2 people. When the 1st Respondent swore his affidavit dated 1st March 2010 (and which affidavit he seeks to rely on in this application) he did not disclose that he had since sub-divided 1545 or disposed part of it to his children. It is, consequently, clear that the transfer by the 2nd Respondent of 1544 and the sub-division and transfer by the 1st Respondent of 1545 are material facts that necessitate an amendment to the originating summons. The Respondents have in their counsels’ written submissions correctly pointed out that the draft amended originating summons does not make the persons to whom the respective parcels have been transferred parties to the claim. It is basic that a party cannot be allowed to litigate over a registered parcel of land whose owner is not a party to the suit.

The Applicant claims to have been in open and peaceful possession and occupation of what was originally 1207. The parcel has since mutated into the respective sub-divisions and registrations. It is trite law that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession. (*GITHU –V- NDETE [1984] KLR 776*).

The other issue taken up by the Respondents was that the draft amended originating summons is not supported by a certified extract of each of the parcels in issue. Order 37 rule 7 (what was originally Order 36 rule 3D) was relied upon. The position is that at this stage there is no amended originating summons that has been filed. There is only a draft. The issue of the competence of the amended originating

summons can only be raised after the same has been filed.

The rest of the objection by the Respondents was on the basis that the Applicant does not have a case of adverse possession that can succeed. All that the court wishes to say at this stage is that there is a serious land dispute between the parties that should be allowed to go to trial. It is only through the intended amendment that all the parcels in question shall become part of the dispute. It is directed that the owners of all the parcels in question have to be made parties to the originating summons through the amendment. I consider that the amendment is being made quite early in the case as directions have not even been given. No injustice will be occasioned because all the necessary parties will be brought into the matter and be given an opportunity to be heard before any decision is made. I have indicated in the foregoing that it is the actions by the Respondents that have made it necessary for the Applicant to seek to amend. Lastly, it has to be borne in mind that the real reason why an amendment is granted is so as to enable the court to fully and finally determine the real issues in controversy so as to avoid a multiplicity of suits over the same matter. (*CENTRAL KENYA LTD –V- TRUST BANK LTD AND OTHERS [2000] 2EA 365*).

I allow the application. The amended originating summons shall be filed and served within 30 days from today. I ask that, in the circumstances of this application, costs do abide the suit.

DATED, SIGNED AND DELIVERED AT EMBU THIS 20TH DAY OF SEPTEMBER 2011.

**A.O. MUCHELULE
JUDGE**