REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 19 OF 2004

CATHERINE WAITHAKA MANDE...PLAINTIFF

VERSUS

GERVAS P. MWANGI...DEFENDANT

JUDGEMENT

The plaintiff brings this suit in her capacity as the administratrix of the estate of Daniel Mande Munyua (deceased). She claims in her plaint that by virtue of the 75 ordinary shares the deceased held in Kalenjin Enterprises Ltd (the Company) that he had bought from one Sosten Menjo on 26th July 1978, he was allocated Plot No. 189 later known as Plot No. 195 (Title No. Ndundori/Muguathi Block 2/195) (the suit land) at the Company's Koilel Farm. The deceased and his family openly resided on the suit land from the date of purchase till his death. His family still resides on it. In 1989 the defendant who was a teacher in a nearby school leased a house on that land from the deceased for Kshs.500/- per month. In 1997 the defendant taking advantage of the deceased's poor health, colluded with the DO Municipality and fraudulently obtained title to the suit land and he is now seeking to evict the plaintiff and her family from it. She therefore seeks a declaration that the suit piece of land, that is, **Title No. Ndundori/Muguathi Block 2/195**, belongs to the deceased's estate as of right and or by adverse possession and an order to evict the defendant from it and having been evicted a perpetual injunction to restrain him from going back.

In his defence the defendant averred that the plaintiff's claim is incompetent and bad in law as it is statute barred. He disputed the plaintiffs claim and averred that by virtue of his shareholding in the Company he is the registered owner of the suit land and his registration being a ?rst registration his title to the land is indefeasible and cannot be challenged even on fraud. He dismissed the plaintiff's claim of adverse possession and averred that it is him who has been in occupation of the land since 1989 and that he has never been a tenant of the deceased. During his life time, the deceased caused him to be charged with the offence of fraudulently obtaining title to the land but he was acquitted of the same.

After both sides had closed their cases, their respective counsel made written submissions. Because counsel for the defendant have in their submissions challenged the competence of this suit, I would like to start with that issue.

In challenging the competence of this suit, counsel for the defendant submitted that the plaintiffs claim is statute barred under the **Limitation of Actions Act** and should be dismissed with costs. They said that as is clear from **Exh.D1**, the plaintiff discovered the defendant's alleged fraud in July 1997. She should therefore have ?led her suit before the limitation period expired and cannot now take refuge under **Section 26** of the **Limitation of Actions Act**.

Counsel cited the Court of Appeal decisions in **Bwana Vs Said & 2 Others, [1991] KLR 454** and **Kenganga Vs Ombwori, [2001] KLR 103** and submitted that the plaintiff's claim based on adverse possession is hopelessly incompetent as it was not brought by originating summons as required by law. They further contended that the plaintiff has in any case not proved fraud and even if he had, the registration of the suit piece of land in the defendant's name being a ?rst registration, his title is absolute and indefeasible and **Section 143(1)** of the **Registered Land Act Cap 300 of the Laws of Kenya** forbids its challenge even on fraud.

Counsel for the plaintiff on their part dismissed these points and submitted that this suit is competent and perfectly before court.

From these submissions and the evidence on record, the issues that emerge for determination are whether or not the plaintiffs claim is statute barred; whether or not the defendant's registration of the suit piece of land is a ?rst registration; whether the plaintiff has acquired title to the land by adverse possession and who is the genuine allottee of the suit piece of land.

A claim to land is statute barred after 12 years. **Section 7** of the **Limitation of Actions Act** makes that very clear. The defendant himself testified that the suit piece of land was allocated to him at the end of March 1997. This suit was ?led on 23rd January 2004, hardly 6 years

thereafter. The defendant's contention therefore that the plaintiffs claim is statute barred has absolutely no basis and I accordingly dismiss it. The issue of the exception in cases of fraud provided by **Section 26** of that Act does not therefore arise.

The defendant's claim that his registration of the suit land is a ?rst registration has also no basis. I get amazed at the preposterous contention counsel make about the ?rst registration under the **Registered Land Act, Cap 300 of the Laws of Kenya** (the RLA). To some, even if a piece of land was initially registered under another Act, when the title is converted the ?rst registration under the RLA, is a ?rst registration. That is fallacious and in total ignorance of the historical background of the enactment of the RLA. The ?rst registration the challenge of which **Section 143(1)** of the RLA forbids is the one that results from the adjudication process under the **Land Adjudication Act, Cap 284 of the Laws of Kenya**. A perusal of both Acts and especially **Section 11** of the RLA makes that clear.

The defendant did not adduce any evidence of having gone through the adjudication process before being registered as the owner of the suit piece of land. It is common knowledge that the suit piece of land was initially owned by Kalenjin Enterprises Ltd. I believe that company must have had title to it under the Registration of Titles Act or under one of the registration Acts. If counsel for the plaintiff had bothered to check they could easily have con?rmed this from the Lands Of?ce.

Be that as it may, I am satis?ed that the registration of the suit piece of land in the defendants name was not a ?rst registration and I accordingly dismiss that point also.

This brings me to the plaintiff's claim of adverse possession. Counsel for the defendant submitted that an adverse possession claim must be brought by originating summons and not by plaint and that the plaintiff's adverse possession claim in this suit having been brought by an ordinary plaint is therefore untenable. I am unable to subscribe to that view. The Court of Appeal is divided on this point. In **Bwana Vs Said & 2 Others, [1991] KLR 454 and Kenganga Vs Ombwori, [2001] KLR 103**, it held that an adverse possession claim brought by way of a plaint is incompetent while in **Mariba Vs Mariba & Another, [2007] 1 EA 175** it held that failure to commence proceedings for adverse possession by way of an originating summons is not fatal.

Notwithstanding the provisions of **Order 36 Rule 3D(1)** which require "An application under Section 38 of the Limitation of Actions Act [which provides for adverse possession claims] shall be made by originating summons," there is no magic in bringing an adverse possession claim by originating summons.

In my view it is the word "shall" in this provision which has led to the erroneous belief that the provision is mandatory. It is a cardinal principle of statutory interpretation that the use of the word "shall" in an enactment does not always render the provision mandatory. Dealing with the difference of mandatory or directory provisions in enactments Justice G.P. Singh, a former Chief Justice of Madhaya Pradesh High Court in India stated in his book ***Principles of Statutory Interpretation at P. 242:-***

> **"The use of the word 'shall' raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object or scope of the enactment and the consequences ?owing from such construction. There are numerous cases where the word 'shall' has, therefore been construed as merely directory."**

I entirely concur with this view. The court is always under obligation to study the entire enactment and decide whether or not a particular provision is mandatory or merely directory. Lord Campbell in the Old English case of **Liverpool Borough Bank Vs Turner [1861] 30 L.J. Ch. 379 at pp. 380 — 381** emphasized this point thus:-

> **"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nulli?cation for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered."**

With these principles of statutory interpretation in mind, I have studied the entire **Order 36** of the **Civil Procedure Rules** and I cannot ?nd anything imperative about any of its provisions to warrant the interpretation of the word "shall" in **Rule 3D** thereof as mandatory. The purpose or objective of this Order is simply to provide for the mode of instituting by way of originating summons claims "for determination of particular questions on undisputed, or to a large extent undisputed facts"- **Kenya Commercial Bank Ltd Vs Osebe (1982-88) 1 KAR 48**. The originating summons procedure in this Order is therefore meant to provide for the institution and prosecution of simple and fairly straightforward claims. As I have already stated there is nothing imperative about it.

It has been held by our courts in numerous cases that the originating summons procedure is inappropriate in a matter where complex and contentious questions of fact are raised. That is what the Court of Appeal said in **Kenya Commercial Bank Ltd Vs Osebe** (supra) when dismissing a claim for general damages raised in an originating summons. That is also what Sir Eric Law JA had said in **Kibutiri Vs Kibutiri [1983] 1 KAR 60**. In his words:-

> **"The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."**

Way back in 1953, in **Salemohamed Mohamed Vs PH Saldanha Mombasa HCCC N0. 253 of 1953 (unreported)**, Sir Ralph Windham CJ had succinctly stated this point thus: -

> **"Such procedure is primarily designed for the summary and 'ad hoc' determination of points of law or construction or of certain questions of fact, or for the obtaining of speci?c directions of the court, such as trustees, administrators, or (as here) the courts' own execution of?cers. That dispatch is an object of the proceedings is shown by Order 36, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court."**

In **Bhari Vs Khan [1965] EA 94 Newbold Ag VP** stated the point even more precisely: -

> **"An originating summons is a form of legal proceedings designed to give, in certain speci?ed circumstances, a quick, summary and inexpressive remedy."**

Disputes arising from partnerships are among the claims required by **Order 36 Rule 4** to be brought by way of originating summons and yet while dealing with such dispute in the said case of **Kibutiri Vs Kibutiri** (supra), Law JA stated: -

> **"When it becomes obvious that the issues raise complex and contentious question of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit. The instant summons is very much in point; it occupied 7 full hearing days, spread over 3 years many witnesses were called and exhibits produced, and the hearing was followed by a long judgment (which should have been a ruling) and a decree (which should have been an order) the effect of which was to dissolve the partnership entirely (which was not a relief claimed in the summons) and to partition the land on which the ?rm carried on its farming activities amongst the plaintiffs and the defendant."**

Similarly, **Rule 3A** of **Order 36** provides that claims for reliefs in disputes arising under a mortgage on "sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee" are to be brought by originating summons. In the said case of **Kenya Commercial Bank Ltd Vs Osebe** (supra), a claim for general damages for the irregular exercise of the statutory power of sale under a mortgage was held to be inappropriate in an originating summons and was accordingly dismissed.

As is the case in this suit, claims to land based on adverse possession are usually seriously contested. That the claimants must strictly prove such claims is clear from the words of Gicheru JA in **Kweyu Vs Omutu [1990] KLR 709** at page 716 while de?ning what adverse possession is:-

> **"The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely."**

In the light of these authoritative and clear decisions, I cannot understand how we can still be arguing that because of the provisions of **Order 36 Rule 3D**, an adverse possession claim is incompetent and bad in law unless it is brought by originating summons. If anything, in my humble view, Rule 3D is misplaced and totally inappropriate in that Order. It should be deleted and adverse claims left to be brought by plaint as other cases. Before that is done, I think we should be guided by the Court of Appeal decision in **Mariba Vs Mariba** (supra) in which it stated:-

> **"While it is true that the suit was commenced by plaint instead of by the procedure of originating summons, we do not consider the error to be fatal in view of the provisions of Order XXXVI, rule 10 of the Civil Procedure Rules...[which] requires the trial court in an appropriate case to continue proceedings commenced by originating summons as though the same had been begun by plaint."**

This being my view, I ?nd and hold that the plaintiff's claim of adverse possession brought by ordinary plaint is competent.

Having found that plaintiff's claim is competently before court, I now wish to consider the evidence on record and decide it on its merits.

In her testimony in court the plaintiff produced several documents in support of her case and conceded in cross examination that before his death on 27th December 1997 the deceased had sold a piece of land to one Josephat Karanja Mwaura. She, however, denied that she is fronting for the said Mwaura in this case. Her son, Anthony Ngugi Mande, PW2, corroborated her evidence and also conceded in cross examination that they are not using the suit land and none of his family members is residing on it. He also denied that they are prosecuting this case on behalf of the said Josephat Karanja Mwaura although his late father had, before his death, sold the whole of it to the said Josephat Karaja Mwaura and they have not refunded the purchase price to him.

Daniel Maina Karugwe, PW3, testi?ed that he is a director of the Company who knew the deceased very well. He said after the deceased bought the shares in the Company he was allocated the suit piece of land on which there was a house that he rented to the defendant. In 1984 when the directors of the Company decided to allocate all its parcels of land, they stamped on the reverse of each share certi?cate the words "ALLOCATION OF PLOT NO ...." and allocated subdivisions of its parcels of land to its members. The deceased was allocated the suit piece of land. He said the defendant came to the suit piece of land long after that allocation. In cross examination he conceded that he was not a shareholder of the Company but had bought shares on behalf of his wife.

Susan Waridi Muchemi, PW4, is an Assistant District Land Registrar, Nakuru. She testified that her of?ce issued Title Deeds to members of the Company on the basis of the list given to them by the Company. She produced the list as **Exh.15**.

The defendant testified and called two witnesses. In his testimony he said that he bought 25 shares in Kalenjin Enterprises Ltd in 1981. In 1984 he bought 50 more shares from one Martin Daniel Kiplangat. He produced the transfer form and a share certi?cate as **Exh.4A** and **4B** respectively. He was not allocated with any piece of land until 1997 when one committee member of the Company by the name Mohammed Noor asked him to take his documents to the directors for veri?cation so that he could be given a piece of land. He did that and at the end of March 1997 he was allocated Plot No. 195 at Koilel Farm. He was surprised that it was the same piece of land on which he had resided as a tenant of the deceased but on enquiry he was told that that is his land. Thereafter he continued residing on it until 18th July 1997 when he received a letter, **Exh.1** from the deceased's advocate requiring him to vacate within 10 days which he replied through his advocate's letter **Exh.6**. On 20th August 1997 the deceased went to his house with CID of?cers and got him arrested and later charged in Nakuru RM Cr. Case

No. 1388 of 1997 with obtaining title by false pretences. He was later acquitted of the charge but one Josephat Karanja started constructing on the suit piece of land claiming that it been sold to him by the deceased. He ?led Nakuru CMCC No. 949 of 1997 and obtained an injunction restraining the said Karanja from going on with construction on the land. Mr. Karanja's appeal against that order of injunction but his appeal was dismissed for want of prosecution.

In cross examination the defendant denied having colluded with anybody to deprive the deceased of his land. He denied that the DO Municipality gave him a letter to the Land Registrar to issue him with a Title Deed but he conceded that on **Exh.15** against Plot No.195 the old number is stated as No.189.

The defendants' ?rst witness, Kenneth Kariuki Githii, who was a District Land Registrar at Nakuru testi?ed that the Company forwarded to his of?ce **Exh.15** which is a list of the members to be allocated Title Deeds. He con?rmed that on that list Plot No.195 (old Plot No.189) belonged to the deceased. He said that the deceased should be the registered owner of that piece of land because **Exh.15** is the ?rst list and its contents tallied with the details in the binder. He, however, stated that there was another list **Exh.D10** with a lot of alternations which had the defendant's name as the owner of Plot No.l95.

The defendant's second witness was Elijah K. K. Chelaite who testi?ed that he was elected a director of the Company on 28th November 2008. Although he conceded in cross examination that his evidence is based on the register, he said that the genuine list of members is the one with a seal on it.

In their submissions counsel for the plaintiff argued that she had proved her case on a balance of probabilities. They said as is clear from **Exhs.3, 4, 5** and **6** the defendant was a tenant of the plaintiff. That is why the police charged him with obtaining a Title Deed by false pretences and forcible retainer of a piece of land. That case was terminated when the deceased who was the principal witness died in December 1997.

Relying on the evidence of PW3 counsel for the plaintiff further submitted that the defendant's share certi?cate, as the defendant himself admitted, having not been stamped with the stamp having the words "ALLOCATION OF PLOT NO ......" as was the case with other members and that his certi?cate having not had the old number for Parcel No.l95 purportedly allocated to him, the authenticity of his documents is in doubt. From the evidence of the Assistant District Land Registrar, Nakuru, PW4 and the defendant's own witnesses DW2 and DW3 it is clear that the genuine list submitted by the Company to the Land Registry for issuing the Title Deeds was **Exh.15**. Besides the defendant's name being the last on **Exh.D10** and written with different ink, the many alterations on it casts doubt on its authenticity. The defendant could not have been allocated the same piece of land that had been allocated to the deceased more than 8 years previously and on which the defendant was the deceased's own tenant. They urged me to ?nd for the plaintiff and award her the costs of the suit.

In response counsel for the defendant submitted that PW3 was not a director of the Company and dismissed his evidence as totally unreliable and urged me to accept and rely on the evidence of DW3 who stated that of the ?ve lists submitted by the Company to the land's of?ce, **only Exh.D10** was dated and sealed. It should, as DW3 testi?ed be the one to be relied upon and not **Exh.15**. They urged me to dismiss this suit with costs.

I have carefully considered these submissions and the evidence on record. Although in his defence the defendant denied ever being a tenant of the deceased on the suit land, in his evidence he admitted he was. He did not say that he had at that time bought any shares in the Company. Like the other shareholders in the Company, the deceased had balloted and had been allocated the suit land. The purported allocation (if at all there was any) to the defendant of the same piece of land on which the defendant was the deceased's own tenant more than 8 years previously by a single official of the Company whom the defendant did not even call to testify in this case, was undoubtedly irregular. Besides the impropriety of that purported allocation, the land was not available for allocation.

From the evidence of the Assistant District Land Registrar, Nakuru, PW4 and the defendant's own witnesses DW2 and DW3 it is clear that the genuine list submitted by the Company to the Land Registry for issuing the Title Deeds was **Exh.15**. These witnesses said the contents of **Exh.15** tally with those in most of the details in their binders. It was the original one to be submitted to them by the Company and has both old and new numbers. Besides the defendant's name being last on **Exh.D10** and written with different ink, the many alterations on it casts doubt on its authenticity. In the light of this evidence, I must reject Mr. Chelaite's evidence that the genuine register is the one with the seal. In any case, having been elected a director only in November 2008, he did not say how he came to know that.

Even if the deceased's allocation of the suit land is vitiated, by dint of his long occupation from 26th July 1978 when he bought his shares from one Sosten Menjo to 1997 when the land was purportedly allocated to the defendant, the deceased had acquired title to it by adverse possession and the land was not available for allocation by the Company to the defendant. That the land had been sold is of no consequence. Immediately before his death, the deceased had commenced criminal proceeding in an effort to have the defendant's title deed revoked and having not transferred the land to the purchaser he was duty bound to reclaim it as he attempted to do and transfer it to him.

For these reasons, I ?nd that the plaintiff has proved her case on a balance of probabilities and I accordingly enter judgment for her and grant a declaration that the suit piece of land, that is, **Title No. Ndundori/Muguathi Block 2/195**, belongs to the deceased's estate as of right and by adverse possession and an order to evict the defendant from it and having been evicted a perpetual injunction to restrain him from going back.

DATED and delivered this 16th Day of February, 2010.

D.K. MARAGA

JUDGE