



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 486 of 2007

KEZIAH WANJIRU GITAU 1ST PLAINTIFF
CYRUS REUBEN KAGUNDA 2ND PLAINTIFF
FELIX MUCHOKI WAMBUGU..... 3RD PLAINTIFF
KEVIN KARIUKI 4TH PLAINTIFF

VERSUS

BEATRICE MUTHONI THUMBI 1ST DEFENDANT
BEATRICE WAMBUI KIGONDU
(sued as Administrator of Estate of
Gordon Kigono Reuben)2ND DEFENDANT

RULING

The plaintiffs herein brought this suit against the defendants by way of Originating Summons under Order XXXVI rule 3D (1) and (2) of the Civil Procedure Rules and Section 38(1) and (2) of The Limitation of Actions Act Cap.22 Laws of Kenya for orders that:

1. **They are entitled to land parcel No.Loc.7/Gakoigo/2693 by virtue of adverse possession;**
2. **That the Land Registrar Murang'a do register the plaintiffs as absolute proprietors of the said parcel of land; and**
3. **That the costs be provided for.**

The Originating Summons is supported by affidavits sworn by all the plaintiffs herein. To date there is not any replying affidavit in reply to the said Originating Summons.

There is now before me an application filed by the 1st defendant by way of Chamber Summons Under Order VI rule 13(1) (b), (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the order that the plaintiffs' suit by way of Originating Summons dated 31st July, 2007 be struck out with costs to the 1st defendant/applicant.

The application is supported by an affidavit sworn by the 1st defendant alongside several grounds which have been set out therein. The application is opposed by the plaintiffs and the 2nd defendant. In a nutshell the grounds upon which the said order is sought are that:

1. **The originating summons does not comply with the mandatory provisions of the law;**
2. **The issues raised are res judicata;**
3. **The issue of adverse possession cannot be pleaded in this cause; and**
4. **The plaintiffs are guilty of material non-disclosure.**

I have related the application to the pleadings and the reply raised by the plaintiffs. Rule 3D of Order XXXVI requires that the Originating Summons shall be supported by an affidavit to which certified extract of the title to the land in question has been annexed.

It is not true that the plaintiffs have not complied with this provision because there is a certified copy of the extract and also the

title to the said property which has been annexed to the affidavit of Keziah Wanjiku Gitau in support of the Originating Summons. That ground therefore fails.

It has been submitted and averred in the 1st defendant's affidavit that Succession Cause No.780 of 1992 disposed of the matters now raised in the Originating Summons. It has not been proved by affidavit or otherwise that, the said succession cause addressed all issues contained in this suit. I say so because, the issues of succession and adverse possession are two distinct rights, which are governed by different legal regimes. It has also not been proved by affidavit or otherwise that, the plaintiffs herein were parties to the succession cause cited.

In that regard, therefore, I am unable to uphold the ground that the matters raised in the Originating Summons are *res judicata*. Whether or not, the plaintiffs are entitled to the subject matter herein, by way of adverse possession, is a matter of not only the law or fact, but also evidence. This cannot be addressed by affidavit only and submission by counsel. Oral evidence has to be adduced and subjected to cross-examination.

The foregoing disposes of the application filed by the 1st defendant. The 2nd defendant, who is the administrator of the subject matter in contest herein, supports the plaintiff's application and to be specific I will quote the submission of the learned counsel for the 2nd defendant which reads as follows:

“The 2nd defendant as the administrator of the estate of Gordon Kigono Reuben submits that the application by the 1st defendant to strike out the suit by the plaintiffs is in all respect premature and that the case by the plaintiffs should be given full hearing and determined on its merit.

The 2nd defendant submits that the plaintiffs being persons residing in the suit premises contrary to what the 1st defendant says, have a right of claim based on Limitation of Actions Act Cap.22 Laws of Kenya. The plaintiffs have lived in the suit premises Loc.7/Gakoigo/2693 all their lives now spanning for over 30 years. The plaintiffs have never been involved in any suit between the defendant and them. There has never been a claim under Limitation of Action concerning the suit premises.

The 2nd defendant thus submits the application by the 1st defendant should fail and the main suit be heard to resolve the issues raised.”

To strike out a pleading is a drastic measure which denies a party his or her day in court. To avoid driving a party out of a judgment seat, the court will work towards sustaining a suit rather than dismissing it. I fully subscribe to that position.

I am persuaded that, it is not only premature to bring this application, but that the same is misplaced in view of the pleadings and the position taken by the 2nd defendant. The application is therefore dismissed with costs to the plaintiffs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of April, 2010.

A. MBOGHOLI MSAGHA

JUDGE