



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS**

ENVIRONMENTAL & LAND CASE 232 OF 2008

**DANGA PROPERTIES LTD PLAINTIFF
V E R S U S
JORETH LIMITED1ST RESPONDENT
BENSON ODONGO OKWIRI2ND RESPONDENT
AMOS NDAMBUKI MUTHAMI3RD RESPONDENT
R U L I N G**

On 16th May, 2008 the Applicant filed this application by way of originating summons under **Order 36 rule 3D of the Civil Procedure Rules, section 38 of the Limitation of Actions Act (Cap 300)** for it to be declared to have acquired title by adverse possession to the suit premises previously know as title 169 Thome Farmers No. 5 Limited and now known as LR. No. 13330/149 and that the registration of the 1st Respondent or any other person deriving title from 1st Respondent based on the land be cancelled forthwith and the Registrar of Title do cancel entry number 203 on title No. 85119 and certificate of title IR 106843 dated 6th July, 2007 in the name of the 2nd and 3rd Respondents and to enter the name of the Applicant of the registered proprietors of the said plot. The application was on the ground that the Applicant and earlier assignees/predecessors have since 1991 been in an actual, open, physical and uninterrupted possession of the suit premises for a period in excess of 17 years thereby acquiring title by adverse possession and any claims to the title by any of the Respondents or anyone acquiring title from the 1st Respondent of the same parcel of land now known as L.R. No. 1330/49 (originally known as plot number 169 Thome Farmers No. 5 Limited) has been extinguished by adverse possession by the Applicant who is entitled to become registered as proprietor of the premises.

The supporting affidavit was sworn by Dr. Kinandu Muragu, a director of the Applicant. He stated that on 7th June, 2000 the Applicant bought plot No. 169 in Thome No. 5 Limited from Stephen M. Kiunga and Beatrice Wainoi Kiunga vide agreement "KM2" for KShs. 1,675,000/= which was paid "KM3". Stephen M. Kiunga surrendered his share certificate back to Thome who issued a new certificate No. 1657 for entry No. 727 "KM5". The deponent immediately took possession of the property, after he was shown the beacons by the surveyors of Thome. The property had crops but no construction. The deponent nominated Kenneth Kibathi Kinyanjui to take care of the plot on which he planted napier grass, trees, plants and bananas. He stated that ever since he has been, through the nominee, in actual, open, physical and interrupted possession of the plot. This was until October, 2007 when the 2nd and 3rd Defendants came to the plot claiming they had bought it. The matter reached the deponent whose investigations revealed that the plot was now known as LR. No. 13330/149 and that the plot was part of property known as I .R. 85119 owned by the 1st Respondent. He found out that the 1st Respondent had had a dealing with Thome that had led to HCCC No. 6206 of 1990 in which the 1st Respondent had sued some shareholders of Thome who were residing on its (1st Respondent's) IR. No. 85119. He further found out that the chairman and director of the 1st Respondent had written to the shareholders of Thome stating that Thome had authority to sell to them plots. "KM 8" refers. The suit was determined on 13th June, 2003 when the Defendants were ordered to pay KShs. 200,000/= to the 1st Respondent so as to be allocated the parcels they were sharing. "KM 9" refers. Thereafter the 1st Respondent gave notices ("KM 10") asking the residents to pay the amount to be allocated the plots. However, the Applicant did not receive the notices as the deponent and his co-director live and work in South Africa. Kenneth was similarly not notified.

The deponent stated that he has been informed by people that Felistas Njeri and Stephen Kiunga had been in physical, open and uninterrupted occupation of the plot since 1991 and that certificate of title had been issued to the 2nd and 3rd Respondents on plot No. 169 now known as LR. 106843, LR No. 13330/149 through entry No. 203 in IR No. 85119. He concluded that the Applicant had acquired the plot by adverse possession.

Harun Muturi, a director of the 1st Respondent, swore a replying affidavit to say that the 1st Respondent has been at all material times the lawful owner of the suit land which originally comprised about 429 acres whose title is marked "HM 1". The suit land originally comprised of two parcels known as L.R. No. 4920/3/2 and 4921/3/1 which were subsequently

amalgamated into one parcel known as L.R. No. 13330. Before amalgamation the 1st Respondent had caused the property to be subdivided into 42 plots. He stated that the 1st Respondent as registered owner of the land has had an absolute and indefeasible title over the land and has exercised exclusive and unhindered proprietary rights over the same including mortgaging and selling parts thereof to third parties. "HM 2" is copy of title showing these transactions. It was in exercise of such rights that the 1st Defendant filed suit No. 6206/1992 above against persons who were trespassing on the land. The Applicant was not a party because he was not then on the land and has not occupied the land or any portion of it, either after 2000 or at all.

It was further deponed that Thome Farmers No. 5 Limited has no claim to the land in dispute and has no connection with it, or the matter. The 1st Respondent continued that vide agreement "HM 3" dated 14th July, 2006 it sold the plot to the 2nd and 3rd Respondents and transfer over the property L. R. No. 13330/169 was duly registered and certificate of title ("HM 4") issued to them. The 2nd and 3rd Respondents took possession and have commenced construction of a permanent structure thereon.

With the originating summons was filed a chamber application under **Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules** for an interlocutory injunction.

On 24th July, 2008 the 1st Respondent applied by way of summons under **Order 6 rule 13 (1) (a) of the Civil Procedure Rules** to have the originating summons to be struck out because it discloses no reasonable cause of action. The grounds were that the Applicant had by his own admission taken occupation of the suit property on 7th June, 2000 and therefore had not had or enjoyed a continuous, quiet, uninterrupted and open occupation inconsistent with the true owners title and without the consent of the owner for a period of 12 years as provided for under **section 38 of the Limitation of Actions Act (Cap. 22)**. This is the application on which the court received written submissions and list of authorities from Mr. Masese for the 1st Respondent and Mr. Ochanda for the Applicant.

Striking out a suit under **Order 6 rule 13** is a strong summary procedure that should only be treated with tremendous caution as its effect is to deny the other side the opportunity to have his case determined after the usual full hearing. In **D. T. Dobie & Company (Kenya) Ltd –Vs- Joseph Mbaria Muchina [1982] KLR 1** the following principle of law was set out:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

Regarding what constitutes a **“reasonable cause of action”** Madan JA defined it to mean a cause of action with some chance of success when only the allegations in the plaint are considered. A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.

The 1st Defendant is saying that according to the affidavit sworn to support the summons, the Applicant took possession of the disputed land on 7th June, 2000 and filed the claim for adverse possession on 16th May, 2008, about 8 years later, and that did not bring it within the 12 years that the law provides as the limitation period. The summons to strike out relies on **section 38 of the Limitation of Actions Act**. This section only provides that a person who claims to have become entitled by adverse possession to land registered under any of the **Acts in section 37** may apply to the High Court for an order that he be registered as the proprietor of the land. **Section 7 of the Act** provides that:-

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

For a person to claim that he has become entitled to land by adverse possession he has to prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or after the discontinuation of possession by the owner of his own volition. (**Kasuve –Vs- Mwaani Investments Limited and Others [2004] IEA 75 (CAK)**).

Stephen M. Kiunga swore an affidavit to support the Applicant's originating summons in which he stated that on 7th February, 1997 he bought plot No. 169 Thome Farmers No. 5 Limited from Felistas Njeri Mukoma for KShs. 1,450,000/= and was issued with share certificate No. 1700. He found the plot fenced using posts, wires and plants. It had a gate. He farmed until 7th June, 2000 when he sold it to the Applicant for KShs. 1,675,000/=. The agreement of sale shows he bought the land jointly with Beatrice Wainoi Kiunga. He stated that during his stay, possession and ownership of the plot he did not come across the 1st Respondent. Felistas swore an affidavit to say she bought the plot on 9th January, 1991 from Thome.

The Applicant is saying that time has to start running from 9th January, 1991 when Felistas bought the plot from Thome, and not on 7th June, 2000 when the Applicant bought it from Kiunga and Beatrice. It is clear that if 7th June, 2000 is considered to be the starting point, the Applicant had stayed on the plot for only 8 years in which case it cannot claim to be entitled to the same by adverse possession. It was, however, submitted on behalf of the Applicant as follows:-

“...the applicant is not only relying on his adverse occupation and possession of the suit property but on earlier assignees and predecessors and especially Felistas Njeri Mukoma and Stephen M. Kiunga who have sworn affidavits on the period of stay in the suit land.”

At this stage of the case, and for the purposes of this application, the court is not being asked to embark on the merits of the case itself as that has to be left for the trial judge. It is not this court’s function to examine the evidence to see whether the Applicant can prove its case, or assess its prospects of success. **(Yaya Towers Ltd –Vs- Trade Bank Ltd (in liquidation), Civil Appeal No. 35 of 2000)**. So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking out. **(FM – 35 Promotions Ltd. –Vs- City Cabanas Ltd, HC (Milimani) CC No. 940 of 1999)**.

The Applicant is saying it is entitled to the land by adverse possession by virtue of occupation by itself and its predecessors for 17 years since 1991. The 1st Respondent is saying time can only begin to run as from 2000 which means the period of occupation was only 8 years. Whether the 12 years period was attained by the Applicant will have to be settled by the trial judge. In other words, the summons by the Applicant shows a reasonable cause of action which should go to trial.

In conclusion, the application of the 1st Respondent is dismissed with costs.

**DATED AND SIGNED AT NAIROBI
THIS 4TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**