



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE NO. 106 OF 2009 (OS)

ALOISE KARIUKI IRERI.....
.....PLAINTIFF

VERSUS

JACKSON NGARI NTHIA.....
.....1ST DEFENDANT

JOHN MUNGUNGUU.....
.....2ND DEFENDANT

R U L I N G

The Applicant in the originating summons dated 30.06.09 filed the same against the 2 Respondents claiming Title by way of Adverse possession. They annexed 2 copies of certificates of official search in place of extracts of Titles to the parcels of land in question. This prompted counsel for the Respondent to file the notice of motion dated 1.02.2010 where he is asking that the originating summons be struck out with costs. The Respondent to the application filed a replying Affidavit stating that he has complied with the law and the originating summons should not therefore be struck out.

The law is very clear on this point and I will therefore be very precise. Order XXXVI Rule 3D(2) which is applicable in this case clearly states:-

“The summons shall be supported by an affidavit to which a certified extract of the Title to the land in question has been annexed”.

The requirement is couched in mandatory terms. It has no place for certificates of search. The law requires a certified extract of Title to be annexed to the affidavit – not a certificate of official search. This position has been expounded in several Court of appeal decisions e.g. **KYEYU VS OMUTO (Civil Appeal NO.8 of 1990) (unreported)**;

PATRICK ODAKO & ANOTHER VS WILLIAM KIREW (ALSO KISUMU COURT OF APPEAL 202 OF 1998) where the court of Appeal again stated:-

“Order 36 Rule 3D of the same Rules prescribes the manner for starting a suit for adverse possession ...such a claim is to be started by way of an originating summons, supported by an affidavit and a copy of the title to the land adversely claimed has to be annexed to the affidavit”.

See also **KASUVE VS MWAANI INVESTMENTS LIMITED & 4 OTHERS (2004) KLR at page 184** where the Court of Appeal held that certified copies of the extract of Title had to be annexed to the originating summons and certificates of Title annexed there to could not suffice. From the express provisions of Order XXXVI Rule 3D(2) and the above Court of Appeal decisions, it is

clear that the application before me has merit and the same must therefore carry the day. I allow the same and strike out the originating summons dated 1.02.2010 with costs to the Respondents.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 9th of December 2010

In presence of:- Ms. Muthoni for Mr. Okwaro & Gachuba for Applicant.