



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 19 OF 2008

SUDI HAMIS & 12 OTHERS.....PLAINTIFFS

VERSUS

HARUN RASHID KHTOR & 7 OTHERS.....DEFENDANTS

R U L I N G

Mr. Gekonde, counsel for the respondent raised a Preliminary Objection to both the Originating Summons dated 14-4-08 and the Chamber Summons dated 4-4-08 on grounds that they do not disclose any cause of action. He pointed out that under Order XXXVI Rule 3(D) it is mandatory that applicant annex certified copies of the Title Deed for the plot which they claim and that in this instance, the documents served on them contain no such annexures. Mr. Gekonde submitted that the Originating Summons is incomplete as the court cannot even know whether applicants have a cause of action. Mr. Gekonde explained that, for the claim on adverse possession to be complete, it must be proved that applicants have been in continued possession for twelve years and parties must show that they are in possession of a particular portion of land and he referred to the case of **Titus Mutuku Kasuve V Mwaani Investments and others Civil Appeal No. 35 of 2002.**

He also referred to the decision in **Paine v Omito (1990) KLR** in urging this court to dismiss the cause with costs.

The applicant's counsel Mr. Okuto admitted that a copy of the Title was not annexed but that the complainant explained their search for the Title was fruitless as the files could not be traced and they had annexed letters written to the Registrar. He urged the court to interpret the law in the spirit and remove fetters which have been placed saying adverse possession denotes possession of land which is inconsistent with the proprietor's Title and that is a fact which can be seen through the acts which have been carried out on the property. He points out that applicants have pleaded they have been in possession since the 1940's and that should not be taken lightly because in the Coast Province there is a problem regarding land and that since the applicants are not registered owners, it becomes very difficult for them to be issued with a copy of that Title, since under provisions of section 22(c) of the Registration of Titles Act the process of parties getting extracts of title is very clear.

Mr. Okuto referred to the decision in **Trust Bank Ltd V Amalo Co. Ltd** which held that where possible, all disputes before the court should be heard on their merits and urged the court to do likewise in the present case.

Mr. Okuto further argued that a Preliminary Objection should only be raised on points of law as was held in the case of **Mukhisa Biscuits V Westend Distributors 1969 EA.**

Mr. Gekonde insists that procedure and legal requirements must be complied with and sought to distinguish this case from **Kisee Maweu's** case saying in Waweru's case the issue was adverse possession by squatters – which is not the situation here as applicant do not say they are equalities.

Order XXXIX Rule 3D (2) reads:

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

It is not denied that a certified extract of Title has not been annexed, but Mr. Okuto argues that attempts at getting that extract have failed despite letters written to the Registrar of Titles for the same.

The defendants have annexed titles which show that they recently got titles to the land less than 12 years ago – is there any evidence to show that the title existed before that? Should this be reason enough to dismiss the suit?

In the case of **Titus Mutuku Kasuni**, the issue that was addressed was whether a party's claim by way of adverse possession got extinguished when the property was acquired by a new owner and that the plaintiff had not identified the parcel of land he was claiming and the failure to annex document of title prior to the subdivision of the land.

The court found that:

“The burden was on the appellant to produce the certified extract of title in respect of the suit properties”

To justify the Preliminary Objection Mr. Gekonde pointed out that defendants had annexed three documents of title and that in the absence of the plaintiffs annexing the certified copy of the original title then it would be difficult to locate the portion claimed by defendant and whether it comprised of the original title or the subdivided titles in the absence of the documents of the court should find that no cause of action was established.

The plaintiff's counsel asks this court to compare that situation to what was considered in **Kisee Maweu's** case saying there may have been an original title which underwent several transfers and that this would be difficult to trace as perhaps the files may even have been destroyed once the original title was returned. This appears to be speculation rather than submission from information obtained from the Registrar of Titles.

How will the court determine when that original certificate of title was issued and to who and in relation to which portion? Nyarangi J, in Kasee's case seemed to be saying that ***“Adverse possession is fact to be observed upon the land, it is not to be seen upon a title ... any man who buys land without knowing who is in possession of it risks his title just as he does if he fails to inspect his land for 12 years after he has acquired it.”***

It is not lost to this court the difficulties a party who is not the registered owner may have in trying to access a copy of a Title which is not in his/ her name I wonder what the legislators had in mind when they enacted that provision under Order XXXVI Rule 3D – may be as Mr. Gekonde put it, it was so as to enable the court to know whether there was a cause of action.

Then again I wonder, but couldn't this be achieved by way of evidence rather than insisting on a precondition such as annexing a Title which the owner may not be willing to part with and which may have certain letters created so as to make it difficult for the party in adverse possession to access? Doesn't insistence on annexing the extract of certificate of Title really derail the substance of the claim which is – how long has the plaintiff been in continuous and uninterrupted possession of the property? What would still show the status of the property? Really there cannot be two meanings to the requirement, perhaps seeing the challenges and difficulties litigants who come under Order XXXVI Rule

3D encounter, a recommendation should be made to the Rules committee to amend the provisions to include certificate of postal search which would still give the same information as an extract of certificate of title.

The Preliminary Objection therefore has merit and is sustained. The Originating Summons and Chamber Summons are dismissed with costs to respondent.

Delivered and dated this **11th** day of **June 2009** at Malindi.

H. A. OMONDI

JUDGE

Mr. Gekanana holding brief for Gekonde for defendants

NO appearance for plaintiffs