



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 109 of 2008

1. TSUMA LEWA DECHE  
2. CYLDE BAYA KIJANA .....PLAINTIFFS

VERSUS

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND ..... DEFENDANT

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RULING

Before court is the Defendant/Applicants Chamber Summons

dated 14<sup>th</sup> April 2009 by which they seek the following orders:-

***“1. THAT this Honourable Court be pleased to dismiss and/or strike out the Plaintiffs suit for it discloses no reasonable cause of action and it’s bad in law.***

***2, THAT the costs of this Application and of the entire suit be borne by the Plaintiff”.***

Mr. Ochwa learned counsel argued the Chamber Summons on behalf for the Applicants. Mr. Ochwa in his oral submissions to the court raised three main grounds upon which the suit ought to be struck out. These were –

***(i) That the suit is bad in law as it did not comply with S. 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.***

***(ii) That the suit is bad in law as it fails to comply with O. 36 of the Civil Procedure Rules and lastly***

***(iii) That the suit is bad in law as it has been brought against a state corporation.***

Mr. Sifuna learned counsel acting for the Defendant/Respondent gave oral submissions opposing the application. I will now proceed to deal with each ground of the application individually.

Mr. Ochwa for the Applicant argues that this suit is bad in law by virtue of S. 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. S. 7 of Cap 22 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”.***

The Plaintiffs claim is one that is based on adverse possession. In their Originating Summons dated 24<sup>th</sup> April 2008 and filed in court on 30<sup>th</sup> April 2008 the Plaintiffs seek determination inter alia of the question:-

***“Whether the Plaintiffs are entitled to all that parcel of land occupied by them jointly and severally and described as Number 1088/III/M.N. Grant No. 19064 by virtue of adverse possession”.***

In the supporting affidavit attached to the Plaint the 1<sup>st</sup> Plaintiff **TSUMA LEWA DECHE** avers that he and his family have resided on the above-mentioned plot for a period of over twenty-five (25) years. Mr. Ochwa for the Applicant argues that the Respondent/Plaintiffs are not entitled to the orders which they seek [of adverse possession] in view of the provisions of S. 7 of Cap 22 which bars any action to recover land after the expiry of twelve years from when such right first accrued.

However having looked at and carefully considered this provision of the law I am inclined to agree with Mr. Sifuna for the Respondents that this particular suit is not be barred by S. 7. S. 7 of Cap 22 refers to

***“Actions to recover land”***

A logical understanding of this phrase is that the claimant would be an owner who is seeking to recover land of which he had somehow become dispossessed. This is not the situation here. The Respondents are not claiming as owners of the plot in question. They are staking their claim to Number 1088/III/MN Grant No. 19064 on the basis of ***“adverse possession”*** having been in occupation of that plot for the past 25 years. In my considered opinion S. 7 of Cap 22 is only applicable to and would only bar an owner who has Title to the disputed land from filing a suit after the expiry of twelve years. This interpretation of S. 7 is further strengthened by S. 2(3) of Cap 22 which provides that:-

***“(3) References in this Act to a right of action to recover land include references to a right to enter into possession of the land, and references to the bringing of an action in respect of such a right of action include references to the making of such an entry”***

The Plaintiff/Respondents do not here seek a right to enter into possession of the disputed plot they are already in occupation. Rather they seek ownership by way of adverse possession.

Further more I am guided in my thinking by precedent which reveals that the High Court of Kenya has in past cases entertained and even allowed claims on the basis of adverse possession in cases where the claimants have been in occupation for well over 25 years. In the case of **Fatuma Ahmed and four others –vs- Hassam Teja and two others HCCC No. 96 of 2005** Hon. Justice D.K. Maraga allowed such a claim in the case of Plaintiffs who had been in occupation for upto fifty years! Likewise in the case of **Runya Munga Runya and six others –vs- Karibuni Holdings HCCC 260 of 2006** Hon. Justice L. Njagi granted ownership by way of adverse possession to Plaintiffs who had also been in occupation for upto fifty years. In neither case did the learned Judges find that the claims were limited by virtue of S. 7 of Cap 22. It is my considered opinion that the present suit is not an ***“action to recover land”*** under the meaning subscribed to this phrase by S. 7. I am satisfied that this suit is therefore not time-barred by S. 7 of Cap 22 and subsequently I find that this ground of the present application has no merit and must be dismissed.

The second ground of the Applicants Chamber Summons is that under O. 36 r 3D(2) of the Civil Procedure Rules the originating summons must contain a supporting affidavit to which a certified copy of the Title in question is annexed. Counsel for the Applicant raises the point that in this case whilst a copy of the Title was indeed annexed it was not a certified copy as required by O. 36 r 3D(2). This rule provides as follows:-

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

Mr. Sifuna for the Plaintiff/Respondent concedes that indeed the Certificate of Title attached to their supporting affidavit is not certified. He however argues that this was due to error or inadvertence on the part of counsel which error ought not be visited on the litigant. He further argues that this is merely a technical omission which the court on its own volition can rectify. With respect I do not agree. The suit is the Plaintiffs suit. To be sure he has engaged counsel to act on his behalf and to represent him in court but the suit at all times remains the property of the Plaintiff who has a responsibility to ensure that his pleadings are compliant with the relevant law. The term used in O. 36 r 3D(2) is “**shall**”. This makes the provision a mandatory one which this court cannot just gloss over or treat as a mere technicality. In the case of **Kweyu –vs- Omuto Civil Appeal No. 8 of 1990** the Court of Appeal in dismissing an appeal solely on the ground that no certified copy of Title was attached held on page 7 that:-

**“the appellant’s supporting affidavit to his originating summons did not have annexed to it a certified extract of the title to the parcel of land out of which the suit land was claimed ... It is for this reason only that I would dismiss the appellants appeal with costs to the respondent”.**

Likewise in the case of **Peter Mwashu and Another –vs- Javan Mwashu and 4 others HCCC 38 of 2004** Hon. Lady Justice Jeanne Gacheche held in dismissing an application for a restraining order that:-

**“..... the mere fact that they didn’t comply with the mandatory requirements of O36 r3D is an indication that their suit is a non-starter”.**

I find no reason to deviate from the above precedents. The provisions of O 36 r 3D are in my view mandatory and failure to adhere to the same renders this suit defective in law and a non-starter. Therefore on the basis of this crucial omission which I find fatal to the sustainability of this suit I allow the present application.

The third ground of the application seeking the striking out of this suit is that the Defendant/Applicant is a state corporation which cannot be sued under the Limitation of Actions Act Cap 22 Laws of Kenya. The Applicants present suit has been brought under the Limitation of Action Act Cap 22 Laws of Kenya. S2 of the said Act defines “**Government**” thus:-

**“The Government” includes corporations**

S. 41(a)(i) of the same Act provides that:-

**“41 This Act does not –**

**(a) enable a person to acquire any title to, any leasehold over –**

**(i) Government land or land otherwise enjoyed by the Government”**

Counsel for the Applicants argue that on the basis of S. 41 Cap 22 the Defendant NSSF cannot be subjected to a suit for adverse possession over any land which it owns as it is a body corporate which has been established under S. 2 of the State Corporations Act Cap 446 Laws of Kenya.

However once again I must with respect disagree with these submissions. Cap 22 defines the term corporation as –

**“the corporations” means Kenya Railways Corporation, the Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation”**

Furthermore S. 41 Cap 22 has given the list of state corporations to which that Act will **not** apply. The NSSF is not included therein. The land in question is registered under the Registration of Titles Act Cap

281 Laws of Kenya. S. 37 of Cap 32 provides:-

***“37. This Act applies to land registered under the Government Lands Act. The Registration of Titles Act, the Land Titles Act, or the Registered Land Act in the same manner and to the same extent as it applies to land not so registered ...”***

It is evident therefore that Cap 22 does and will apply to this parcel of land. Lastly and of equal importance is the fact that the NSSF Act Cap 258 does not define the NSSF as a state corporation. S. 3(1) of Cap 258 describes the NSSF as a “**Fund**”. S. 4(1) of the same Act provides for the setting up of a Board of Trustees for the NSSF. This Board is a body corporate which as in the terms of S. 4(1)

***“4(1) There shall be a board of trustees to be known as National Social Security Fund Board of Trustees which shall, by that name be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued and may purchase, hold, manage and dispose of movable and immovable property and inter into all such contracts as it may deem necessary or desirable and for the purposes of this Act ...”***

I therefore find that the NSSF is not in any way excluded from the provisions of Cap 22 and I hereby reject this ground of the present application.

Lastly counsel for the Applicants argue that the present suit cannot be sustained as the Defendant hold a Title issued under Cap 280 Laws of Kenya and as such are the absolute and indefeasible owners of the land in question. May I repeat at this juncture that the Plaintiff do not seek to challenge in any way the Defendant Title to the plot. They merely claim ownership by adverse possession. As such this argument is misconceived and cannot stand.

Finally based on the foregoing I find that the Originating Summons dated 24<sup>th</sup> April 2008 is defective due to failure to comply with O 36 r3D Civil Procedure Rules. As such and for this reason alone I hereby strike out this present suit. Costs in the cause.

**Dated and delivered at Mombasa this 6<sup>th</sup> day of August 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Welobah for Mr. Ochwe for Defendant/Applicant

No appearance by Plaintiff/Respondent

**M. ODERO**

**JUDGE**

**6.8.2009**

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**VERSUS**

**BOARD OF TRUSTEES**

**NATIONAL SOCIAL SECURITY FUND ..... DEFENDANT**

29/9/2009

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Ochwa – Applicant

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**COURT**

The Ruling in HCCC No. 109/2008 (OS) dated 6/8/2009 shall apply to HCCC No. 107/2008 (OS) and HCCC No. 103/2008 (OS).

**M. ODERO**

**JUDGE**

**29.9.2009**