REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 293 of 2009

SAFARIS UNLIMITED (AFRICA) LIMITED .....PLAINTIFF

VS.

MUCHANGA INVESTMENTS LIMITED.....DEFENDANT

RULING

The plaintiff herein brought this suit against the defendant by way of Originating Summons for declaratory orders as follows:

1. Declaration that the defendant holds and has held the property LR.3586/3 Langata, Nairobi in trust for the plaintiff pursuant to section 37 of the Limitation of Actions Act.

2. Declaration that the Plaintiff is entitled to be registered as the proprietor of the whole of the property comprised in and described by the title L.R.3586/3 under the Registration of Titles Act.

3. Declaration that any right of action of the Defendant for recovery of possession is barred under the Limitation of Actions Act.

4. Declaration that the Plaintiff is entitled to have the order extracted in these proceedings registered against the title L.R.3586/3 in accordance with the Limitation of Actions Act and the Registration of Titles Act.

The said declarations are premised on the questions raised for determination by the plaintiff inter alia:

1. That the plaintiff has been in continuous, open uninterrupted possession of the land comprised in and known as LR. NO.3586/3 adverse to the title of the defendant from1st May 1997 to 1st May 2009 without the defendant legally seeking, or filing suit for, recovery of possession or for eviction of the plaintiff.

2. That during all that period, the plaintiff was and to date continues to be in exclusive and public and continuous possession of the land and occupies and uses it exclusively for the furtherance of its objects, purposes and activities beneficial to the plaintiff without regard to the defendant's interests and title.

3. That the defendant has on 12th June 2009 sought to distrain for arrears of rent for the period 1st January 1994 to 31st May 2009 a period of 15 years and such distress for rent is barred by section 8 of the

Limitation of Actions Act as well as section 5 of the Distress for rent Act Chap.293 of the Laws of Kenya.

It is the plaintiff's case that in the absence of any grant, lease, demise or contract from the defendant to the plaintiff or between the plaintiff and the defendant there is no basis for the defendant to levy distress to demand rent or seek vacant possession, the defendant having become trustee for the plaintiff of the whole of the property comprised in and described by the title LR.3586/3 in terms of sections 37 and 38 of the Limitation of Actions Act and in accordance with section 75(6) (a) (vi) of the Constitution of Kenya and the plaintiff is entitled to be registered as the proprietor of the whole of the property comprised in and described by the title LR. 3586/3.

In effect, what the plaintiff seeks against the defendant is that it is entitled to the suit property by way of adverse possession.

The Originating Summons is supported by the affidavit sworn by Gordon Bernard Antony Church and two further affidavits, sworn by the same person and one Antony Howard Victor Church.

In reply thereto, the defendant has filed an affidavit sworn by Horatius Da Gama Rose and another by one Keith Howard Osmond.

Following the said documents filed by both counsel, the learned counsel for the defendant filed a notice of preliminary objection dated 1st July 2009 and court-stamped 2nd July, 2009. The said preliminary objection is based on the following grounds:

1. On the basis of the pleadings filed in the earlier suit High Court Misc. No.133/1998 (OS) and the judgment rendered in Civil Appeal No.25/2002 this suit is debarred by *res judicata* and issue estoppel.

2. On account of the admissions made by the applicant in correspondence with the respondent, the claim of adverse possession is frivolous and an abuse of the court process. By willful concealment of the correspondence the applicant obtained ex-parte orders which should be discharged.

3. This suit seeks to circumvent the judgment made by the Court of Appeal and/or to re-litigate the issues relating to inter alia the feigned adverse possession.

On that basis, the defendant/respondent prays that this suit and application be struck out and or dismissed in limine.

The plaintiff had earlier presented an ex-parte application by way of chamber summons which sought restraining orders against the defendant pending the hearing of the main application. The court granted the interim orders which remain in place to-date.

The Civil Procedure Act provides in **Section 7** as follows:

"***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

Explanation. (1) – The expression 'former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party

and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

Both learned counsel have filed written submissions followed by brief presentations after which they left the matter to the court to decide. There are also several authorities that have been cited by both sides which I have had occasion to peruse.

If a court were to decide that the matter is *res judicata,* it must lay down its hands because at that point it would have no jurisdiction whatsoever to go beyond that order. I have been referred to the history of this particular dispute which I have to address in respect of both sides.

There is on record HCCC No.133 of 1998 (OS). The plaintiff in that case is the plaintiff in this case. The plaintiff had sought extension of a caveat registered against the title of the suit property herein for reasons that it was a purchaser and that it had acquired the right to adverse possession.

The defendant then moved the court to strike out the Originating Summons and it would be noted at this stage that, the plaintiff's claim was raised and emphatically denied by the defendant. On an application by way of chamber summons, the defendant was restrained by the court. Eventually the striking out of the Originating Summons sought by the defendant was rejected. The defendant filed Civil Appeal No.25 of 2002 the judgment of which was rendered on 6th June 2009.

It is the defendant's case in the present case that, a finding was made on adverse possession specifically and that the plaintiff herein was found to be a tenant in possession and a tenant in possession cannot be in adverse possession.

Both counsel have taken the court through these proceedings and it is the plaintiff's case that in the earlier case what was sought was the extension of a caveat and not a claim for adverse possession.

I have related the facts as set out in both cases and the authorities cited by both counsel in this case. It is clear that, once a matter is in issue as set out under section 7 of the Civil Procedure Act aforesaid and, which is directly and substantially in issue in both cases and if a decision thereon is rendered, then the same cannot be raised in a subsequent suit.

The learned counsel for the plaintiff, Mr. Mwenesi, has submitted at length on the fact that the learned counsel for the defendant has raised the notice of preliminary objection prematurely because in the first place, he has not entered an appearance and in any case, the matters addressed in the objection belong to the province of evidence. I must observe at this stage that Mr. Ngatia, the learned counsel for the defendant has filed a notice of appointment which in my view is sufficient to address the matters before the court. In any case, nothing really turns on the said issue and no prejudice has been shown shall befall the plaintiff if audience is given to Mr. Ngatia at this stage.

In one of the most celebrated cases on preliminary objections, **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd. [1969] EA,** observations made by the learned judges therein are instructive. At page 700 Law J. A. had this to say:

"***So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or***

which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit."

At page 701, Sir Charles Newbold P. said the following:

"***The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion confuse the issues. This improper practice should stop."***

In yet another case which addresses the issue of jurisdiction, see **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1** Nyarangi JA, had this to say:

"***I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seased of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…… It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."***

The facts relating to this particular case appear in the material provided by both learned counsel but in particular HCCC No.133 of 1998 (OS) annexed to the affidavit of Horatious Da Gama Rose as annexture "HDGR 72" and also **Civil Appeal No.25 of 2002** cited by both parties.

In the said annexture "HDGR 72", there appears the record of HCCC No.133 of 1998 (OS) aforesaid. Prayer No. (b) of the amended Originating Summons appearing at page 127 of the said annextures reads as follows:

"***participate into an inquiry as the rights of the plaintiff on the said property LR. No.3586/3 the plaintiff being in adverse possession."***

The replying affidavit sworn by Horatius Da Gama Rose on 9th April 1998, specifically denied that the plaintiff therein was in adverse possession of the suit property.

The defendant in the said suit as observed earlier, moved to strike out the Originating Summons which was refused by the court. The defendant then lodged the said appeal and one of the grounds of appeal was framed as follows:

"***2. The learned judge erred in his evaluation of the evidence before him when he failed to find and hold that on the 1st respondent's own admission, the 1st respondent occupied the suit premises as a tenant of the appellant and it could not in the circumstances claim that it is entitled to the suit premises by reason of adverse possession."***

It is instructive that, the learned judges of appeal, following the appeal filed by the defendant against the half a page ruling, went ahead to consider the issues exhaustively in a 25-page judgment. I wish to observe that, the issue of adverse possession was an issue in the original suit and, with respect, the learned judges correctly addressed the same conclusively in the said appeal. In particular, they observed that, the respondent was in fact a tenant in possession and that a tenant in possession cannot be said to be in adverse possession.

To re-inforce the said finding, the learned judges said as follows:

"***On the basis of the letters of admission, we think that Mr. Church and by extension his company were tenants and tenant in possession has no adverse possession. Time cannot run in their favour until the tenancy is terminated. The situation of the tenant as far as adverse possession is concerned is similar to that of a licensee and we therefore re echo the decision of this court cited by the learned counsel for the appellant namely the case of Wambo vs. Njuguna [1983] KLR 172 at Holding 4 where the court held:***

"***Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."***

The position of the plaintiff then and now has not changed. The tenancy has not been determined and no time has run in its favour. If anything, in the course of the proceedings leading to Civil Appeal No.25 of 2002 aforesaid, any time in favour of the plaintiff stopped to run. See **Civil Appeal No. 231 of 1999, Njuguna Ndatho v. Masai Itumo and Others**. The Plaintiff cannot take advantage of the time the case was pending determination.

It is my finding that, that being the case, **section 7** of the **Civil Procedure Act** applies and therefore the plaintiff cannot at this stage plead and canvass the said issue in this fresh suit. The doctrine of estoppel accordingly also applies. That in my view also falls within the cited authority of **Mukisa Biscuit** in that, it disposes off the whole suit because that is the substratum of the present suit. I say so because, the levying of distress apart from being a secondary issue, can be pursued by the plaintiff in a totally different action.

The next question that arises is whether or not the court can determine this suit at this stage. Again, I find support in the same **Civil appeal No.25 of 2002** aforesaid. The learned judges had this to say:

"***A court of law would not be entitled in our view to abdicate its cardinal role of making a determination……. In our view, the often quoted principle that a party should have its day in court should not be taken literally. It should have its day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of administration of justice."***

The learned judges then cited the case of **Ashmore v. Corp of Lloyds [1992] 2 All ER 486** and **Saleh Mohammed Mohammed vs. P. H. Saldanha 3 Kenya Supreme Court (Mombasa) Civil Case No.243 of 1953 (UR)**.

The learned judges also addressed the issue of abuse of court process. It is true that the plaintiff herein at the first instance when ex-parte orders were obtained, did not disclose that there was a tenancy relationship between the parties. In the **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd.** case aforesaid, Nyarangi, JA quoted the case of **Andria (Basso), [1984] 1 QB 477 at page 491** stating:

"***It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the exparte application, even though the facts were such that, with full disclosure, an order would have been justified."***

I am constrained to reiterate what the learned judges said in **Civil Appeal No.25 of 2002** to the effect that:

"***The 1st respondent and Mr. Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting originating summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process."***

The observation by the learned judges was prompted by the fact that Mr. Church had admitted that his occupation or possession of the suit property was based on a tenancy but still used the 1st respondent company to claim purchaser's interest and also claim as an adverse possessor.

In the same Civil Appeal, the learned judges cited the Nigerian Case of Karibu **Whytie J Sc in Sarak v. Kotoye [1992] 9 NWLR 9 pt 264 at 188 – 189 (e)** where it was stated as follows:

"***The concept of abuse of judicial process is imprecise, it implied circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice…"***

In the present pleadings, there is no doubt whatsoever that it is the repetition of the same claim that has been adjudicated upon. One would be excused to conclude that **HCCC No.133 of 1998 (OS**) having taken so many years before it was laid to rest on 6th June 2009 by the judgment in **Civil Appeal No.25 of 2002**, the plaintiff still hopes that the fresh case would take the same course. This indeed would amount to an abuse of the court process.

Having said so, I have come to the conclusion that the preliminary objection must succeed. It goes to the root, spirit and the intention of these pleadings. I have asked myself what remains of the pleadings before me. I know it is a drastic step to take, but a drastic step must be taken to save judicial time and cost of litigation. The suit before me must therefore be struck out for being *res judicata* and an abuse of judicial process.

It follows that the interim orders obtained by the plaintiff in this matter on 22nd June, 2009, must be discharged. The defendant shall have the costs of this suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this **23rd day** of **September, 2009**.

A. MBOGHOLI MSAGHA

JUDGE