



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE 95 OF 1994

SIRIKWA MULTIPURPOSE & ANOTHERPLAINTIFF

V E R S U S

SIMON K. CHOGE DEFENDANT

R U L I N G

In his application dated 11th May, 2009 the defendant/applicant is seeking orders that the entire suit herein be struck out for being Res Judicata, time barred and an abuse of this Honourable Court's due process. The application is supported by the applicant's affidavit sworn on 11th May, 2009.

Mr. Abok learned counsel for the applicant submitted that the suit herein is time barred and that the issues raised in the suit have been litigated in Nairobi Civil Appeal No.139 of 1989. The same issues were also litigated in Civil Case No. Kakamega 4357 of 1988. The Court of Appeal case was as a result of the decision made by the Kakamega High Court. The main issues in both cases were in respect of ownership of land and the suit was brought by way of adverse possession.

The applicant's counsel referred this court to the judgements of Justice Cockar, Justice Omolo and Justice Gachuhi, Judges of the Court of Appeal. Counsel contended that the Court of Appeal found that the applicant had been in possession of the suit land since 1972 and that at no given time had the plaintiff been in possession of the property. Counsel also urged the court to strike out the replying affidavit for having been filed and served out of time and that it does not reveal the source of the information. Counsel relied on the Authority of Eldoret **HCCC No.35 of 2005 TITUS GATITU NJAU -VS- MUNICIPAL COUNCIL OF ELDORET, NRB (MILIMANI) HCCC NO.239 OF 2006; BENJAMIN OLE TINA -VS- NATIONAL BANK OF KENYA LTD. and MACHAKOS HCCC NO.19 OF 2006; INVESCO ASSURANCE CO. LTD. & ANOTHER -VS- JACINTA KOKI MUSUMBI & 29 OTHERS.** Counsel argued that the plaintiff's suit is an abuse of the court process as it seeks to reopen the same case.

Mr. Kiveu, learned counsel for the plaintiff/respondent objected to the application. Counsel submitted that the plaintiff had by an application dated 20th April, 2009 sought to amend the plaint. He contended that the suit is not Res-judicata because the case has not been heard and determined on merit. The issues before the High Court and the Court of Appeal were both technical and procedural. The suit for adverse possession had been initiated by way of plaint and the court of Appeal held that it ought to have been initiated by way of originating summons. The issue of ownership was not determined.

The plaintiff's counsel further contended that **section 26** of the Limitation of Actions Act, Cap 22, states that in case of mistake or fraud, time shall start running from the time of discovery of the mistake or fraud.

Before dealing with the plaintiff's application for injunction and leave to amend the plaint, it would be better to deal with the defendant's application first. The main issues for determination is whether the suit is time barred, res judicata and an abuse of the court process. All the above issues can be dealt with together as they all emanate from the fact that the issues herein have been already litigated upon between the parties. **Section 7** of the Civil Procedure Code provides as follows:-

7. 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 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.

It is unfortunate that none of the parties was kind enough to annex the pleadings in **HCCC NO.4357 OF 1988**. My understanding of that suit as from the Ruling of Justice Akiwumi (as he then was) and the Court of Appeal judgements of Justice Cockar, Omolo and Gachuhi is that the plaintiffs herein were also the plaintiffs in that suit. They instituted their suit by way of a plaint and were claiming adverse possession of the same property as in this suit. Other than the plaint, the plaintiffs filed an application for injunction that was granted ex-parte by Justice Rauf (as he then was) as the defendant's Advocate failed to attend court on 18th April 1989 when the application for injunction was heard.

The applicant herein filed an application to have the plaintiff's suit struck out for disclosing no reasonable cause of action on the grounds that the applicant was in possession of the land and that the plaintiff's suit had been instituted by way of a plaint. This application was argued before Justice Akiwumi and on 22nd May 1989 he delivered a ruling whereby he declined to strike out the plaintiff's suit but did set aside the injunctive orders issued by Justice Rauf. Both parties appealed to the Court of Appeal this being Civil appeal No.133 of 1989.

The Court of Appeal did strike out the plaint for the reasons that a claim for ownership by way of adverse possession ought to have been instituted by way of an originating motion and not a plaint. The suit was also struck out as it did not comply with **Order 1 rule 8** of the Civil Procedure Rules as it was a representative suit yet the 347 other beneficiaries were not named. Further, the suit was struck out as it did not show any cause of action on the claim that the applicant was holding the property in trust for the plaintiffs. The Court of Appeal held that the plaintiff had violated the provisions of **Order 36 Rule 3D (2)**. It also further held that a claim for adverse possession could not be maintained while the defendant was in possession and without defining the portions the appellants (current plaintiffs) were claiming to be in exclusive possession (see judgement of Justice J.M. Gachuhi J.A.) consequently, the decision of Justice Akiwumi not to strike out the plaint was set aside and the Court of Appeal struck out the plaint.

Coming to the current suit, the plaint herein was filed on 21st February, 1994. The plaintiffs are contending that the defendant committed fraud by having himself registered on the suit property. The plaintiffs intend to amend the plaint and claim that indeed the plaintiff is the registered owner of the suit property namely L. R. No.8915 (I.R 12019) measuring 127 hectares or thereabout and L.R. No.2187 (I.R 51154) measuring 1,552 acres or thereabout. They have exhibited titles which they claim to have been issued to them in 1987 and 1999 respectively. The Plaintiff would like to have the defendant evicted from the two properties and also pay mesne profits from 1972 to-date.

Have the issues in the current suit been litigated upon in the former suits? It is my finding that the issues have not been litigated upon between the parties in the previous suit. In the former suit the Court of Appeal struck out the Plaint as the Plaintiff's claim was for adverse possession, yet the suit was instituted by way of a plaint instead of Originating motion. This contravened **Order 36 Rule 3D (2)**. Further, the Court of Appeal struck out the plaintiffs' suit as they were claiming adverse possession yet the defendant was in occupation.

In the current suit the plaintiff is pleading fraud and that he has now discovered that he is the owner of the property, that is if the plaint is amended and would like to be paid mesne profits.

It is therefore my finding that the claim herein is not Res-judicata or time barred neither is it an abuse of the court process.

The court notes that in compliance with **Order XIV** parties herein agreed on the issues to be determined by this court. A list of statement of issues signed by their counsels for both parties was filed in court on 22nd July 1994. A total of 17 issues have been agreed upon and the same include the issue whether the plaintiff's suit is Res-judicata (issue No.15) or whether it is barred by limitation (issue No.16). It therefore follows that this court will have to try and make a finding on all the agreed issues as provided under **Order XIV rule 6** and **7**.

Turning to the plaintiff's application dated 20th April 2009, the orders being sought are to amend the plaint and an order of temporary injunction to restrain the respondent from alienating, disposing and/or wasting the suit properties, i.e. L.R. NOS.8915 and 2187 pending the hearing and determination of the suit. The application is supported by the affidavit of Daniel Mulinya Omolo sworn on 20th April, 2009.

Mr. Kiveu, counsel for the applicants contended that initially the plaintiffs thought that the properties were registered in the defendant's names. The plaintiff has now discovered that indeed the properties are registered in the plaintiff's name and annexed two copies of titles as proof of that allegation. The intended amendment will result to a claim for mesne profits and a prayer for eviction. Counsel relied on the case of **PHILIPS, HARRISON & CROSFIELD LTD. -VS- KASSAM (1982) KLR 458**. Counsel further submitted that **Order 6 (a) rule 3** allows court to permit amendment of pleadings time notwithstanding.

Mr. Abok, counsel for the respondent opposed the application. He relied on the affidavit of the respondent sworn on 11th May, 2009. Counsel submitted that the defendant is the duly registered owner of the suit properties. The respondent in his replying affidavit exhibited title deeds showing that the properties were transferred to the defendant on 31/5/1972 after paying KShs.807,820/=. The land was to be held for a term of 999 years with effect from 1/10/1919. Counsel disputed the plaintiff's allegation that it is the registered proprietor of the suit properties.

For this court to grant the restraining orders against the defendant as requested by the plaintiff, the plaintiff has to establish a prima facie case with a probability of success as well as showing that if the orders are not granted then the plaintiff will suffer irreparable damage not capable of being compensated by way of damages.

It is unfortunate that there are two separate series of title deeds for the same properties. In the earlier case No.4357 of 1988, the defendant was able to establish that he is the registered owner of the suit properties. Indeed the plaintiff's claim was that the defendant had had himself registered as the proprietor in total exclusion of the plaintiff. One of the prayers being sought in the current suit is a declaration that the defendant is registered and holds the pieces of land known as LR NOs8912/2 and 2187 Kitale as trustee for the benefit of himself and the plaintiffs jointly and in equal shares. The applicant is now contending that it has discovered that the defendant is not the registered owner of the suit properties. The amendment of the Plaint will only be done if this court allows the same.

I am not satisfied that the plaintiff has established a prima-facie case against the defendant. The defendant is already in occupation and granting restraining orders will cause inconvenience to the defendant. The plaintiff would like to have the defendant evicted from the properties and this proves the fact that the defendant is already in occupation.

On the second limb of the application for leave to amend, I do note that it has taken almost fifteen (15) years since the plaint was filed for the request to be made. However, I do not find any prejudice that would befall the defendant. It is only fair to allow the plaintiff to introduce its newly found status as the registered owner of the suit properties. For the interest of both parties, it would be advisable to have the

suit set down for hearing such that all issues are determined between them once and for all.

In the end, I do allow the plaintiff to amend the plaint. The Amended plaint to be filed and served within Fourteen (14) days from the date of delivery of this ruling. The prayer for injunction is hereby dismissed. Each party shall meet its own costs for both applications.

Delivered, Dated and Signed at Kakamega this 15th day of October, 2009

SAID J. CHITEMBWE

J U D G E