



1.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 720 of 2005

2. 1. Land & Enumerate Law Division

Subject of main suit: a) Land

b) Adverse possession

LR Limuru/Kamirithu/7.581

LR Limuru/Kamirithu/7.612

c) Land originally Trust Land Under the native Land Trust Land Board with effect from 23 March 1959.

d) Land Title LR Limuru/Kamirithu/T.581

LR Limuru/Kamirithu/T.612 issued to defendant.

Robert Njiriri Mukoma ID 07131 759/63

e) Files suit in subordinate court at Kamirithu

No.533/92 for eviction of 4 persons living on land and not party to suit.

f) 16 plaintiff file Originating Summons for adverse possession

g) Injunction applications 13.6.2005 to restrain defendant from evicting them dismissed Ojwang J (3.2.06) mentions affidavit on Originating Summons defective.

h) Defendant files application to serve out Originating Summons.

3. Application 19 October 2006

a) That Originating Summons be struck out

b) An abuse of the process of the court

4. In reply by plaintiff/respondent.

That on 29.10.07 leave was granted by court, Onyancha J to file fresh affidavit of service

5. Held

a) Once an order of the court has been given, it stands and has the force of law unless removed by way of appeal or setting aside.

b) There has been no appeal nor application to set aside orders. The application of 19 October 2006 has been overtaken by the application of 18 April 2007.

6. Case law

Gladwell Mantu Githumbi

V

Jane Muthoni Munge & Others

Hcc1319/06, Ang'awa J.

Ruling on preliminary objection 14.2.08

7. Statute

Order 18 & 5 Civil Procedure Rules

8. Advocate

a) Mbugua Muthoni instructed by Kituo cha Sheria for Respondent/Plaintiff

b) D.N instructed by Timan Man Njugi & Co Advocate

RICHARD NJUGUNA WAWERU & 15 OTHERS PLAINTIFF

VERSUS

ROBERT NJIRIRI MUKOMA DEFENDANT

RULING NO 2

I: APPLICATION DATED 19TH OCTOBER 2007 SEEKING ORDERS TO STRIKE OUT THE ORIGINALLY SUMMONS

A) Back ground of application

1. The original main suit seeks this courts orders for adverse possession by sixteen plaintiffs. For over 40 years the plaintiffs claim that they had been in possession of this parcels of Land LR

2. These two parcels of land were originally in the name of the native Land Trust Board and registration made on 23 March 1959. The titles were then transferred to Robert Njiriri Mukoma, the defendant herein (1D 07131759/63) on the 10 August 1982. He proceeded to Kiambu Resident Magistrates court and filed a suit being RM533/92 against 4 persons living on the said price of land and there obtained orders of eviction. There was, I am informed by the applicant no appeal to the suit. None of the 16 persons were party to that suit but fearing that they too may be evicted they filed this High Court case by way of an originating summons and prayed that an injunction may issue against the defendant from evicting them by application dated 13 June 2005

3. This application for injunction came before my brother Ojwang J who dismissed the application on grounds that no loss suffered was demonstrated if an injunction is not amended. Their remedy laid in compensation by an award of damages. (Decision ruling of 3.2.06).

4. In his obiter dictum the Hon Judge commented that he noted the plaintiffs application was defective in form on their supporting affidavit.

That this affidavit was sworn "collectively and in chorus.". Namely there were 3 persons, who deponed an affidavit in preliminary/second person and not in the first person singular.

5. The defendant/applicant filed this application dated 19 October 2007 seeking orders that the said Originating Summons be struck out as being an abuse of the process of court.

6. The plaintiff/applicant though had filed an earlier application dated the 18 April 2007 in which they sought prayers to file fresh affidavits to the Originating Summons. Ojwang J was correct in stating that their affidavit was defective. He in fact was referring to order XVIII r 5 Civil Procedure Rules.

7. On the 16.10.2007 the plaintiff appeared before my brother Onyancha J and did so in the absence of the defendants who failed to appear to court. The application was granted to file fresh affidavits to court.

8. It was then on 19.10.07 that this application was filed.

B) APPLICATION 19.10.07

9. The advocate for the defendant/applicant prayed that the suit be struck out due to this defect.

10. In reply the plaintiffs respondent stated leave had been granted to file the fresh affidavit to the said application.

C) OPINION

11. It is unclear whether the defendant/applicant was aware of the orders by Onyancha J of 16.10.07. If he was, he would not have filed the application of 19.1.07, three days later as this certainly amounts to an abuse of the court process.

12. I did state in the case of Gladwell Wambui Githimbi v Jane Muthoni Munge & 2 Others Hccc1319/06 In a Preliminary Objection ruling of 14.2.08 that where a judge or magistrate makes an order or enter judgment it has a force of law. It cannot be changed unless it is appealed against or it is set aside by an order of the court. It is immaterial that the decision of the court is incorrect it is an order or judgment unless otherwise removed by an act of law.

13. The applicant/plaintiff have been given leave to effect file the said affidavit afresh. These are orders of the court by another judge which I am not able to interfere with.

14. The said application of 19 October 2007 is hereby dismissed with costs to the plaintiffs/applicant.

Dated this 14 day of February 2008 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Mbugua of Mbugua Mureithi & Co. Advocates for the plaintiff/Respondent – present

D.N. Gichuru of Timan Njugi & Co. Advocates for the defendant/applicant - present