



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1357 of 2004 (OS)

JOYCE GATHONI KIARIE.....PLAINTIFF/RESPONDENT

VERSUS

NAOMI KABORO MUNGAI.....DEFENDANT/APPLICANT

AND

SAMUEL MWIKA KIARIE.....THIRD PARTY/RESPONDENT

RULING

By chamber summons dated 06.11.07 stated to be brought under Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap.21, the defendant/applicant applied for the following orders:-

1. That the plaintiff's pleadings be struck out with costs to the defendant.
2. That the costs of this application be provided for.

The grounds upon which the application is based are:-

- a) That the pleadings are fatally defective as drawn, taken out and filed.
- b) That the plaintiff has not had peaceable occupation of the subject land as expressed in her pleadings.
- c) That the plaintiff's interest in the suit land is tainted with that of a purchaser, but which position has expressly been negated by the third party.
- d) That in view of the above, the same are an abuse of process for being grossly in conflict with the appropriate provisions of law.
- e) That in the interests of justice this honourable court ought to find in favour of the plaintiff (*sic*)

The application is supported by the affidavit of Njugi B.

Gachogu, Advocate sworn on 06.11.07.

At the hearing of the application, the defendant/applicant was represented by learned counsel, Mr C.K. Maina while the plaintiff/respondent was represented by learned counsel, Mr P.M. Wamae.

The defendant's/applicant's case is essentially that the plaintiff/respondent cannot invoke the process of adverse possession because she has not been enjoying peaceful and uninterrupted occupation of the suit premises.

On the other hand, the plaintiff's/respondent's counsel opposed the application. He relied on grounds of opposition dated 21.11.07. The plaintiff's/respondent's position is essentially that the suit herein was brought by way of originating summons dated 14.12.04; that pursuant to Order XXXVI rule 8A of the Civil Procedure Rules, the parties appeared before Njagi, J on 27.03.06 and by consent took directions that the originating summons be heard by way of *viva voce* evidence; that by virtue of the parties' participation in the taking of the above directions, they should be deemed to have admitted that the originating summons was properly on record; and that if the defendant/applicant subsequently wished to depart from the directions given, she should have applied for review of the order for directions, which she did not do.

I have given due consideration to the application and opposition thereto.

The court record shows that on 27.03.06 the parties appeared before Njagi, J who indeed gave directions as indicated by plaintiff's/respondent's counsel above. The Judge also dispensed with the joinder of the interested party. The directions given on 27.03.06 on the mode of proceeding with this matter are still in place and I am of the view that as long as the said orders subsist, the next step in this matter is for substantive hearing of the originating summons to be embarked upon. Whether or not the plaintiff has had peaceful occupation of the suit land and for the requisite period is a matter of evidence for the trial. In the premise, the chamber summons application dated 06.11.07 constitutes an unwarranted interruption and the same is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 14th day of April, 2008.

B.P. KUBO

JUDGE