



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 77 of 2006

KILUNDO MULULUI.....PLAINTIFF

VERSUS

WAMBUA WAA.....DEFENDANT

RULING

1. This matter has already had a number of applications coming before court. The application now before court is the plaintiff's application dated 26/06/2007. The application is expressed to be brought under Order 39 Rules 1, 2 and 2A(2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law by which the applicant seeks **ORDERS:-**

- (a) ***THAT, this application be certified as urgent and be heard in the 1st instance.***
- (b) ***THAT, the Defendant/Respondent herein be committed to Civil jail for such period as would be deemed necessary by this Honourable Court for being in contempt of court by disobeying and breaching the court order granted on the 26th day of January, 2007.***
- (c) ***THAT, the Officer Commanding the Machakos Police Station do enforce the orders granted by this Honourable Court on 26th day of January, 2007.***
- (d) ***THAT, the Respondent be condemned to pay the costs of this application.***

2. The applicant alleges that the respondent is in contempt of this court's orders dated 26/01/2007 in that he has entered the suit land, ploughed it and gone ahead to harvest the applicant's mango fruits and planted crops in blatant breach of this court's orders. The application is supported by the sworn affidavit of **Kilundo Mulului** dated 26/06/2007.

3. On the 21/11/2007, however and before the application could be heard, the respondent filed Notice of Preliminary Objection to the application calling on the court to strike out both the application and the main suit on the grounds that:?

- (a) ***The plaintiff's suit/claim which is based on alleged adverse possession is competent, bad in law and an abuse of this Honourable Court's process. The suit CANNOT be entertained by this Honourable Court and ought to be struck off with costs.***
- (b) ***The application dated 26/6/2006, whose basis is the said incompetent suit, is itself***

incompetent and must be struck off as well.

(c) *The plaintiff's suit is, in the alternative, statute-barred, and must be struck off along with all the interlocutory proceedings thereon based.*

4. The Preliminary Objection was canvassed before me on 21/11/2007 during which Mrs. Nzei appeared for the defendant/Objector and urged the court to find that under Section 38(1) of the Law of Limitations Act, Cap 22, any person claiming adverse possession of land had to apply to the High Court to be registered as an adverse possessor in accordance with the provisions of Order 36 Rule 3D of the Civil Procedure Rules. The relevant provision requires that a claim in adverse possession must be commenced by an Originating Summons supported by affidavit and not by way of plaint as in the instant case. She urged the court to find and to hold that the plaintiff's suit is so fatally defective that it is incapable of redemption by way of amendment. Mrs. Nzei relied on the Court of Appeal decision in **Civil Appeal No. 38 of 2000 – Bilha Kanyi w/o Geoffrey Gathungu and Kabuchwa Gathungu**.

5. In the instant case the Plaintiff Kilundo Mulului filed plaint on 17/08/2000 seeking judgment against the defendant for orders that:?

(a) *One third of all the parcel of land registered in the names of the Defendant, Mwiluli Waa and Wambua Waa declared the property of the Plaintiff and the register accordingly amend which land is known as Muthetheni/Nyaa/423 and/or in the alternative.(sic)*

(b) *1/3 of the Plot parcel known as Muthetheni/Nyaani/423 be declared the property of the Plaintiff by adverse possession.*

(c) *Any other relief as the court may deem just and fair to award as the circumstances of the case shall demand.*

(d) *Costs and interests of this case.*

6. The plaintiff averred that he had bought the parcel of land known as Muthetheni/Nyaani/423 from the defendant in or about the 27th day of January 1981 and that on the 22nd day of October 1982, the parties entered into a written agreement when the balance of the purchase price was paid to the Defendant bringing the total purchase price paid to Kshs.8,500/=. That since then, the plaintiff took possession of the land and has remained in quiet and uninterrupted occupation of a third of the said parcel of land. The plaintiff said at paragraph 9 of the plaint:?

“9. The plaintiff has consequently come to court to have the said plot parcel declared the property of the plaintiff by way of purchase and/or adverse possession.”

7. I believe that it is this averment at paragraph 9 of the plaint that led to the plaintiff asking the court to enter judgment against the defendant declaring that ***“1/3 of the plot parcel known as Muthetheni/Nyaani/423 be declared the property of the plaintiff by adverse possession.”***

8. It is also because of the above reason that Mrs. Nzei urged the court to strike out the plaintiff's claim for adverse possession on grounds that the same has been brought to court under the wrong procedure. She also contended that since the application dated 26/06/2007 was premised on a fatally defective suit, the application should also be struck out.

9. Mrs. Nzei also contended that should the court find that some element of the plaintiff's suit is not based on a claim in adverse possession, then the court should find that such a claim is statute barred. Relying on Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, she contended that the plaintiff's suit is not sustainable for reason that the same was filed far beyond the 12 years when the cause of action arose, which dates are given as 22/10/1982 and 27/01/1981.

9. Miss Kitua for the plaintiff/respondent opposed the application and submitted that as much as counsel

for the defendant/objector would want the court to believe, the suit herein is not based on adverse possession *per se*. My understanding of this line of contention is that the suit is partly based on a claim in adverse possession and on something else, namely a direct purchase, and Miss Kitua argued further that since the prayer for adverse possession is only in the alternative, the suit is properly before court. Miss Kitua urged the court to disallow the objection and to let the matter be heard and determined on the merits. Miss Kitua further submitted that the case of **Bilha Kanyi** (above) relied upon by the objector was clearly distinguishable for the reason that the plaintiff in that case had based her claim solely on adverse possession of a title registered under the Registered Land Act (RLA).

10. That case however dealt with the treble issues of *res judicata*, **Limitation of Actions and review of orders**. The holding which Mrs. Nzei sought to rely on is the ruling of the superior court with which the learned judges of appeal did not agree, and which they set aside; although the law is clear that claims for adverse possession ought to be commenced by way of Originating Summons under the provisions of Order 36 Rule 3D of the Civil Procedure Rules.

11. On whether or not the plaintiff's suit herein is time barred, Miss Kitua contended that the Cause of Action arose only in August 2006 when the defendant/objector threatened the plaintiff with eviction. However, Miss Kitua did not support her arguments with any authority. According to **BLACK'S LAW DICTIONARY** (English Edition) adverse possession is defined as:?

“The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious over a specified period of time”

While HALISBURY'S LAWS OF ENGLAND, Fourth Edition, Vol. 28 at paragraph 768 defines adverse possession and gives the effect thereof in the following words :?

“No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. Such possession is called adverse possession. What constitutes such possession is a question of fact and degree; there is no general principle that, to establish possession of an area of land, the claimant must show that he made physical use of the whole of it. ---- where a right of action to recover land is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action is not deemed to accrue unless and until adverse possession of the land is taken. Time can therefore not begin to run unless and until the true owner ceases to be in possession of his land.”

12. According to the same authority at paragraph 769, ***“the true fact whether a rightful owner has been dispossessed or not is whether an action for possession of the land will lie at his suit against some other person”***, and that ***“to constitute a dispossession. Acts must have been done which were inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, and with intention of establishing dominion and not merely with the intention of using the land until prevented from doing so.”***

13. A careful look at the plaint in the instant suit does suggest to me that infact the plaintiff's prayer for adverse possession is misplaced because his claim is based on a direct purchase of land from the defendant as the same does not fit in with the definitions hereinabove given. That now raises the question whether the plaintiff can successfully prosecute his claim against the defendant on a transaction which he allegedly entered into either in 1981 or 1982. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right of action arose. In this case, the plaintiff filed suit some 25 years from the date of the cause of action. Such a claim cannot stand.

16. In the circumstances, I am satisfied that the defendant's objection on this point succeeds. Accordingly, the plaintiff's suit together with the plaintiff's application dated 21/02/2007 filed under Certificate of Urgency on 22/02/2007 are hereby struck out with costs to the defendant.

Orders accordingly.

Dated and delivered at Machakos this 29th day of May 2008.

R.N. SITATI

JUDGE

Delivered by Lenaola J in the presence of:?

Mrs. Nzei for Applicant

Mr. Mung'atta for Respondent

I. LENAOLA

JUDGE