



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 522 of 2004

RAVJI PROPERTIES LIMITED

SEEMA PROPERTIES LIMITED

KRUSHIL PROPERTIES LIMITED.....PLAINTIFFS RESPONDENTS

-versus-

JOSHUA ONYANGO ANGUKA

JIMMY OKOTH OTIENO.....

.....DEFENDANTS

AND

LAWRENCE GITHINJI & 20 OTHERS....OBJECTORS

APPLICANTS

R U L I N G

The Chamber Summons before me dated 23rd October 2008 was filed by objectors in objection proceedings against execution of the judgment dated 4th June 2007, in this suit. In re-action to the Chamber Summons, the judgment creditors filed a preliminary objection dated 13th November 2008. I have heard the Chamber Summons together with the Preliminary Objection.

Briefly, the position is that the objectors to the execution are saying they have constructed houses on the suit piece of land which houses are either being demolished or are in danger of being demolished in execution of the aforementioned judgment, which the judgment creditors, obtained against the judgment debtor in this suit.

In the Chamber summons dated 23rd October 2008 before me therefore, while the judgment creditors are the Respondents, the judgment Debtors are not a party.

The suit between the Plaintiffs and the Defendants was based upon an agreement in writing entered into between the Plaintiffs on the one hand and the Defendants on the other. Following that transaction, the

Plaintiffs became registered as owners of the suit piece of land apparently under the Registration of Titles Act and the parcels in question therein were known as L.R. No. 209/11254; L.R. No.209/11255 and L.R. No.209/11256.

But the Plaintiffs could not thereafter get possession and as a result filed this suit to gain possession and to permanently restrain the Defendants, servants and/or agents from interfering with the Plaintiffs' peaceful possession thereof.

In the judgment dated 4th June, 2007, Lady Justice K. H. Rawal having found

“that the three plaintiffs are the absolute and indefeasible owners of pieces of land bearing L.R. No.209/11254, L.R. No.209/11255 and L.R. No. 209/11256 respectively”

and that

“The Defendants who are on the said lands have no colour of right to occupy the same and are trespassing on those pieces of land,”

the learned Judge did “allow the plaint” and ordered

“that the Defendants by themselves or their agents or representatives are injuncted permanently from interfering with peaceful possession of the Plaintiffs and/or from interfering with the parcels of land known as L.R. No.209/11254, L.R. No.2009/11255, L.R. No.209/11256.”

She went on to say:

“I further order that the Defendants do vacate the said parcels of land and, in the event of any resistance, the police officers manning Embakasi Police Station to assist the Plaintiffs in evicting and/or removing the Defendants from parcels of land bearing L.R. No. 209/11254, L.R. No.209/11255, L.R. No.209/11256.”

The Judge had noted at the beginning of the judgment that the suit had been fixed for hearing under Order IX B Rule 1 of the Civil Procedure Rules because the Defendants had not cared to enter appearance or file defence. The remarks must have been made because summons to enter appearance and the plaint had been served.

Since the objectors in this Chamber Summons dated 23rd October 2008 are claiming interest in the suit piece of land through the Defendants in this suit, the said Objectors are, to my mind, covered by the judgment dated 4th June 2007 and having failed to join in the suit as party/parties before the suit was heard and determined, they ought not expect me give them the orders they are now asking for because if I do so, that will clearly be contradicting the judgment herein dated 4th June 2007, an event which ought not happen. I should not be saying as the Objectors want me to say, through this Chamber Summons, that the suit piece of land belongs to the Objectors.

Otherwise the Objectors better note what Mr. Mugambi, learned Counsel for the Judgment Creditors, said during the hearing of this Chamber Summons and his Preliminary Objection, to the effect, first, that Rule 12 of Order I of the Civil Procedure Rules deals with parties in a suit. It does not include an Objector. Hence Lawrence Githinji purporting to have authority under that Rule to swear affidavit on behalf of Co-objectors is misconceived even if he filed authority purported to be from Objectors 2 to 21.

Secondly, Order XXXVI Rule 3D of the Civil Procedure Rules. This Chamber Summons alleges that the Objectors have a proprietary interest in the suit land because they have acquired the land by virtue of Adverse Possession. But they have not shown by way of evidence the court's determination to that effect. Order XXI Rule 53 says that any person who has a legal or equitable right is the one entitled to make the objection. Thus the basis of the Objector's claim should have been declared by the court so that

the said objector raises the objection when he already has a legal right or equitable right.

In this Chamber Summons the Applicants are asking this court now to determine that the Objectors have adverse possession.

Moreover, even if that were to be done, it has to be by way of originating summons under Order XXXVI Rule 3D and not by way of Chamber Summons as they are doing now.

From his list of authorities Mr. Mugambi relied on the first case C.A. 262/98 Patrick A. Odako & Another –vs- William N. Kirew before a three Judge bench where emphasis is that a claim for adverse possession must be by way of an originating summons.

See last paragraph on page 1 and move to top page 2. The issue is settled and it is an issue of jurisdiction. There are other case authorities supporting the same position.

They add that such a claim cannot be raised as a counterclaim or as a defence in a suit by way of a plaint. Several other cases have dealt with same point in same way.

It means therefore that a claim based on adverse possession should not be made in objection proceedings which specifically provide under Rule 57 of Order XXI that the objection be by way of Chamber Summons. The law is deliberate mentioning Chamber Summons in order to avoid adverse possession claims in objection proceedings.

Lastly, the Objectors say they are strangers to the proceedings. The suit was filed against two Defendants by way of plaint. Service was by way of advertisement in three dailies; namely:

The Daily Nation.

The Standard

and

Taifa Leo

The proprietary interest the Objectors are claiming must be the one based on adverse possession. Otherwise, they would have brought other evidence to prove their claimed proprietary interest.

On the basis of all that has been stated above therefore, the Preliminary Objection dated 13th November 2008 is hereby upheld while the Chamber Summons dated 23rd October 2008 is dismissed. The Objectors who filed the aforesaid Chamber Summons to pay to the Judgment Creditors/Plaintiffs costs of objection proceedings.

Dated at Nairobi this 28th day of November 2008.

J. M. KHAMONI

JUDGE

Present:

M/s Cherugumi for the Objectors

Mr. Mugambi for the Plaintiffs/Respondents

Court Clerk - Kabiru