



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KITALE
CIVIL SUIT. 89(OS) OF 2005

DANIEL MBATHA MWANIKAPLAINTIFF

VERSUS

WAMUINI B FARM SURVEY COMMITTEE JOSEPH WAINAINA NDUNGU

& 5 OTHERSDEFENDANTS

RULING

The action before court was commenced by way of an Originating Summons dated 26th July, 2005. The said summons were subsequently amended on 30th March, 2006, pursuant to a consent order made on 21st March, 2006.

In answer to the action, the 2nd to 8th respondents have raised a preliminary objection, and do ask the court to strike out the entire suit with costs. The said preliminary objection is founded upon the following grounds;

“1. THAT, the amended originating summons dated 30/3/2006 as presented is bad in law, incompetent and an abuse of the due process.

2. THAT, the applicant’s claim for adverse possession is misconceived and does not lie against the 2nd to 8th respondents.”

When canvassing the preliminary objection, the 2nd to 8th respondents (who shall hereinafter be cited as ‘the respondents herein’) indicated that pursuant to section 38 of the Limitation of Actions Act, an applicant ought to ask the court for an order that he be registered as the owner of the property in relation to which he claims ownership by virtue of adverse possession.

In this case, the applicant is said to have failed to seek registration as proprietor of the suit property. Instead, he had only prayed for the cancellation of a title which had already been issued to someone else, whilst he too had title.

It was the contention of the respondents herein that if the applicant was already the registered owner of the suit property, he should only have filed a plaint, through which he could have sought orders for the eviction of the defendants.

The other submission by the respondents herein was that there can be no claim for adverse possession if the applicants were not in possession.

Thirdly, the respondents herein submitted that twelve (12) years had not lapsed as between 24/12/1997 when the 8th respondent was registered as the proprietor to the suit land, and 26/7/2005 when the originating summons were lodged in court.

The respondents herein have pegged the period to those two dates because in their view, adverse possession does not run as against the Government.

Finally, the respondents herein indicated that the claim could not lie against the 1st to 7th respondents because they were not the registered proprietors of the suit property.

When answering to the preliminary objection, the applicant first called upon the court to strike it out, on the grounds that there were no legal provisions for the amendment of preliminary objections.

The applicant also submitted that preliminary objections could not be sustained if the facts giving rise thereto needed to be ascertained. To that end, the applicant has correctly restated the legal position, as preliminary objections ought to be limited to pure points of law, which were founded on undisputed matters of fact.

As far as the applicant was concerned, he had been on the suit property since the year 1980, when he bought shares with the 1st defendant.

It is his case that he had been in occupation of Title No. 646, which was a part of L.R. No. 384, the main title. The said main title was said to have been sub-divided in 1997, so that the applicant's claim was not founded on titles obtained in 1997. As far as the applicant was concerned, his claim can be traced back to 1980 when he started occupying the land in issue.

A part of that property, (which was No. 645), had been carved out to create the suit property, which was then transferred to the 8th respondent.

As the applicant had been in possession since 1980, it is his case that the 1st to 7th respondents did not have any good title which they could pass on to the 8th respondent, as their own claims had been overtaken by adverse possession. The applicant's reason for that contention is based on the fact that the 1st respondent had acquired title in 1975. Thereafter, the applicant took possession in 1980, which meant that his claim for adverse possession matured in 1992.

Because the 8th respondent only took possession in 1997, the applicant wishes to have the said position reversed, through the cancellation of the title No. 646, which would then revert to the applicant, as it was part of title No. 645.

In **A. KARIM KIBUNJA VS. M. M'RINGERA KIBUNJA, CIVIL APPEAL NO. 103 OF 1996**, the Court of Appeal reiterated the position that a preliminary objection cannot be raised if any fact has to be ascertained.

The respondents herein have submitted that in this case, no facts need to be ascertained as they were relying on the applicant's own pleadings. One such fact as was pleaded by the applicant was that there had been an interruption in 1997, when the 8th respondent took possession of the suit property. Therefore, as far as the respondents herein were concerned, twelve years had not lapsed by the year 2005, when the applicant instituted those proceedings.

Whereas there is no dispute about the date when the 8th respondent obtained possession of L.R. No. KIMININI/KAPKOI SISAL BLOCK 2/WAMUINI 'B'/646, there is definitely a dispute about the date

from which the applicant's claim for adverse possession could run. On the one hand, the applicant asserts that his claim ran from 1980, when he took possession of L.R. No. KIMININI/KAPKOI SISAL BLOCK 2/WAMUINI 'B'/645. That would imply that his claim did mature in 1992, if his assertion were held to reflect the factual position.

On the other hand, the respondents herein contend that time begun to run from 1997 when the 8th respondent was registered as the proprietor of plot No. 646.

Secondly, whilst the respondents insist that the 8th respondent took possession in 1997, the applicant insists that it was not until 1999 that the 8th respondent first set foot on plot No. 646.

In the circumstances, I find and hold that the facts need to be ascertained before the court could proceed to make legal findings thereupon.

In **WASUI VS. MUSUMBA (2002) 1 KLR 396**, the Hon. Ringera J. (as he then was) held that an order for adverse possession could only be made against a respondent who was the currently registered proprietor of the land which the applicant sought to have registered in his name.

That would appear to support the argument of the 1st to 7th defendants herein, to the effect that no claim for adverse possession could be sustained against them, as they were not the registered proprietors of plot No. 646.

But then again, in the same authority, the learned judge did hold as follows;

“On the impact of prescriptive rights in respect of one title on subsequent titles to the same land, I agree with the submission of counsel for the applicant that if the applicant had been in adverse possession of the land of Wilson Odari for 12 years prior to 1993 when it was subdivided and other titles registered, the proprietors of the new titles would not have been able to shake off his rights. As I understand the law, prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof.”

That suggests that if the applicant is able to satisfy the court that he did enter into possession in 1980, the 1st to 7th respondents may be unable to shake off his claims to the land. And if that be the position, it would follow that the 1st to 7th respondents had no legal capacity to transfer plot No. 646 to the 8th respondent.

In the circumstances, although the 1st to 7th respondents may not be the registered proprietors of the suit property, they do appear to be crucial links in the chain, if the applicant's entitlement is deemed to date back to 1980.

It is my considered opinion that this is an appropriate case for determination after due consideration is accorded to all the facts, some of which are yet to be determined. Accordingly, the preliminary objection is overruled, with costs to the applicant.

Dated and Delivered at Kitale, this 16th day of October, 2007.

FRED A. OCHIENG.

JUDGE.