



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 78 of 2005

VIOLET OMUSULA SIKENYI PLAINTIFF.

VERSUS

VINCENT KAMARI DEFENDANT.

RULING.

The plaintiff filed his suit on 15/6/2005 seeking the following order against the defendant.

(a) A declaration that the plaintiff is the sole owner of Title No. Trans Nzoia/Twiga/324 while the defendant is a trespasser therein, an order that the defendant, his servants, family members or anyone claiming under him do move out of the said plot failing which forceful eviction do issue and a permanent injunction to restrain any further trespass after judgment.

He is also asking for costs and interest. I find it opportune to say at this stage that this one prayer ought to have been split into at least 2 prayers. Reason being that the prayer for a declaration and the one for injunction are totally distinct prayers.

The plaintiff's claim is that she is the sole registered owner of the land in question and that the defendant has no proprietary rights over the same – hence her prayers in the plaint.

The defendant filed an amended defence and counterclaim dated 14/12/2005. In the said defence, the defendant claims that the Title Deed for the land in question was issued to the plaintiff through fraudulent means. He has therefore asked the court to dismiss the plaintiff's case. In his counterclaim, he has asked the court to make a declaration that the suit land belongs to him by way of adverse possession. He has also asked the court to cancel the plaintiff's title Deed. The plaintiff filed a reply to the defence and counterclaim on 19/12/2005 contending that the claim for adverse possession was misplaced in that the plaintiff was registered as owner of the plot in 2004 and so time could only start running against him on that date. I do not wish to go into the details of those pleadings because this is not the judgment in respect of those pleadings.

A day after filing the reply to defence and counterclaim, Mr. Kiarie for the plaintiff filed the application dated 20/12/2005 – which application is now the subject of this ruling. The application is a Notice of Motion under order XXXV r. 1 (1) b, OLR 1 and OVI rule 13 (1) (a) and (c) of the Civil Procedure Rules. In the application, he is seeking the following prayers

(a) That summary judgment be entered against the defendant, and a declaration be made that the applicant/plaintiff is the sole owner of Title No. Trans Nzoia/Twiga/324 while the defendant is a

trespasser therein, and a further order be made that the defendant, his servants, family members or anyone claiming under him to move out of the said plot and failing which forceful eviction do issue, as well as a permanent injunction to restrain any further trespass after judgment.

(b) That the defence as well as the counterclaim be struck out with costs. The same is premised on the 9 grounds enumerated on the face of the affidavit. It is also supported by the affidavit of the applicant dated 20/12/2005 and several annexures.

A supplementary affidavit sworn by one Benjamin Thuku is not dated as required under cap 15 of the Laws of Kenya. I will therefore ignore the contents of the same for the purposes of this ruling. The application is opposed vide the replying affidavit of the respondent dated 10/1/2006.

The gist of the grounds in support of the application is that the applicant bought the plot in question from the original allottee sometime in 1989. She was however registered as absolute proprietor in 2004. She is therefore the sole registered owner of the said plot. She claims that the registration is a first registration and the same is therefore indefeasible. That any claim of adverse possession on that title can only start running from the date she was registered i.e. on 24/3/2004 and so the Respondent's claim against her for adverse possession cannot stand. According to the applicant therefore, the defendant/respondent has no defence at all and so his defence and counterclaim should be struck out and summary judgment be entered in his favour. According to Mr. Kiarie for the plaintiff/applicant, there are no triable issues that would require this case to go through a full trial and that the defendant/Respondent is just wasting court's time.

Counsel for the Respondent though obliquely admitted that the claim for adverse possession was not properly before the court but said that the defendant would still come back to court by way of originating summons. I have considered the application and all the affidavits for and against the same. I have also considered the annexures and the oral submissions made by both counsel. Having done so, I have narrowed down the issues for decision into 2.

Firstly whether the claim for adverse possession is properly before the court and whether the said counterclaim should be struck out at this stage.

Secondly, whether the plaintiff's title to the land in question can be cancelled as prayed by the defendant. If the answer to these two issues is in the negative, then certainly there would be no point of sustaining the defence and counterclaim to the very end.

I will deal with the issue of the claim for adverse possession first. As stated earlier, counsel for the respondent seems to agree that the claim for adverse possession was not properly before the court. I will nonetheless deal with the issue her admission notwithstanding. First and foremost, a claim for land based on adverse possession must be brought to court by way of originating summons.

Order 36 rule 3D of the Civil Procedure Rules prescribes the manner for starting a suit for adverse possession under section 38 of the limitation of Actions Act cap 22 of the Laws of Kenya. Order 36 r. 3D (1) is couched in mandatory terms. A claim for adverse possession cannot be initiated by way of plaint or counterclaim. This is settled law and the authorities on this subject are legion. I need not therefore belabour the point. The authority of **PATRICK ODAKO & MESHACK ODAKO VS WILLIAM N. KIREW Civil appeal No. 202/1998** cited by Mr. Kiarie is a case in point.

For the sake of argument however, even assuming that this claim was properly before the court, would it see the light of day? Has a claim for adverse possession accrued against the plaintiff in this case? From the Title Deed annexed to the applicant's affidavit, it is not disputed that she was registered as sole owner of the property in question on 24/3/2004. Any claim for adverse possession against that Title would therefore start running on 24/3/2004. This suit was filed only approximately 1 year later. The statute of limitations has not yet caught up with the plaintiff herein.

Counsel for the defendant/respondent submitted that a claim for adverse possession could lie against the settlement Fund Trustee who were the owners of the plot before it was transferred to the

plaintiff/applicant. With respect to counsel for the respondent, however, that argument was self-defeatist – reason being that the settlement Fund Trustee (SFT) is not a party to this suit. It is also noted that the said issue was conclusively determined by a Five Judge court of Appeal Bench in the case of **SAMUEL NDUNGU GITU VS DANSON NDUNGU & 2 OTHERS**, Civil Appeal No. 304/1997. where the five Judge court of Appeal Bench agonized on the aspect of departing from its own decision given earlier which held that a claim for adverse possession could be sustained where the property was under the ownership of the settlement Fund Trustee. The correct legal position now is that

“The interest of the Settlement Fund Trustees in

the suit plot is not extinguishable under the Limitations of actions Act – chapter 22 of the laws of Kenya”

The defendant’s claim on adverse possession cannot therefore stand. This brings me to the second issue i.e. whether the plaintiff/applicants Title Deed can be cancelled as prayed in the counterclaim. Both counsel submitted extensively on this issue. I have considered all the authorities furnished to me on this one aspect and I applaud both counsel on research well down. As a starting point, I will start with the issue as to whether the plaintiff’s title is a 1st registration. From the Title Deed annexure UOS 2 and the title Abstract marked UOS3, the plaintiff was indeed the first owner to be registered under the Registered Land Act. This registration is therefore a first registration. Section 143 of the R.L.A. which deals with cancellation of or rectification of the Title Deed provides as follows:-

143 (1) subject to sub-section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

2. The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Section 143 (1) is very clear and needs no elaboration. A first registration cannot be cancelled nor amended even where the same is said to have been obtained through fraud or mistake. Even the case of **MUTSONGA VS NYATI** Civil suit No. 295/1976 cited by counsel for the Respondent acknowledges the fact that a first registration cannot be cancelled. The register can only be amended to reflect an entry recording a lawful transfer ordered by a court. The court is not being asked to record any lawful order or to alter the entry. We are being asked to cancel the registration. With respect to counsel for the respondent, that authority does not assist her. The case of **CHAUHAN VS OMAGWA (1985) KLR** is also different from this case in that the registered owner of the land in that case is the one who had sold land to 2 parties. In this case although the applicant bought the land from another party, that party was actually not a registered owner and he is not the one who transferred the land to him. The transfer of the land in question was direct from SFT to the applicant. The 3rd party is said to have sold the land to the parties herein does not actually feature anywhere in the Registration process.

If the respondent has any problems with the said transfer, he should have laid his claim against either the SFT or the original allottee. The applicant herein was a bona fide purchaser for value without notice. There is no evidence whatsoever that the respondent even bought the land from the original allottee or from SFT. It appears to me that he is on the applicant’s land as a trespasser and not with any colour of right. It is noted that according to the Register abstract marked annexure No. 3, there are no encumbrances or other easements recorded against the applicant’s title in favour of the Respondent herein.

From whatever angle I look at this, I do not see what defence the defendant/Respondent has in this matter. His defence is just an attempt to clutch at straws and play for time. There are no triable issues in this matter. As I stated in my earlier ruling in **Appollos Hiram Muna vs Wilson Ngeiywa & others**, ***“Summary judgment should be given where there is no reasonable doubt that a plaintiff is entitled to***

judgment and where it is inexpedient to allow the defendants to defend for the mere purposes of delay.”

Under OXXXV r.1 (b) a plaintiff can apply for summary judgment against a trespasser without necessarily going through the rigours of a full trial. In a situation like ours where courts are overwhelmed a backlog of with cases and where a full trial takes years to be determined, it would be a travesty of justice to allow a party who has clearly no defence to continue hanging on to another's property while denying such party the right to enjoy the fruits of his labor.

I agree with Ms. Wanyama for the Defendant/Respondent that summary judgment should only apply in the clearest issues. My finding is that this is one such case where issues are very clear.

As stated earlier on, the defendant's claim on adverse possession cannot stand. He has no evidence that he bought the land from the original allottee; and he has actually established no legally recognizable interest over the plot in question. He is a mere trespasser and his continued stay on that property is an offence, which the court should not sanction. These to me are very clear issues to compel me to allow summary judgment in this matter.

For the foregoing reasons, I am satisfied that the application before me has merit. I accordingly allow the same and grant the orders as prayed.

W. KARANJA.

JUDGE.

Delivered, signed and dated at Kitale this 5th day of March, 2006.