

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Suit 91 of 1997

SAMUEL OMIKONYI
KUSUMOAPPLICANT

V E R S U S

JOSEPH SHIKWANYI
MACHENGORESPONDENT

R U L I N G

This is a ruling in respect of the Chamber Summons application dated 1.8.2005 made on 5-8-2005 by the Defendant, Joseph Shikwany Machengo, pursuant to Order VI Rule 13 (1) (a) and (b) and Order XXXVI Rule 3 D (2) of the Civil Procedure Rules seeking orders that the suit herein be struck out on the ground that it discloses no reasonable cause of action and alternatively and without prejudice to the foregoing prayer for an order that the suit be dismissed because it is incompetent and an abuse of the process of the court.

The plaintiff's advocates on record, Messrs Fwaya, Nandwa & Co. were on 13.1.06 served with the application by Robert O. Mbeja, a process server, as shown in the affidavit of service sworn by the latter on 19.1.06. The plaintiff did not oppose the application by filing either grounds of opposition or a replying affidavit.

The application proceeded to hearing on 15.5.06. Mr. Akwala appeared for the Defendant but neither the plaintiff nor his advocates attended court.

Mr. Akwala relied on the supporting affidavit of the defendant sworn on 1.8.2005 in support of the application and on the grounds stated on the face of the application.

In brief, the defendant's contention was that the suit which was commenced by the plaintiff by originating summons dated 5.8.97 did not disclose a reasonable cause of action because although the plaintiff claimed the suit land (NO.MARAMA/BUCHENYA/711) by virtue of adverse possession of more than 12 years under section 38 of the Limitation of Actions Act (Cap 22), the affidavit of the plaintiff sworn on 5.8.97 in support of the originating summons showed that the plaintiff took possession and occupation of the suit land either in May, 1987 or in May, 1985 as stated in paragraphs 8 and 11 of the said affidavit. The suit was instituted on 14.8.1997. The period of twelve years from May 1985 expired in May, 1997. As the suit was filed on 14.8.1997, the period of 12 years had elapsed before the date on which the suit was filed. For that reason, it cannot be argued that on the face of it the period of adverse possession had not crystallized. There is however, apparent inconsistency as correctly pointed out by Mr. Akwala between the contents of paragraphs 11 and 8 in that in the former, time would seem to run from May 1987 while in the latter it ran from May 1985. In an application of this nature it would be wrong to take the date adverse to be plaintiff against whom the application is made.

The second ground proffered was that the suit was incompetent. Mr. Akwala submitted that the extract of title to the suit land was not annexed to the affidavit of the plaintiff as required by Rule 3D (2) of Order XXXVI of the Civil Procedure Rules. The said rule states

Rule 3D (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

The requirement of the Rule is that the Originating Summons must be supported by an affidavit. Failure to file a supporting affidavit contemporaneously with the Originating Summons renders the suit incompetent. The Rule further requires that to the affidavit must be annexed certified extract of the title to the land in question. Non compliance with the latter requirement does not to my mind render the affidavit bad in law. But, such non compliance renders the affidavit deficient. However, such deficiency can be corrected. The court has discretionary power to allow a party who has omitted to attach an extract of the title to the affidavit to do so subject to costs. I do not think it would be a good policy by the court in a case such as this to strike out the suit where the omission does not render the suit bad in law but merely impedes the immediate ascertainment as to whether the land in question is registered in the defendant's name or not.

In the circumstances, I decline to strike out the suit as prayed.

However, I order that the plaintiff do file a certified extract of the title to the suit land within 45 days from the date hereof.

The costs of the application shall be costs in the cause.

Dated, signed and delivered at Kakamega this 6th day of July, 2006.

G. B. M. KARIUKI

J U D G E