



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 90 of 2004(OS)

MUSA MALALA MISIKO.....APPLICANT

VS

HUSSEIN RABI ALUCHIO.....RESPONDENT

R U L I N G

Musa Malala Misiko, in an originating summons filed pursuant to the provisions of Order XXXVI rules 3D and 7 of the civil procedure Rules prayed to be declared to have acquired 1 ½ acres to be excised from L.R. No. NORTH WANGA/KHOLERA/118 which land is registered in the names of Hussein Rabi Aluchio by adverse possession. He also filed an affidavit in support of the originating summons. Hussein Rabi Aluchio who was named as the Respondent filed a replying affidavit to resist the summons. Directions are yet to be given.

In the intervening period the applicant sought to have the Respondent restrained from interfering with the applicant's use and enjoyment of the 1 ½ acres comprised in the suit premises pending the hearing and determination of the suit. He filed two affidavits in support of the summons. As expected the Respondent opposed the summons by filing grounds of opposition and a replying affidavit he swore on 19th October 2004.

The facts leading to the filing of the suit and the subsequent chamber summons can be summarized as follows: It is said that the applicant bought 1 ½ acres to be excised from L.R. No. NORTH WANGA/KHOLERA/118 from one Ismael Wambuche (deceased) in 1972. The deceased who is the grandfather of the Respondent is said to have put the applicant into occupation after fixing the boundaries on the ground in the presence of the area chief and a village elder. The applicant avers that he put up his own residential house and five other houses on the suit premises and that he has been in occupation since 1972. The applicant continued occupying the suit premises even after Ismael Wambuche passed away on 18/11/1973 before giving him title to the 1 ½ acres.

It is further averred that in the year 2003, the Respondent and his brothers demanded a sum of Ksh.75,000/- and 2 heads of cattle so that they could give him title to the land he was occupying. When the applicant refused to oblige to this demand it is said that on 10th July 2004 the Respondent in company of other strangers forcefully entered into the portion in the applicant's occupation whereupon they started cutting trees and fixing new boundaries. This turn of events alarmed the applicant thus prompting him to institute these proceedings and the summons the subject matter of this ruling. The Respondent flatly denied all these allegations and he accused the applicant of lying to attract the sympathy of this court. The Respondent averred that the applicant has never bought nor occupied any part of the suit premises. He in fact pointed out that the applicant was occupying his land known as L.R. No. NORTH WANGA/KHOLERA/1337 which is adjacent to the land in dispute.

In order to discount the Respondent's averments the applicant filed a supplementary affidavit sworn by one Richard Maanya. In his affidavit which he swore on 27th October 2004, Richard Maanya stated that he served as the Kholera sub-location's Assistant chief from 1960 to 1983 when he retired. He deponed that he witnessed the transaction between the applicant and the late Ishmael Wambuche in 1972. He further deponed that he witnessed the fixing of boundaries in the suit premises in the presence of his village elder Joseph Mukoya now deceased.

On the basis of all these facts the applicant now seeks to have this court issue an order of injunction against the Respondent. The Respondent says that the order is not available to the applicant because he failed to establish a prima facie case with a probability of success when he failed to show that there was a written agreement disposing of the land as required under Section 3 of the Contracts Act. It is conceded by the applicant that there is no written agreement as required under the contracts Act. The view I have in respect of this matter is that it is not necessary for a party to produce a written agreement when one is seeking for orders to be declared to have acquired land by adverse possession. What is important is for one to establish the conditions necessary to succeed on an action based on adverse possession. From the submissions of both learned counsels and after perusing the pleadings and the affidavits presented to this court, I am satisfied that the applicant has established a prima facie case with a probability of success.

The applicant has also urged this court to grant the order of injunction in order to preserve the status quo which has been in existence for the last 32 years. The Respondent has denied the fact that the applicant is in occupation. However the facts deponed to by Richard Maanya in the supplementary affidavit have not been disputed. In view of the matters deponed to in this affidavit I am satisfied that the applicant is in actual occupation of part of L.R. NO. NORTH WANGA/KHOLERA/118. In the circumstances therefore I think it is necessary for the convenience of the applicant to restrain the Respondent in order to maintain the status quo. This court will also in the process be safeguarding crucial evidence which may be destroyed in the process of the Respondent's trespass.

In the process of submissions, the Respondent raised objections relating to certain procedural matters which were not complied by the applicant while filing the application. The Respondent accused the applicant for failing to comply with order L rule 15 (2) of the civil procedure rules. He urged this court to strike out the summons for being incompetent due to that defect.

Order L rule 15 (2) reads:

“Every motion and summons shall bear at the foot the words-

“If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient;”

I the fact that the rule is couched in mandatory terms. It is conceded by the applicant that he avertedly failed to comply with that rule. He urged this court to overlook the defect for the broad interest of justice.

The view I have is that the rules were not meant made in vain. They have to be complied with. But on the other hand the rules were not to fetter with or inhibit the court's inherent power from doing justice. This court at times may exclude or overlook certain lapses committed by the parties who appear before it in order to hear the substance rather than put technical objections on a higher notch. In my view the failure to comply with the provisions of order L rule 15 (2) did not go to the jurisdiction of the summons. It did not prejudice the Respondent in any respect. The objection appears in essence to be that of want of form. The law under order VI rule 12 bars litigants from raising technical objections to any pleadings on the ground of any want of form. I decline to allow the objection on those grounds.

The final result in this matter is that the summons dated 19th August 2004 is allowed in terms of prayer 2 and 3 with costs to the applicant.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE