



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Civil Case 43 of 2004**

**DIAMOND TRUST BANK (K) LTD.....PLAINTIFF**

**VERSUS**

**MARTIN NGOMBO & 8 OTHERS.....DEFENDANT**

**RULING**

Moving the Court by way of Chamber Summons filed in Court on 13<sup>th</sup> May, 2005, the plaintiff prays that

- (i) the defence by the defendants be struck out.
- (ii) Judgment be entered in favour of the plaintiff as prayed in the plaint
- (iii) the costs of this application to be borne by the defendants.

The application is based on the fact that the defence does not disclose any reasonable defence. At the hearing of the application Mr.Luseno for the plaintiff argued that the plaintiff being the registered owner of the suit property, instituted this suit to recover the suit property currently occupied by the defendants. The defendants, it was further, argued, have not in their defence denied the ownership of the suit property by the plaintiff.

That a claim advanced by the defendants for adverse possession is not available as a defence. Further, it was submitted that the filing of this suit constituted an interruption of time and thereby extinguished any claim for adverse possession.

In reply, Mr.Odongo for the defendants submitted that their defence is not based an adverse possession *per se*. The defendants have questioned the title of the original owners who they claim did into have a good title or at all to the suit property, hence could not transfer the same to the plaintiff.

I must on the outset observe that the application is brought under the provisions of Order 6 rule 13 (1) (a) of the Civil Procedure Rules, under which the plaintiff is entitled to seek that a defence filed by the defendants be struck out for failing to disclose a reasonable defence.

The key words are “reasonable defence”.

This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence.

It is, however, a procedure which is to be resorted to in very clear and plain cases.

In **D.T.Dobie & Co. (K) Ltd. V. Muchina** (1982) KLR 1 at Page 9 Madan JA (as he then was) delivered himself thus on this point in respect of summary procedure provided for by order 6 rule 13 of the Civil Procedure Rules:

**“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way”**

At this stage the Court is only required to satisfy itself that the defence raises *prima facie* triable issues and that is not a mere sham. In the instant case the issue is whether the defendants’ possession of the suit property is adverse and whether such possession can be raised in a defence filed by a claimant for adverse possession. It was argued for the plaintiff that adverse possession is not a defence in law and that in any case the time stopped running when the plaintiff instituted this suit. Regarding the latter submission, that is the correct position of the law in terms of the decisions to which counsel for the plaintiff referred the Court, **Githu V Ndeete** (1984) KLR 776, and **William Gatuli Murathe V Gakuru Gathimbi** Civil Appeal No. 49 of 1996.

In the instant case it has to be shown when time started running and when it stopped. This is, in my view, a matter of evidence which depend on the defendants successfully establishing the particulars of adverse possession.

Can adverse possession be raised in a defence? From decided cases it is clear that there is no generally acceptable procedure in a claim for adverse possession. In **Ngethe V Gitau** (1998/99) LLR 770 (AK) the Court was categorical that a claim for adverse possession must begin by Originating Summons. Yet in **Bayete Co.Ltd. V Kosgei** (1998) LLR 813 (CAK) the Court granted adverse possession in a suit commenced by a plaint. A month later in **Tingángá Ltd. V Moki Savings** (1999) LLR 1092 (CAK) the same Court of Appeal maintained that a claim for adverse possession must always be commenced by Originating Summons and never by plaint. A more interesting situation is that in **Wabala and Another V Okumu** (1997) LLR (CAK), where the claim for adverse, as in the instant case, was raised as defence.

In the **Parklands Properties Ltd. V Patel**, (1981) KLR 52 the High Court proceeded to decide the matter on merit without taking issue with the fact that adverse possession was raised in a defence.

As I have already stated we are not, at this stage concerned with the details of the merit of the defendants’ defence. The defendants, a part from raising a defence of adverse possession, are also questioning the original title which was transferred to the plaintiff. These are matters which cannot be decided on affidavit evidence.

On the basis of these matters, I find that the defence, on the face of it, provides an answer to the plaintiff’s claim. For these reasons, the plaintiff’s Chamber Summons of 13<sup>th</sup> May, 2005 is dismissed with costs and it is further ordered that the defendants shall have unconditional leave to defend.

**Dated and delivered this 22<sup>nd</sup> day of September, 2005 at Malindi.**

**W.OUKO**

**JUDGE**