



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

AT BUNGOMA
CIVIL SUIT NO. 105 OF 2002

JUMA MUNIALO PLAINTIFF

VS

MUCHA MUNIALO DEFENDANT

RULING

The defendant argued two preliminary points of law when this originating summons came up for hearing. The first objection is that this originating summons is bad and incompetent because the plaintiff did not comply with the provisions of order XXXVI rule 3 D of the Civil Procedure rules. The defendant's complaint is that the plaintiff did not annex to the supporting affidavit a certified copy of the extract of the title. It is the argument of Mr. Makokha that this defect renders the whole action incompetent.

The plaintiff opposed this preliminary point and stated that this court has a wide discretion to allow an amendment in cases of this nature. Mr. Waswa for the plaintiff is of the view that the defect is not fatal.

It is clear from the record that directions were taken on 11th March 2003 in which this court directed that the originating summons would be deemed as a plaint and the replying affidavit to be deemed as the defence. What the plaintiff seeks in the originating summons is to be declared to have acquired title number EAST BUKUSU/SOUTH NALONDO/1183 by adverse possession.

Can an action of this nature be struck out for failure to annex to the supporting affidavit, a certified copy of the extract of the title?

I think I should consider the relevant provisions of the law before attempting to answer the above question. Order XXXVI rule 9 of the Civil Procedure rules provides:

“On the hearing of the summons if the parties do not agree on the correctness or sufficiency of the facts set forth in the summons and affidavit, the Judge may order the summons to be supported by such further evidence as he may deem necessary, and may give directions as he may think just for the trial of any issues arising there upon, and may make amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.”

It would appear the law under this rule gives this court discretion to overlook the mandatory provisions of order XXXVI rule 3 D (2) of the Civil Procedure rules. It is a kin to the provision of Section 3 A of the Civil Procedure Act. In a nutshell the law gives this court the discretion to act as it deems fit for the broad interest of justice. It is therefore my humble view that failure to comply with the above

provisions of the law does not render the action incompetent.

However, in view of the directions given on 11.3.2003, I think the most appropriate decision to be taken by the court at the end of this matter will be to exercise its discretion under Order XX rule 5 A of the Civil Procedure rules which provides that

“Where there is a prayer for a Judgment the grant of which would result in some alteration of the title of the land registered under any written law concerning the registration of the title to land, a certified copy of the title shall be produced to the court before any such Judgment is delivered.”

This latter provision of the law also fortifies the view that the defect raised by the defendant is not fatal to the action before court.

The second preliminary point which was argued by Mr. Makokha is that this originating summons is res-judicata in view of the decisions in Bungoma S.R.M.C.C. No 117 of 1986, Kakamega H.C.C.A. No 134 of 1989 and Sirisia D.M. C.C.C. No 24 of 1994.

The plaintiff pointed out that the defendant did not annex any form of evidence to prove this point. I think I am not satisfied that the defendant has established that this matter is res-judicata. It is not just enough to list a number of civil suits already decided over the subject matter. One must establish res-judicata in terms of the definition given under Section 7 of the Civil Procedure Act. In the absence of such proof, this ground must fail.

I have come to the conclusion that the preliminary objection raised by the defendant lacks merit. The same is dismissed with costs to the plaintiff.

READ AND DELIVERED THIS 22nd DAY OF January 2004

J.K. SERGON

JUDGE