



Sammy & 4 others v Daystar University & 4 others (Environmental and Land Originating Summons E002 of 2024) [2024] KEELC 6926 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6926 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2024
A NYUKURI, J
OCTOBER 16, 2024
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF LAND PARCEL L.R. NO. 8784/1 MAVOKO
AND
IN THE MATTER OF A VESTING ORDER

BETWEEN

NICHOLAS SAMMY 1ST PLAINTIFF
JIMMY MUTAVA 2ND PLAINTIFF
BENSON NZOMO 3RD PLAINTIFF
ALBERT MUOKI MASAI 4TH PLAINTIFF
DAVID MAITHA 5TH PLAINTIFF

AND

DAYSTAR UNIVERSITY 1ST DEFENDANT
DAYSTAR UNIVERSITY SACCO 2ND DEFENDANT
MICHAEL MUASYA NDUNDA 3RD DEFENDANT
CHIEF LANDS REGISTRAR 4TH DEFENDANT
THE HON ATTORNEY GENERAL 5TH DEFENDANT



RULING

Introduction

1. Before court is a preliminary objection filed by the 3rd defendant, dated 7th February 2024 seeking that the suit herein be dismissed and or struck out on the following grounds;
 - a. That the suit herein is incurably incompetent and ought to be dismissed and or struck out as it offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010.
 - b. That annexing an extract of the title to the suit property is a mandatory requirement in pursuing a claim of adverse possession and such is not a technicality.
 - c. That the suit has been brought to this court in clear disregard of the above suit and is an abuse of the due process of this court.
 - d. That the suit is fatally defective.
2. The objection was canvassed by way of written submissions. The 1st and 2nd defendants filed their written submissions dated 5th April 2024 while the 3rd defendant filed their submissions dated 20th March 2024. The plaintiffs did not file any submissions.

The 3rd defendant's submissions

3. Counsel for the 3rd defendant submitted that the issue raised in the objection touches on the competence of the suit. Counsel argued that the plaintiffs' suit offends the mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010.
4. On whether the preliminary objection is based on a point of law, reliance was placed on the cases of *Mukisa Biscuits Manufacturing Company Ltd v. West End Limited* [1969] EA 698 and *Oraro v. Mbaju* [2005] eKLR 141 for the proposition that a preliminary objection ought to be based on a pure point of law.
5. Counsel cited the provisions of Order 37 Rule 7 of the Civil Procedure Rules and argued that the same required a party claiming land under adverse possession to attach a certified extract of the title to the land in question. Counsel argued that the fact that an extract of the disputed title is not annexed to the originating summons is not disputed and that therefore the question raised in the objection does not require evidence.
6. Further reliance was placed on the case of *Ushago Diani Investment Limited v. Abdulwahab* [2023] KEELC 2021 [KLR] (27 September 2023) to support the above position, counsel urged the court to find that the question raised in the preliminary objection is a pure point of law.
7. On whether the suit offends provisions of Order 37 Rule 7 of the Civil Procedure Rules, counsel submitted that the requirement to annex a certified extract of the title is mandatory, and that since the plaintiffs herein failed to attach the extract of the disputed title, then this suit is incompetent. The court was referred to the cases of *Benson Mwangi Cherere v. Charles Francis Kimindiri Wandarwa* [2018] eKLR, *Esther Mulee & 2204 Others v. Attorney General & Another and Murigi Wainanina & 14 Others (interested parties)* [2020] eKLR. On costs, counsel argued that the plaintiffs having vexed the defendants and abused the court process, they should be condemned to pay costs.



Submissions by the 2nd and 3rd defendants

8. Counsel for the 2nd and 3rd defendants submitted that Order 37 Rule 7 of the Civil Procedure Rules requires a claimant of land under the doctrine of adverse possession to annex a certified copy of title. Counsel pointed out that at the point when the plaintiff sought interim orders, this court noted that there was no annexed certified extract of title, as that matter had been raised.
9. Reliance was placed on the case of Joseph Kamau Ngiria v. Roselyn Dola Ouko & 2 Others [2019] eKLR and Benson Kamau Cherere (Supra) for the proposition that failure to annex a certified extract of title of the disputed land is fatal to the suit.

Analysis and determination

10. The court has carefully considered the preliminary objection and the submissions filed. The issues that arise are as follows;
 - a. Whether the objection is on a pure point of law.
 - b. Whether the objection is merited.
11. A preliminary objection is an objection on a suit or proceeding before court based on a pure point of law where the facts relied upon are not in dispute. In the case of Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd [1969] EA 696, the court held as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.
12. The objection raised herein is that Order 37 Rule 7 of the Civil Procedure Rules makes it mandatory for a claimant of land on the basis of adverse possession to annex a certified extract of tile of the disputed land to the suit filed in court. I have considered the Originating Summons herein and it is clear that the plaintiff did not attach a certified extract of tile to the Originating Summons. This fact is not disputed by the plaintiff; and was confirmed to be the position by this court on 25th January 2024 and in the ruling of the court delivered on 7th March 2024. Even after the above findings, no certified extract of the title was filed in court by the plaintiff. That being the case, it is undisputed that the plaintiff has not filed a certified extract of title of the disputed property.
13. Order 37 Rule 7 of the Civil Procedure Rules requires a claimant for land under adverse possession to annex a certified extract of title and provides as follows;
 1. An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
 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.
 3. The court shall direct on whom and in what manner the summons shall be served.
14. Therefore as Order 37 Rule 7 of the Civil Procedure Rules requires a claimant of land under adverse possession to annex to their suit a certified extract of the title for the disputed land; and since it is not disputed that the plaintiff has not attached a certified extract of title, I find and hold that the objection



raised by the 3rd defendant is on a pure point of law and the facts relied upon are not in dispute and therefore the objection is a proper preliminary objection.

15. On whether the objection is merited, it is clear that the requirement for annexing a certified extract of title of the disputed land is couched in mandatory terms and therefore must be complied with. In my view, since the *Limitation of Actions Act* provides in Section 38 that a person who has occupied another's land continuously for 12 years can ask this court to declare them the owner of the land as against the title holder, such a claimant must demonstrate that they have sued the title holder and that the land they claim indeed exists. In this case, the plaintiff did not annex a certified extract of title and therefore the court cannot know if that title exists as described or whether the defendants herein are the registered proprietors of the title stated. For those reasons, the mandatory requirement to annex a certified extract of title is not a mere technicality but goes to the core of the claim under adverse possession.
16. As the plaintiff has failed to attach the certified extract of title of the disputed land, he has contravened mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules and I therefore find and hold that the plaintiffs' suit is incompetent and an abuse of the court process and I hereby struck it out with costs to the 1st, 2nd and 3rd defendants.
17. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Omondi for 3rd defendant

Ms. Kamau for 1st and 2nd defendants

No appearance for other defendants

No appearance for the plaintiffs

Court assistant – Josephine

