



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 35 OF 2019

EMILY CHEPKOR CHEPKWONY.....PLAINTIFF

VERSUS

PAUL ARAP CHANDOEK.....DEFENDANT

RULING

1.The defendant/applicant by notice of preliminary objection dated 15th March 2021 sought that the plaintiff's suit be struck out on the following grounds: -

- 1. That the entire suit is bad in law, incompetent, non-starter, inept and an abuse of the court process and the same ought to be struck out.*
- 2. That to the extent that the plaintiff's claim of entitlement over the suit property based on adverse possession was commenced by way of plaint instead of the originating summons the instant suit is fatally defective and ought to be struck out.*
- 3. That the suit herein is otherwise frivolous, vexatious and offends the mandatory provisions of the Civil Procedure Rules.*
- 4. That entertaining the suit herein is a waste of judicial time.*

2.The plaintiff opposed the defendant's preliminary objection on the grounds set out on the replying affidavit sworn by the plaintiff on 14th June 2021. The plaintiff asserted that the suit raised complex issues that could not be adequately ventilated in an originating summons filed pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

3. The Court on 23rd March 2021 directed that the preliminary objection be determined as a preliminary issue before any further directions are given in the suit on the basis that if the preliminary objection was successful it had the potential of disposing the entire suit.

4. I have considered the issue raised in the preliminary objection and I am satisfied the threshold of what constitutes a preliminary objection as established in the case of ***Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd (1969) EA 696*** where the court held that a preliminary objection to qualify as such must be on pure point of law. In the instant matter the issue taken on the preliminary objection is whether or not the suit is fatally defective for not having been commenced by way of an originating summons as the law requires since the plaintiff's claim is founded on adverse possession. This is a pure point of law that can be argued and determined as a preliminary objection. In the ***Mukisa Biscuit case (supra) the court of Appeal as per Sir Charles Newbold, P.*** Stated thus:-

“A preliminary objection is in the nature of 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

5. The parties canvassed the preliminary objection by way of written submissions. The defendant submitted that he was the registered proprietor of **LR.No.Nakuru/Saino Settlement Scheme/1354** and holds a title deed for the property issued to him on 12th October 2005. He contends that the plaintiff is not challenging his title on grounds that the same was fraudulently and illegally procured and/or was procured irregularly and/or unprocedurally but has rather pleaded that she had been in conspicuous occupation of the land for a period of over 22 years and has thus acquired title to the said land by adverse possession. The defendant has argued that to the extent the plaintiff has predicated her case on the doctrine of adverse possession, the plaintiff ought to have instituted the suit by way of an originating summons and not by way of plaint. The defendant relied on the court of appeal decision in the case of ***Mania Njuguna -vs- Paul Njuguna Mwangi Nairobi Civil Appeal No.151 of 1999 (unreported)*** where the court stated as follows:-

“ this means that the usual way of instituting a suit is by way of a plaint but there are also other ways which can be prescribed for instituting suits. Orders XXXVI Rule 3D (now Order 37 Rule 7) of the Civil Procedure Rules prescribe the way for starting a suit for adverse possession under section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya). Such a suit is to be started by way of an originating summons supported by an affidavit and a copy of the title to the land”.

6. The defendant thus contended the plaintiff’s suit was fatally defective and should be struck out. He contended, not even the overriding objective under section 1A and 1B of the Civil Procedure Act and/or Article 159 (2) (d) of the constitution which enjoin the court to do substantive justice without being shackled by technicalities of procedure could save the suit arguing that procedural rules are an integral part of the overall administration of justice and cannot be ignored.

7. The plaintiff in response to the defendant’s submissions submitted that the Court of Appeal in the case of **Chevron (k) Ltd -vs- Harrison Charo Wa shutu (2016) eKLR** made it clear that a claim by adverse possession could be brought by way of plaint. The court of appeal in the case referred to the case of **Njuguna Ndatho -vs- Masai Ituma & 2 others Civil Appeal No. 231 of 1999** where the court had held a claim of adverse possession could only be brought by way of originating summons.

8. The Court of Appeal referring to the holding in the **Njuguna Ndatho case (surpa)** in the **Chevron (K) Ltd** case (supra) states thus:-

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See **Mariba -vs- Mariba Civil Appeal No.188 of 2002, Counterclaim or defence as was the case here. See Wabala -vs- Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin -vs- Julius Charo Karisa Civil Appeal No 26 of 2015, where the claim was raised in the defence this court in rejecting the objection to the procedure stated as follows: -**

“Where a party like the respondent is in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala -vs- Okumu (1997) LLR 609 (CAK)** which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd -vs- Kosgey (1998) LLR813** where the plaint made no specific plea for adverse possession, the plea was nonetheless granted”.

9. From the above exposition of the law by the court of appeal as relates to the competency of suits commenced by a plaint where adverse possession is raised, it is evident that a suit is not rendered fatally defective merely because the suit is commenced by way of a plaint rather than by way of an originating summons.

10. It is not lost to the court that in the majority of cases where the plaintiff instituted a claim for title on the basis of adverse possession commenced by an originating summons, the court invariably directs that the originating summons be deemed to be a plaint and the response thereof a defence and that the suit be heard by way of Viva voce evidence. This essentially is to enable the evidence of the parties to be tested under cross examination. Order 37 Rule 19 of the Civil procedure empowers the court to convert an originating summons into a plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a plaint. It cannot therefore be argued that where the suit that pleads adverse possession and is commenced by way of plaint is fatally defective.

11. The nature of the prayers sought in the plaint are such as would invite oral evidence and I am satisfied an originating summons would not have been an appropriate pleading to afford the parties the opportunity to fully ventilate their issues. No party would suffer any prejudice if the suit was permitted to proceed to formal trial as each party will have the opportunity to adduce evidence and cross examine the witnesses of the other party. It is my view that if the preliminary objection were to be upheld and the plaintiff’s suit struck out, it would amount to elevating reliance on procedural technicalities to a very high pedestal and to ignore the edict the constitution under Article 159 (2) (d) gives to the court to administer justice without undue regard to the technicalities of procedure. The Civil Procedure Act under sections 1A,1B and 3A enjoins the courts to administer justice in a just expeditious, efficient and cost effective manner. This overriding objective otherwise referred to as the oxygen principle (O2) is mirrored under section 3 of the Environment and Land Court Act while Section 19 (1) of the Environment and Land Court Act restates the provisions of Article 159 (2) (d) of the Constitution in the following terms: -

19 (1) In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure.

12. Having regard to the arguments in support and in opposition to the preliminary objection, it is my view that it would be efficacious to allow the suit to proceed to trial and the issues to be determined on merit. Striking out of the suit would leave the issues between parties unresolved and would perhaps mean another fresh suit would have to be instituted. That would not be fostering the overriding objective under sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act.

13. For the reasons I have discussed herein above I find and hold the preliminary objection is devoid of merit and the same is dismissed

14. The costs of the preliminary objection will abide the outcome of the suit.

15. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

J M MUTUNGI

JUDGE