



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC MISC CIVIL SUIT NO. 13 OF 2019

IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS PLOT NO. KWALE/MSAMBWENI 2974,

PLOT NO. KWALE/MSAMBWENI 2975,

PLOT NO. KWALE/MSAMBWENI 2976,

PLOT NO. KWALE/MSAMBWENI 2977,

PLOT NO. KWALE/MSAMBWENI 2978,

PLOT NO. KWALE/MSAMBWENI 2979,

AND

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

SALIMU BAKARI JOWA.....PLAINTIFF/APPLICANT

VERSUS

EUGENE JOSEPH CHERNEL.....DEFENDANT/RESPONDENT

RULING

1. For determination is the defendant's Notice of Motion dated 22nd September 2020 as well as the plaintiff Notice of Preliminary Objection dated 2nd February 2021.

2. On 3rd February 2021 court directed that the application and the Preliminary Notice be canvassed concurrently by way of written submissions.

3. The Notice of Motion is brought under Section 1A, 1B, and 3A, of the Civil Procedure Act and Order 2 Rule 15 (3) of the Civil Procedure Rules and seeks the following orders:-

a) THAT the above suit be dismissed with costs as against the plaintiff.

b) The plaintiff, his servants and agents to be declared trespassers and to be evicted, if on the Defendant's property Kwale/Msambweni/2975 & Kwale/Msambweni 2978 with police assistance if necessary.

c) THAT the costs of this application be provided for.

4. The application is supported by the affidavit of Jason Eugene Chernel and is based on the grounds that the plaintiff's suit against the defendant is scandalous, frivolous and vexatious, with no chance of success, and is an abuse of the court's process. That the plaintiff's suit against a deceased person is null and void ab initio. That the plaintiff cannot sustain an adverse possession claim against the deceased defendant who bought the undivided land Kwale/Msambweni 'A' 1682 from the plaintiff.

5. Mr. Jason Eugene Chernel stated that he is the son of the defendant who is deceased. He annexed a copy of the Certificate of Confirmation of Grant dated 31st January 2017 and marked 'A'. The deponent stated that the plaintiff was one of the original vendors who sold Kwale/Msambweni/1682 to the deceased defendant, who upon getting title subdivided it into Kwale/Msambweni 2975, 2976, 2978 & 2979. That the deceased defendant then sold Kwale/Msambweni 2976, 2977, 2979 and retained Kwale/Msambweni 2975 and 2978, and he refuted the claim that Kwale/Msambweni/2974 exists.
6. Mr. Jason Eugene Chernel stated that the plaintiff cannot claim adverse possession over the suit property when he had sold it to the deceased defendant and handed vacant possession, which the deceased defendant subdivided and sold. To prove the sale of the suit property between the plaintiff and the defendant, the defendant annexed a copy of the sale agreement marked 'C', a copy of the transfer marked 'D', a copy of the title deed issued to the defendant marked 'E' and a copy of the Land Board Consent for consolidation of Kwale/Msambweni 1682 and Kwale/Msambweni 'A' 1348. The deponent also annexed the defendant's letter 'G', addressed to the Land Registrar Kwale relinquishing the original titles of Kwale/Msambweni 1682 and Kwale/Msambweni 'A' 1348 in exchange for the subdivision and creation of Kwale/Msambweni/2975, 2976, 2979. The deponent went on to explain why the plaintiff has no claim over the suit property, since Kwale/Msambweni/2975, 2976, 2979 were sold off and attached copies of their respective transfer forms as 'H' 'I' 'J'.
7. Mr. Jason Eugene Chernel stated that the suit is bad in law, misconceived and a nullity for suing a deceased person, instead of suing the estate of the deceased through his executors or administrators, of whom none has been sued herein, and for that reason the suit should be struck out with costs. He further claimed that the plaintiff's suit has no chance of success as it's a nullity from inception, and prayed to court to dismiss the plaintiff's suit with costs.
8. The applicant objected to the application, through a Notice of Preliminary Objection dated 2nd February 2021 and prayed for the same to be struck out with costs on the grounds that; the application seeks to recover the suit property by stating that the plaintiff is trespassing, which amounts to tort, a separate and distinct cause of action. That the court lacks jurisdiction to hear and determine the application, which has been brought after the lapse of the statutory period set out in Section 4 and 7 of the Limitation of Actions Act. That the application is incompetent, bad in law and the same should be struck out with costs.
9. The defendant filed his submissions on 15th February 2021 and stated that it's trite law that a suit cannot be filed against a deceased person and that the defendant died before the suit was filed, making it unsustainable, null and void and incapable of amendment. He made reference to the Court of Appeal decision in **Geeta Bharat Shah & 4 others V Omar Said Mwatayi and anor (2009) EKLR** to emphasize that the entire suit is a nullity with no chance of joinder or amendment, and the law is clear that legal representative cannot be forced to join a nullity.
10. Further to that, the defendant stated that the plaintiff as required by Order 37, Rule 7 of the Civil Procedure Rules has not attached any extract of the title to his affidavit supporting his claim, and without the title which is a mandatory requirement, the suit for adverse possession, cannot proceed and is groundless. The defendant also stated that the plaintiff did not disclose to court that he sold the suit property to the defendant, and by virtual of the sale, transfer and issuance of title to the defendant, the plaintiff relinquished all his rights, title and interest in the suit property. That having sold the suit property, the plaintiff cannot turn around and claim the same land vide adverse possession.
11. In response to the plaintiff's Preliminary Objection, the defendant stated that every continuance of trespass, causes a fresh cause of action for so long as the trespass continues and made reference to **Eluid Njoroge Gachiri V Stephen Kamau Ng'ang'a (2018)EKLR**. For that reason, the defendant stated that the application is not time barred by the Limitation of Actions Act and that the suit is null and void from inception and for that reason the court should grant the application.
12. The plaintiff filed his submissions on 4th March 2021 and stated that the defendant have admitted to the sale agreement in 1984, after which the plaintiff and his family has always been in actual possession, with the full knowledge of the defendant who has not demanded the plaintiff to be evicted, nor shown interest to the suit property. That the defendant has been indolent of his rights for over 30 years making the plaintiff to have been in actual possession for 12 years as prescribed by the law, and he sought to rely on the Court of Appeal decision of **Chervon (K) Ltd V Harrison Charo wa Shutu (2016)EKLR**.
13. The plaintiff further submitted that the defendant slept on his rights and has not demonstrated to court any step that he took throughout the years, to secure the suit property from the plaintiff, and nothing stops the plaintiff from approaching court for adverse possession. He further submitted that suit herein had merit and that the contention that the suit is against the defendant who is deceased can be cured by having the claim withdrawn and filed afresh with the right parties.
14. That the claim of trespass made under a notice of motion cannot be sustained as stated in the case of **Pronto Energy Limited V Hashi Energy Limited (2019)EKLR**, and that a claim for trespass can only be brought as a claim on its own, since an order for eviction is a form of permanent injunction. The plaintiff advanced the argument that the defendant can only sustain a claim for trespass in a suit where he can seek permanent injunction against the plaintiff in a suit where parties can be heard on merit. The plaintiff relied on **Haile Selassie Libara Muhalia V Muranga Propoerties Ltd and anor (2007)** where it was held that in an application for injunction brought under Sub Rule2, the applicant is required to cement or anchor his interim relief in a relief of permanent injunction in the plaint, and failure to do so as the defendant has done render the application incompetent. The plaintiff concluded by asking court to allow the preliminary objection and strike out the application with costs to the plaintiff.
15. I have considered the pleadings, submissions filed herein as well as the authorities relied upon.
16. The defendant invites court to invoke Order 2, Rule 15 of the Civil Procedure Rules, that empowers court consider striking out pleadings, including this Originating Summons at any stage of the proceedings. The defendant has pleaded that the plaintiff's suit is scandalous, frivolous and vexatious, that the suit has no chance of success and is an abuse of the process of the court.
17. The plaintiff's suit has been brought as a Originating summons dated 5th April 2019, brought under Order 37 Rule 1 of the Civil

Procedure Rules, Section 3A of the Civil Procedure Act, Section 7, 37 and 38 (7) of the Limitation of Actions Act. The plaintiff claim ownership to Plot No. Kwale/Msambweni 2974, 2975, 2976, 2978 and 2979 by virtue of adverse possession. In his supporting affidavit, the plaintiff states that he has for the past 20 years resided in the suit property that measures approximately 9.6 ha. He stated that he has lived on the suit property all his life together with his family. He further states that he has built his permanent structures, and planted vegetation while enjoying quite possession of the suit property.

18. Order 37, Rule 7, states that originating summons shall be supported by a certified extract of the title to the land in question. The plaintiff claims Plot No. Kwale/Msambweni 2974, 2975, 2976, 2978 and 2979 by virtue of adverse possession. The plaintiff states in his affidavit that he has attached a certified copy of the official search to the suit land. I have carefully perused the court file and I do find that there is none attached. Nevertheless, an official search does not amount to a title document within the meaning of Section 26 of the Land Registration Act. Order 37 Rule 7 requires that a certified extract of the title to be exhibited. There is none exhibited in this case.

19. The defendant in his supporting affidavit has attached a sale agreement dated 7th July 1980 where the plaintiff together with Hassan Bakari and Abdalla Bakari Njowa sold Kwale/Msabweni "A" 1682 to the defendant, and a certificate title was issued on 28th March 1981 in favour of the defendant. The defendant later subdivided the said parcel of land and surrendered the mother title to the Land Registrar. The defendant was issued with titles to Subdivisions Kwale/Msambweni 2975, 2976, 2977, 2978, 2979, 2980, and 2981. Of the subdivisions, the defendant avers that Plot No. 2976, 2977 and 2979 were sold and retained ownership to Plot No 2975 and 2978. He attached the following transfer forms; Kwale/Msambweni "A"/2976 that was registered on 1st October 1982, Kwale/Msambweni "A"/2977 that was registered on 7th June 1984, and Kwale/Msambweni "A"/2979 that was registered on 23rd June 1983.

20. From the evidence adduced by the defendant, out of the five Plots that the plaintiff claims ownership to, three of them have been transferred to third parties ie Kwale/Msambweni "A" 2976, 2977 and 2979. The plaintiff has not adduced any evidence to challenge the title that was passed to the 3rd parties by the defendant neither has he laid claim to the title held by the 3rd parties.

21. The rationale of Order 37 Rule 7, in this present suit is to guide court to make a determination on who is the registered proprietor of the said parcels of land, the exact acreage and date of registration to compute time. The defendant has adduced evidence to prove that he has since transferred title on three of the plots, yet the plaintiff has not adduced evidence to the contrary.

22. In my view, the plaintiff should have annexed the respective title documents to Kwale/Msambweni 2974, 2975, 2976, 2978 and 2979. A suit for adverse possession, basically seeks to deprive a registered proprietor of title to land, and such plaintiff ought to adhere to the mandatory requirements of Order 37 Rule 7.

23. In my view, the plaintiff's suit discloses no reasonable cause of action and cannot sustain this suit for he has not demonstrated to court a title capable of supporting a claim of adverse possession.

24. The applicant, has annexed a Certificate of Confirmation of Grant dated 31st January 2017 for the estate of the deceased defendant. Steven Smith, Solti Gyozo (Junior) and Saleem Ghalia were named as the legal representatives of the estate of the deceased defendant. Having confirmed that the defendant is deceased, this court finds that the plaintiff's suit is a non-starter for having failed to institute the suit against the persons who have been issued grant of letters of administration. Only persons holding letters of administration have the capacity to represent the estate of a deceased person.

25. Consequently, I find no merit in the plaintiff's Notice of Preliminary objection dated 2nd February 2021 and dismiss it. I find the defendant's application merited and it is hereby allowed. The plaintiff's suit is dismissed with costs to the defendant.

26. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this, 7th day of June 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE