



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 26 OF 2020 (OS)

MUKOKINYA M'ARITHI.....PLAINTIFF

VERSES

PATRICK MUNKIRI KABUNDUDEFENDANT

IN THE MATTER OF ADVERSE POSSESSION OVER L.R NO. THAU/MUMUI/5

AND

IN THE MATTER OF

THE LIMITAITON OF ACTIONS ACT (CAP 22)

AND

IN THE MATTER OF

ALND ACT NO. 6 OF 2012 AND LAND REGISTRATION ACT NO. 3 OF 2012

RULING

1. Mukokinya M'Arithi the applicant has brought an application dated 27th July 2020 under order 40 of the civil procedure rules section 1A, 1B, 3 3A and 3E of the civil procedure Act section 68 (1) & (2) 69 and 70 of the land registration act and section 29 of the environment and land act seeking for prayers

(a) Spent

(b) That an order of temporary injunction do issue restraining the respondent, his agents, relatives, servants or anyone acting at his behest from evicting, entering into or in any other manner whatsoever interfering with the plaintiffs quiet possession, occupation and use of L.R No. Thau/Mumui/5 pending interparties hearing of this application and thereafter pending hearing and determination of the main suit.

(c) That an order of inhibition do issue inhibiting any dealing with L.R No. Tahu/Mumui/5 pending hearing and determination of this suit.

(d) That the respondent do bear the cost of the application.

2. The application is premised on the grounds that the applicant who is elderly has been in occupation of the land since 1993, initially her deceased husband was the registered owner but it appears the respondent fraudulently became a registered owner in 2006. The respondent has threatened to evict her yet she has nowhere else to go.

3. She has a supporting affidavit sworn on 27th July 2020 in which she has attached annexures marked as MM1 – MM 4 namely the green card extract, death certificate, photo images of her homestead and search certificate showing the current ownership of the suit premises.

4. The plaintiff applicant approached this court by way of an originating summons dated 27th July 2020 brought under section 7 (d) of the land act section 28 (b) of the land registration act order 37 rule 7 (1) and (2) of the civil procedure act and any other enabling provision of the land in which she claims to be entitled to the whole of L.R No. Thau/Mumui/5 by virtue of adverse possession and for determination of

following questions:

- Whether her and her deceased husband were original owners; whether she took possession over twelve years continuously, uninterrupted and exclusively and hence entitled to be declared adverse possessor; if the defendants acts are fraudulent and detrimental to her rights.
- Whether the title held by the defendant ought to be cancelled and rectified in her favour and lastly who should bear the cost of this suit.

5. After the filing of both summons and application, the applicant filed yet another application dated 29th March 2021 seeking for admission for hearing during the high court vacation. The court allowed the chamber summons and issued interim orders on 10th May 2021 and observed a ruling herein after previous directions and consent this both the application and a preliminary objection dated 31st August be disposed off by way of written submissions.

6. Having only given the above background I now turn to the preliminary objection based on the following grounds:-

- (i) That the originating summons and the notice of motion dated 27th July 2020 is misconceived, frivolous and vexatious.
- (ii) That the originating summons and notice of motion is an abuse of the court process, bad in law, ill conceived, frivolous, vexatious and ought to be dismissed.
- (iii) That the plaintiff and his lawyers have no locus standi to bring the proceedings for want of authority from the estate of M'Mugongo Thanyuke Baibere.
- (iv) That there was a consent order dated 2nd March 2005 in which Hon. Justice Kamau sitting at High Court Nairobi handled the estate of the deceased and settled it by consent of the beneficiaries.
- (v) That the court cannot determine issues herein which were compromised by a court of competent and concurrent jurisdiction in HCK succession cause no. 408 of 1978 and hence the applicant is estopped from reopening a settled matter fifteen years down the line.
- (vi) The subject matter of the originating summons does not qualify in law under order 36 of the civil procedure rules.

7. Following the filing of the originating summons the record shows the court did not certify the application dated 27th July 2020 as urgent but granted orders for maintenance of the status quo on 30th July 2020. The respondent was ordered to file a reply to both the originating summons and the notice of motion.

8. In compliance the respondent filed 8 grounds of opposition dated 31.8.2020 which are similar to the notice of preliminary objection above mentioned. Similarly the respondent filed a replying affidavit sworn on 26th October 2020 via email which prompted the applicant to file a supplementary affidavit sworn on 2nd November 2020 in which the court had given directions to be filed by 27th October 2020.

9. The court has looked at all the pleadings in this matter and the written submissions by the applicant dated 3rd November 2020.

10. The issues to be determined are whether the grounds set out in the notice of preliminary objection are points of law which constitutes a preliminary point of law.

11. In **Mukisa Co. Ltd vs West End Distributors Ltd (1969) EA** it was held:

“A preliminary point consists of a point of law which has to be pleaded or which arises by clear implication out of pleading and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to defer the dispute to arbitration.....”. Preliminary objection is in the nature of what used to be a demand. 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.

12. The 1st and 2nd grounds of preliminary objections are that both the OS and the motion are misconceived, frivolous, vexatious, abuse of court process, bad in law and ought to be dismissed. The respondent has not demonstrated in law why in his view the suit and the application fit such a description. He who plead must prove. In my considered view though the respondent has not elaborated this two grounds, the issues raised fall under exercise of court discretion and hence fall short of the test under the lens of the above quoted decision.

13. With regard to grounds 3, 4, 5, 6 & 7 of the objection, the respondent has not filed an answer to the originating summons in which he has attached any ruling, consent orders, decision, decree and or pleadings to support such an allegation. More importantly even if that was the case it would be matters falling under ascertainment of facts which in this matter are disputed by both parties.

14. At this juncture this court is yet to give directives on the manner of hearing the originating summons.

15. The last ground of objection is that the subject matter on the originating summons does not qualify in law under order 36 of the civil procedure act. The above order states that:

“All suits where a plaintiff seeks judgment for— (a) a liquidated demand with or without interest; or (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits”.

16. This section on summary digest;- I don't think the originating summons has invoked orders 36 of the civil procedure rules and that the applicant has made any prayer for summary judgment. As have stated above this court is yet to give directions on the manner of disposing of the originating summons. Even if there was to be such a request by the applicant which the court is not aware of, the respondent has already filed grounds of opposition to the originating summons as well as a replying affidavit, though the applicant in her supplementary affidavit seeks to have it rejected by virtue of having been filed outside the deadline set out by the court.

17. This court reiterates the spirit of both the constitution of Kenya 2010 article 159 as read together with section 1A, 1B, 3, 3A of the Civil Procedure Act and Environment and Land Court Act to do substantive justice to the parties.

18. No party ought to be shut out of the seat of justice on account of mere procedural technicalities and no prejudice has been demonstrated by the applicant that if the replying affidavit were to be admitted as duly filed within time. Needless to say the applicant has responded to its contents through a supplementary affidavit.

19. Bearing in mind the respondent is acting in person and assuming the respondent mistakenly offered to order 36 instead of order 37 under which the originating summons is brought it is important to discuss this last point of preliminary objection in that context.

20. Order 37 rule 8 provides instances when the court may be moved by way of originating summons in relation to registered land unless there is a pending suit involving the same land in which case such an application has to be made in such a suit.

21. It is not in dispute that the subject land herein is registered under the Registered Land Act Cap 300 now repealed. The applicant is seeking adverse possession as well as cancellation on the grounds that the registration was irregular in favour of the respondent.

22. On the face of the originating summons, the applicant has stated the grounds and facts she relies upon.

23. Question (a), (b) & (c) raises matters of fraud cancellation and rectification of the register. These are by no means complex in terms of applicable law and requiring detailed evidence. They require a full hearing which is outside the scope of an originating summons.

24. In Kibatiri vs Kibutiri (1983) KLR 1 law 8 held as follows;

“The scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raised are complex and contentious questions of facts and law a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit”.

25. Order 37 rule 19 (1) gives the court a discretion at the time of giving discretion on the manner of proceeding with the matter by way of conversion into a plaint of otherwise for one reason or the other.

26. In the instant case, the court is asked by the applicant to determine matters adverse possession as well as those of fraud, illegality and subsequent cancellation of the title deed.

27. It is clear the land registrar and the government under which the land registrar works are not party to these proceedings. The applicant has not sought to enjoin them. The applicant must move within the law so as to seek courts orders. It is obvious therefore the originating summons is the wrong procedure to move the court for cancellation of title on account of fraud or illegality.

28. The court of appeal in John W. Wepukhulu vs Secretary board of governors, burn school (2005) eKLR held thus;

“The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction of certain specific facts or obtaining of specific directions of the court such as trustees, administrators or court execution officers. The procedure should not be used for determination of matters that involve a serious question or determination of disputed questions of facts”.

29. Further in Mukesh Manchana Shar and another vs Priyat Shah and another (2015) eKLR the court of appeal reversed on High court ruling declining jurisdiction and held thus;

“Before we consider how these provisions apply to the question before us, we held to emphasize that it is perfectly well settled and indeed engrained in practice as repeatedly stated by legious of judicial authorities that unrestricted use of originating summons procedure is discouraged. It follows that the application by originating summons has never been a substitute for initiating claims involving contentious issues of facts looking at the history of its evolution.....”.

All the actions identified in order 37 are to be brought by originating summons in a simple form no. 26 or 27 of the appendix A.....

Locally Hancox JA as he then was In Waki commissioners vs Mohammed Bin Umeya Bin Abdulmanji Bin Mwijabu & antoher Mombasa Civil Appeal no. 83 of 1983 concluded

.....complex issues Are not appropriate for decision by way of an originating summons.

.....in the originating summons under our review, we reiterated that the respondent raised six very specific and direct questions. They all question to do with the construction of the will.....”.

..... the questions are not complex and the issues involved all that serious enough to warrant the invocation of the usual procedure of a plaint.....”.

30. Unlike in the instant case the Court of Appeal found the court had jurisdiction to handle that matter for the dispute had no likelihood of substantial or protracted trial.

31. The applicant herein has raised nine issues which in my considered view raise substantial points of law as well as facts. The respondent in his reply has highly disputed those facts.

32. They therefore appear to me to be not only controverted contentious but also serious in nature. The issues also appear to involve other parties who are not party to these proceedings. Even if the court were to exercise its discretion and give direction on the mode of hearing by way of conversion such other parties have to be brought on board.

33. The court of appeal in the above quoted case went on to hold that it is no longer mandatory to raise a claim for adverse possession only by way of originating summons as held in Husenaka vs Omocha 1994 LLR 578 and in Wabala & another vs Okumu 1997 LLR 608.

34. In Cyst J. Haroo and another vs Uchumi services Ltd and 3 others 2014 eKLR Angote J held thus; held thus:

“This court can indeed cancel a title deed by ordering for the rectification of the register where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.....

However order 37 rule 8 of the civil procedure rules expressly prohibited this court to entertain a claim for cancellation of a title deed by way of originating summons.....

To provide fraud, one has to examine in detail the documents that led to the acquisition of the said title examination and cross examination of people involved in the processing of the title and sometimes calling of expert witnesses or the officials from the ministry of lands and other relevant institution.....”.

35. In the circumstances of this case one of the prayers is for cancellation of the title deed. I find and hold the proceedings before this court offends order 37 of the Civil Procedure Rules and proceed to strike out the originating summons and by extension the notice of motion dated 27th July 2020 with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

Thangicia for plaintiff

Kabundu in person

HON. C.K. NZILI

ELC

JUDGE