



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC No. 10 OF 2020

BETWEEN

AGNES NYALOYA LUKWA (suing as the legal

representative of the estate of the late

JULIUS MUHAMBI AMAYI (DCD).....APPLICANT

AND

ANTONY PANGA IMBUUSI..... RESPONDENT

RULING

1. The applicant commenced proceedings herein through Originating Summons (OS) filed on 18th February 2020. She averred that she has acquired title to the parcel of land known as Idakho/Shikulu/2339 by way of adverse possession. She therefore sought determination of the following questions:

1. WHETHER the Applicant herein AGNES NYALOYA LUKWA legal representative of the estate of the late JULIUS MUHAMBI AMAYI has acquired title to the parcel of land known as IDAKHO/SHIKULU/2339 measuring 0.5 Ha or thereabouts by way of adverse possession.

2. WHETHER the Respondent ANTONY PANGA IMBUUSI holds title to the said parcel of land in trust for the Applicant.

3. WHETHER the title of the Respondent to the said parcel of land got extinguished upon the expiry of 12 years from the date the Applicant took possession in or about 1995.

4. WHETHER the Respondent should be ordered to execute all documents of transfer to facilitate the transfer into the Applicant's name of the said parcel of land.

5. WHETHER the Respondent should be condemned to pay costs of this suit.

2. The respondent answered the OS *inter alia* through Notice of Preliminary Objection dated 13th July 2021. This ruling is in respect of the said preliminary objection.

3. The preliminary objection was pleaded as follows:

TAKE NOTICE that at the hearing of this suit, Counsel for the Defendant shall raise a Preliminary Objection on point of law on grounds that

1. That the Plaintiff failed to annex to the Supporting affidavit sworn 14/2/2020 an abstract of title of the land they adversely claim contrary to mandatory provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules.

2. That consequently the Defendant prays that the Originating Summons dated 3/5/2018 be struck out with costs.

4. The court ordered that the preliminary objection be canvassed through written submissions. Both sides duly filed submissions.

5. The respondent argued that non-compliance with **Order 37 Rule 7 (2)** of the **Civil Procedure Rules** is fatal to the suit. He relied on the case of **Wesley Kipyegon Bor & 8 others v Richard Pares & 3 others [2020] eKLR**. Additionally, the respondent argued that the

applicant deposed that her husband bought the suit property through an agreement date 21st June 1995 and considering that this suit was filed in the year 2020 which is 25 years from the date of the agreement, the suit offends **Section 7** of the **Limitation of Actions Act**. He urged the court to strike out the suit with costs.

6. On her part the applicant argued that striking out is a special remedy and a technicality which should only be resorted to in the most hopeless of cases. Citing **Article 159 (2) (d)** of the **Constitution of Kenya**, **Section 19** of the **Environment and Land Court Act** and **Section 1A** of the **Civil Procedure Act**, she argued that the focus should be on substantive justice rather than dismissing matters on procedural technicalities. She further argued that failure to comply with **Order 37 Rule 7 (2)** of the **Civil Procedure Rules** can be remedied under **Order 37 Rule 18**. She went on to argue that the respondent had conceded in his replying affidavit and witness statement that he is the registered owner of the suit property. She cited *inter alia* the cases of **Essolly Enterprises Limited v Benjoh Amalgamated Limited [2019] eKLR** and **Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) & 3 others [2018] eKLR** and urged the court to dismiss the objection.

7. I have considered the objection and the submissions. The law relating to preliminary objections in this region has been settled since the often-cited decision of the Court of Appeal for East Africa in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** where Law JA stated as follows:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. Sir Charles Newbold, P. went on to state in the same case thus:

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 had to be ascertained or if what is sought is the exercise of judicial discretion. ...

9. It follows therefore a matter in which the court has discretion cannot be the basis of a valid preliminary objection.

10. The thrust of the preliminary object is that there is non-compliance with **Order 37 Rule 7 (2)** of the **Civil Procedure Rules**. The rule provides:

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

11. The applicant seems to indirectly concede that she did not comply with the rule. She has instead focused her efforts on showing that it would not be just to strike out her suit for not complying with the rule. A perusal of the originating summons and the affidavit in support shows that indeed, a certified extract of the title to the suit property was not annexed.

12. The question that arises is whether non-compliance with **Order 37 Rule 7 (2)** in the first instance should lead to an automatic striking out. A ready answer is found at **Order 37 Rule 18** which provides:

At the time of directions, if the parties do not agree to the correctness and 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 such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

13. It seems to me therefore that the court has discretion and power to remedy non-compliance with **Order 37 Rule 7 (2)** prior to trial. That is more so in the context of the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** and **Section 19** of the **Environment and Land Court Act** which emphasise the overall mission of the court to do substantive justice. Consequently, the preliminary objection herein which is founded entirely on non-compliance with **Order 37 Rule 7 (2)** cannot succeed. In line with the mission of the court to do substantive justice, I will give the applicant a chance to comply. Adverse consequences will only follow in the event of failure to comply upon expiry of the period given.

14. I am aware that prior to filing the Notice of Preliminary Objection, the respondent had filed a replying affidavit in which he asserted that he is the registered proprietor of the suit property. Such a concession does not relieve the applicant of her obligations under **Order 37 Rule 7 (2)**. It is for good reason that the law expects that all registrable details of the suit property in a claim for adverse possession be vouched for by the land registrar and not just the parties. Among other possibilities, the parties may be genuinely mistaken as to such details.

15. The respondent also argued that this suit offends **Section 7** of the **Limitation of Actions Act**. That aspect of the submissions has no foundation in the preliminary objection and is at best an afterthought.

16. In view of the foregoing discourse, I make the following orders:

a) **Notice of Preliminary Objection dated 13th July 2021 is dismissed. Costs shall be in the cause.**

b) **The applicant to file and serve within 30 (thirty) days from the date of delivery of this ruling, a supplementary affidavit to which a certified extract of the title to the parcel of land known as Idakho/Shikulu/2339 is annexed.**

c) In default of compliance with (b) above, this suit shall stand struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Anguba for the Applicant

No appearance for the Respondent

Court Assistant: E. Juma