



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 51 OF 2018 (OS)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION**

**BETWEEN**

**ISAYA OWINO ONUONGA.....APPLICANT**

**Versus**

**MARGARET ATIENO OWINO (Administrator of the**

**Estate of WILLIAM ANGUJO ONYANGO –(Deceased).....RESPONDENT**

**AND**

**TOM ODIPO JAOKO.....1<sup>ST</sup> INTERESTED PARTY**

**FREDRICK OMONDI OKATI.....2<sup>ND</sup> INTERESTED PARTY**

**MOURICE OKOTH OKATI.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

**A. INTRODUCTION**

1. This ruling is in respect to two-fold matters namely:

a) A Notice of motion dated 2<sup>nd</sup> July 2018 and filed in court on 12<sup>th</sup> July, 2018 by the 3<sup>rd</sup> interested party, Mourice Okoth Okati (herein after referred to as the instant application)

and

b) A Notice of motion preliminary objection dated 24<sup>th</sup> May 2018 by the 1<sup>st</sup> interested party, Tom Odipo Jaoko (herein after referred to as the preliminary objection)

2. At the heart of the present dispute is a parcel of land measuring approximately 0.03 hectares in area comprised of original land title number West Kasipul/Konyango Kokal/1671(now 2594,2594,2595 and 2596 herein after referred to as the trio suit parcels of land) situate in Homabay County within the Republic on Kenya. The trio-suit parcels of land were immediate subdivisions of the parent land title number West Kasipul/ Konyango Kokal/2362 forming part of the original land.

3. The applicant Isaya Owino Onuonga (the applicant herein) is represented by learned counsel, Mr. J. Bana of Bana and Company Advocates.

4. The respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are represented by the firm of Midenga and company Advocates further to a Notice of change of advocates dated 21<sup>st</sup> January, 2019 and filed on 2<sup>nd</sup> January, 2019 and a Notice of appointment dated 11<sup>th</sup> November, 2019 and filed on 12 November, 2019. Previously, the firm of Abdullahi and advocates, were on record for the 3<sup>rd</sup> interested party.

5. The 1<sup>st</sup> interested party is represented by learned counsel, Mr. Odondi Awino of M/s. Ododi Awino and company advocates.

#### **B. THE PLAINTIFF'S CLAIM IN THIS SUIT**

6. The present suit was filed by way of an originating summons dated 17<sup>th</sup> April, 2018 and filed in court on 18<sup>th</sup> April, 2018 under **Order 37, Rule 7(1) and (b) of the Civil Procedure Rules, 2010 and section 38 of the Limitation of Actions Act (Cap 22)**. The applicant is claiming herein that he has acquired the right to title to the parent land by way of adverse possession.

7. The originating summons is premised on grounds 1 to 5 set out on it's face and the applicant's 14-paragraphed supporting affidavit of even date. In particular, the plaintiff is seeking determination of the following issues;-

1) A declaration that the respondent's right to recover 0.03 hectares of the original land title NO. WEST KASIPUL/KONYANGO KOKAL/1671(now 2594,2595 AND 2596) is barred under the Limitation of Actions Act, Cap 22, laws of Kenya and her title thereto extinguished.

2) A declaration that the purported transfer of the resulting title NO. WEST KASIPUL/KONYANGO KOKAL/1671(now 2594,2595 and 2596) to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties was wrongful, unlawful and null void.

3) Cancellation of the register in respect of title NO. WEST KASIPUL/KONYANGO KOKAL/1671(now 2594,2595 and 2596) and transfer of the said titles to the applicant.

4) Permanent Injunction.

5) The Deputy Registrar of this court do execute a transfer of 0.03 hectares of the suit property in favour of the applicant.

6) Costs.

8. Briefly, the applicant claims that on 2<sup>nd</sup> April, 1980, he bought a portion 25ft by 140ft of the original land from William Ongujo Onyango (deceased) for Kshs.3000/= which he paid in full as shown in the 1<sup>st</sup> agreement marked as "100-1". Again by a second agreement dated 17 December, 1981, the applicant bought an additional portion measuring 25ft by 140ft of the original land from the said deceased at Ksh.3000/= which he paid in full as per the second agreement marked as "100-2". That in the year 1982, the applicant developed the trio-suit parcels of land by erecting several renting houses thereon. That the deceased died before transferring the trio suit parcels of land to him.

9. The applicant further claims that in the year 2006, the respondent was appointed as the administrator of the estate of the deceased. That the respondent subdivided the original land into among others, the parent land, LR NO.2362 covering the applicant'd developments thereon and demanded an additional sum of Kshs.100,000/= which the applicant paid in full to the respondents as shown in the 3<sup>rd</sup> agreement dated 6<sup>th</sup> April 2007 and marked as "100-4". That since 1980 the applicant has occupied and possessed the trio-suit parcels of the land openly, peacefully and continuously. That the defendant has failed to transfer the trio-suit parcels of land to the plaintiff hence participating the present suit.

#### **C. THE RESPONDENT AND INTERESTED PARTIES' RESPONSE**

10. The defendant and the 2<sup>nd</sup> interested party failed to the reply to the originating summons. They were duly served with summons to enter appearance dated 15<sup>th</sup> April, 2018 which prompted them to hire their present counsel on record.

11. The 1<sup>st</sup> interested party denied the applicant's claim by his replying affidavit sworn on 24<sup>th</sup> May, 2018. He deposed that he is a stranger to the applicant's claim.

12. In his 18-paragraphed replying affidavit simultaneously filed with the application and dated evenly, the 3<sup>rd</sup> interested party deposed, inter alia, that the applicant's claim is complex and raises weighty issues that cannot be tried by way of originating summons which procedure is unsuitable for resolving such issues. That the originating summons is want of reasonable cause of action and non suited herein. That the same is incompetent ill advised, misconceived, actuated by bad faith, manifestly scandalous, frivolous, vexatious, totally devoid of merit and a blatant abuse of the honourable court process.

13. The 3<sup>rd</sup> interested party further deposed that the prayers sought in the originating summons are not tenable. That the applicant cannot claim that he bought the trio-suit parcels of land alongside a claim for prescription by adverse possession under the cited provisions of the law. He relied on annexed documents marked as "MOO" which include a copy of the title deed and register in respect of the 3<sup>rd</sup> suit parcel of land and sought that the suit be struck out and or dismissed with costs.

#### **D. THE INSTANT APPLICATION**

14. In the instant Application, the 3<sup>rd</sup> interested party is seeking the following orders;

a) Spent

b) The honourable court be pleased to strike out the suit herein as the same is bad at law, it is scandalous, frivolous, vexatious and otherwise an abuse of the courts process.

c) Such orders and/or directives that the Honourable court may deem just and appropriate in the circumstances of this case.

d) Costs of this application be awarded to the 3<sup>rd</sup> interested Party/ Applicant.

15. The said application is premised on grounds 1 to 14 set out on it's face and the 3<sup>rd</sup> interested party's supporting affidavit. Essentially, the contents of the replying affidavit are replicated in the said grounds and the supporting affidavit to the application which do constitute the gist of the instant application.

16. By grounds of the opposition dated 16<sup>th</sup> October, 2019 the plaintiff opposed the application and the preliminary Objection. The grounds are that:

1. Both the Notice of Motion and the Notice of Preliminary Objection are misconceived and without basis.

2. The plaintiff's suit is sound and proper being brought under **section 38 of the Limitation of Actions Act as read with the provisions of the Land Control Act and Order 37 of the Civil Procedure Rules,2010.**

3. No proper basis has been laid for dismissal of the suit.

4. The prayer for dismissal of suit at this stage goes against the principal of overriding interest.

5. The suit is not defective and if so, such defect is curable.

#### **E. THE PRELIMINARY OBJECTION**

17. In the preliminary objection, the 1<sup>st</sup> interested party has sought that the plaintiff's originating summons be struck out on the grounds:-

**i. THAT the originating summons is incurably defective for failure to annex an extract of title as mandatorily required by Order 37 Rule 7(2) of the Civil Procedure Rules, 2010 under Cap 21 Laws of Kenya.**

18. The applicant opposed the preliminary objection as already noted at paragraph 16 herein above.

#### **F. SUBMISSIONS OF THE PARTIES**

19. On 18<sup>th</sup> October 2018, the court directed that both the application and the preliminary objection be argued by way of written submissions. Accordingly. On 22<sup>nd</sup> January 2019, learned counsel for the 3<sup>rd</sup> interested party filed submissions dated 21<sup>st</sup> January, 2019. Learned counsel for the 1<sup>st</sup> interested party associated himself with the said submissions as shown in the court proceedings of 23<sup>rd</sup> July, 2019 herein.

20. Learned counsel for the plaintiff was given latitude to file and serve submissions as revealed in the court proceedings of 18<sup>th</sup> October, 2018, 22<sup>nd</sup> January, 2019, 23<sup>rd</sup> July 2019, and 3<sup>rd</sup> October, 2019. However, the said counsel failed to comply accordingly as discerned in the court proceedings of the 12<sup>th</sup> November, 2019 in this matter.

21. In the 3<sup>rd</sup> interested party's submissions, reference was made to the orders sought in the originating summons as well as orders sought in the instant application. His counsel framed and analysed issues as to whether the application is merited and the party to bear the costs of the application in favour of the 3<sup>rd</sup> interested party. Counsel submitted that it is now settled that the objective of legal proceedings by way of an originating summons in to provide quick, simple and non-expensive remedy in certain cases as held in **Bhari -vs- Khan (1965) EA 94** cited with approval by the Court of appeal in the case of **Nyambura Mucheru -vs- Joyce Wanjiru Mucheru (2000) eKLR and the decision in Mwalimu Kalume Charo and another -vs- Kifalu Karisa Kitsao (2016) eKLR.**

22. Counsel also submitted, inter alia, that the 3<sup>rd</sup> interested party bought the 3<sup>rd</sup> suit parcel of land from one Peter Akoko Yoya, the then registered proprietor at Kshs 230,000/= being the purchase price in the year 2006. That the same land was eventually transferred to the 3<sup>rd</sup> interested party on the 12<sup>th</sup> day of February, 2016 and that the he has possessed and occupied the land without any interruption.

23. Counsel further submitted that the originating summons in complex and raises weighty issues that cannot be tried by way of the said summons as sought therein. That the suit is filed contrary to statute hence cannot be saved by the oxygen principle or Article 159 of the Constitution of Kenya, 2010. Counsel relied on authorities namely **Cyril S. Haroo and another -vs- Uchumi services Ltd and 30 others (2014) eKLR, Kibutiri -vs- Kibutiri (1983) KLR and Telkom Kenya Ltd -vs- John Ochanda** (suing on his own behalf and on behalf of 996 former employees of **Telkom Kenya Ltd (2014) eKLR**, and sought dismissal of the suit with costs.

#### **G. ISSUES FOR DETERMINATION**

24. I have duly considered the originating summons, the replying affidavit, the instant application together with the grounds of opposition and submissions herein. The issues numbers (i) and (ii) in the submissions of the 3<sup>rd</sup> interested party are hereby embraced. So, is the instant application and preliminary objective herein merited for the grant of the orders sought therein?

#### **H. ANALYSIS AND DETERMINATION**

25. The present suit has been initiated by way of originating summons under **Order 37(supra)** which plainly stipulates instances when the same may be filed in respect of land registered under the Registered Land Act (the repealed Act). The exceptions are under **sections 120, 128, 133, 138, 143 and 150 of the same Act**. It is further provided there under that unless there is a pending suit involving the same land, an application by originating summons may be made in that very suit.

26. Generally, the procedure for asserting an adverse possession claim is by way of originating summons as provided for under **sections 37 and 38 of the laws of Limitation Act** Cap 22 laws of Kenya; see **Salim –vs- Boyd (1971) EA 550**.

27. **Section 19 (2) of the Environment and Land Court act 2011 (2015)** stipulates that this court shall be bound by the procedure laid down by the Civil Procedure Act (Cap 21 Laws of Kenya). To that extent, **section 17 of the Act (cap 21)** provides for courts in which suit be instituted.

28. **Section 19 of the same Act (Cap 21)** requires that every suit shall be instituted in such manner as may be prescribed by the rules. It is noted that those rules include the Civil Procedure Rules, 2010.

29. Additionally, **Order 3 Rule 1 (1) of the Civil Procedure Rules,2010** requires that a suit be initiated by a plaintiff. It is reads:-

*“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”*

30. Furthermore, parties may commence suits in court by way of originating summons in certain circumstances; see also the decision of Angote, J in **Cyril J Haroo case (supra)** which I endorse accordingly.

31. It is abundantly clear that the mode of instituting a suit has to be in consonant with the prescribed rules. It is so targeted to attaining the ends of justice as envisaged **under sections 1A and 3A of the Civil Procedure Act (Cap 21) and section 3 of the Environment and Land Act (supra)**.

32. Under **Order 37 Rule 19 of the Civil Procedure Rules,2010** an originating summons duly filed may be converted into a plaintiff. In the instant case, directions have not been given to that effect.

33. The parent land herein was registered in the name of the respondent, Margaret Atieno Owino on 30<sup>th</sup> November 2006 and title deed issued in her favour on 24<sup>th</sup> December 2007 under the Registered Land Act chapter 300 Laws of Kenya ( the Repealed Act). It is so discerned from the land register marked as “100-3” attached to the applicants affidavit in support of the originating summons.

34. Notably, **Section 143 (1) of the Repealed Act** did provide for cancellation of title to land in instances of fraud or mistake. The said section is one of the exceptions **under Order 37 rule 8 of the Civil Procedure Rules 2010** which stipulates instances when an originating summons be lodged in respect of land registered under the Repealed Act.

35. It pretty clear from the face of the originating summons that the applicant is seeking among others cancellation of the register in respect of title to the trio suit parcels of land. The applicant is also seeking that the purported transfer of the trio –suit parcels of land to the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> interested parties, was unlawful, null and void.

36. In the case of **Tayebali Adamji Alibhai –vs- Abdulhussein Adamji Alibhai (1938) 5 EA CA 1**, applied in **Kimani Ruchune and another –vs- Swift Rutherford company Ltd and another (1976-80) 1 KLR 1500** by Kneller J, it was held that rights and registrations of land can be challenged on grounds of fraud and adverse possession ;see also **Salim –vs- Boyd (supra)**.

37. Interestingly, the register marked as “100-3” annexed to the applicant’s affidavit in support of the originating summons relates to the parent land which was closed in 4<sup>th</sup> February 2009 following it’s subdivisions namely LR NOs. 2524, 2525 and 2526. However, the said subdivisions do not feature in the pleadings which only reveal the original land,the parent land and the trio suit parcels of land.

38. Moreover, the document marked as “100-3” is not the relevant extract of title as mandatorily required under **Order 37 Rule 7 (2) (supra)**. Quite clearly, the said document does not even relate to the trio- suit parcels of land herein.

39. So, is the aforesaid discrepancy fundamental? I am of the considered view that the answer is in the affirmative since the discrepancy goes to the root of title to the property in dispute and the same is not curable under **Article 159 (2) (d) of the Constitution of Kenya, 2010**.

40. It is trite law that strange results would follow if a Judge were free to determine issues, not properly before that Judge; see **Bhari case (supra)**.

41. Again , I note that copies of the a agreement dated 2<sup>nd</sup> April, 1980 and 17<sup>th</sup> December 1987 marked as “10001” and “1002” respectively and annexed to the applicants affidavit in support of the originating summons are in Dholuo language, an indigenous language in Kenya. This court is aware that the official languages of the Republic of Kenya are Kiswahili and English under **Article 7 (2) of the Constitution**

(supra).

42. Under **Article 7 (3) (a) and (b)** of the said Constitution the state shall promote and protect the diversity and development of languages inclusive of indigenous language of the people of Kenya. Nonetheless, the documents marked as “1001 and “1002 were not accorded English translation as required under Article 7 (2) of the same Constitution as read with **section 23 (1) of the Environment and Land Court Act (supra)**. Thus, the omission or defect strikes at the root of the instant matter.

43. In **Kibutiri -vs- Kibutiri (1982-88) 1 KAR**, the Court of Appeal held thus:-

*“The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involves a serious question.”*

44. As already noted an originating summons is a form of legal proceedings designed to give in certain specific cases, a quick summary and in expensive remedy. That it can not be mounted on disputed questions of fact; **Bhari case (supra)**.

45. In the present suit, the issues for determination are not simple matters. They concern title to the trio-suit parcels of land and need to be proved by way of evidence. Plainly, they are complex in nature.

46. It follows that the originating summons as filed in contrary to the mandatory laid down law. The same can not be salvaged by **Article 159 (2) (d) (supra)**.

47. In that regard, I subscribe to the Court of Appeal decision in **Telkom Kenya Limited (supra)** where it was held that:-

*“ As he been said before, the rules serve as handmaidens of the lady Justice”.*

48. In the premises, I find the instant application and the preliminary objection full of merits. I proceed to uphold the preliminary objection and partially grant the instant application.

49. Wherefore, the present suit mounted by way of an originating summons dated 17<sup>th</sup> April, 2018 and filed on 18<sup>th</sup> April, 2018, be and is hereby struck out as sought in order number (b) in the instant application.

50. By dint of the provision **to section 27 (a) of the Civil Procedure Act (supra)** and bearing in mind the decision in **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank and 2 others (2012) eKLR**, the applicant to bear the costs of the entire suit.

51. It is so ordered.

**DATED SIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF JANUARY 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Odoni Awino learned counsel for the 1<sup>st</sup> interested party and holding brief for Midenga for respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

Tom Maurice – Court Assistant