



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 293 OF 2018 (O.S)

PETER KABUE KARIUKIPLAINTIFF

VERSUS

DANIEL NJUGUNA KARIUKI.....DEFENDANT

RULING

1. The parties to this suit are siblings: the plaintiff is the defendant's younger brother. The plaintiff filed originating summons dated 4th October 2018 in which he urged the court to declare that he has acquired land parcel number Naivasha/Maraigushu Block 7/519 by adverse possession. He averred that the said property is registered in the name of the defendant and that he entered into it in the year 1971 with the express authority and permission of the defendant. He added that he remains in the property and that he has developed it. He further stated that he has requested the defendant to transfer the property to him but he has not done so.

2. By Notice of Motion dated 27th March 2019, the defendant seeks striking out of the originating summons herein on the ground that it discloses no reasonable cause of action. The application is supported by an affidavit sworn by the defendant. He deposed therein that the plaintiff admitted in the originating summons that he entered into the suit with the defendant's express authority and permission and that therefore adverse possession cannot arise.

3. The plaintiff responded to the application through his replying affidavit sworn on 25th June 2019 wherein he deposed that his case had satisfied the requirements for adverse possession. He added that the defendant had subdivided the suit property in violation of this court's orders of 30th October 2018. He annexed a report filed in court on 7th June 2019 by the Senior Land Registrar, Naivasha. The said report was prepared and filed pursuant to orders made by the court on 27th February 2019.

4. The application was canvassed through written submissions. The applicant reiterated in his submissions that to the extent that the plaintiff had admitted in the originating summons that he entered into the suit with the defendant's express authority and permission, adverse possession cannot be established. It was further argued that being siblings, the plaintiff cannot claim adverse possession against the defendant. The defendant cited the cases of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** and **Rodgers Mwamboje v. Douglas Mwamboje [2014]** to buttress his arguments.

5. For the plaintiff, it was argued once again that the originating summons had satisfied the requirements for adverse possession. He relied on the cases of **Lawrence Muiruri Njuguna v Charles Mwenga Mulwa [2017] eKLR** and **Jacob Mwanto Wangora v Mary Waruga Wokabi & 3 others [2018] eKLR**. The plaintiff also dwelt a bit on the arguments that the defendant had subdivided the suit property in violation of this court's orders of 30th October 2018. Needless to state, issues of possible breach of the court's orders and consequences thereof would need to be raised in the correct forum.

6. I have considered the application, the affidavits and the submissions. Striking out is a draconian remedy that should be resorted to very sparingly. The wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** still remains:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

7. The plaintiff's case is that he has acquired the suit property herein by adverse possession. Asike-Makhandia, JA described adverse possession in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. ... [Emphasis supplied]

8. As is clear from the above quote, possession can only be said to be adverse to the title of the registered proprietor if it is without his consent. Consent instantly excludes adverse possession. The Court of Appeal stated in **Patrick Magu Mwangi Kimunyu v Joreth Limited** [2015] eKLR as follows:

It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.

9. The plaintiff herein has made it clear that he entered the suit property and remains therein with the consent of the defendant who is his elder brother. That being his case, it does not disclose the cause of action of adverse possession which he is advancing. Further, the plaintiff himself states that land parcel number Naivasha/Maraigushu Block 7/519 was subdivided by the defendant. It therefore no longer exists. This is confirmed by the report filed in court on 7th June 2019 by the Senior Land Registrar, Naivasha. It would be futile for the court to declare that the plaintiff has acquired land parcel number Naivasha/Maraigushu Block 7/519 by adverse possession when that parcel no longer exists. Whereas the court should make every effort to sustain a claim without summarily terminating it through striking out, I see no way in which life can be injected into the plaintiff's case. It is bereft of any life and must be interred through striking out.

10. In view of the foregoing, I find merit in Notice of Motion dated 27th March 2019. This suit is hereby struck out. Considering that the parties are siblings and so as not to exacerbate the conflict, I order that each party bears own costs.

Dated, signed and delivered in open court at Nakuru this 12th day of March 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the defendant/applicant

Mr Karanja Mbugua for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomoi