



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 77 OF 2018

TOBIAS ODHIAMBO MIRON.....PLAINTIFF

VERSUS

PAUL ODHIAMBO WERE.....DEFENDANT

JUDGEMENT

The plaintiff avers that in the year 2005 the plaintiff entered into the defendant's land parcel number S/Wanga/Lureko/1977 and started cultivating sugar cane therein among other crops. The plaintiff avers that since then nobody has raised any claim whatsoever against his occupation and utilization of the said land parcel. The plaintiff further avers that he has been in occupation of the said land parcel openly and without any hindrance from the registered owner or from anybody else for more than twelve (12) years and in the circumstances he ought to be registered therein by operation of adverse possession. The plaintiff prays for the judgment against the defendant for:-

- (a) An order for the plaintiff to be registered in L.R. No. S/Wanga/Lureko/1977 by adverse possession.
- (b) The Deputy Registrar of this honourable court to sign all the transfer instruments in favour of the plaintiff.
- (c) Costs of this suit and the interests thereon.

This court has considered the evidence and the submissions therein. The defendant was served but failed to attend court or file any defence. The preliminary issue for determination is whether this suit is properly brought before the court. The plaintiff in his plaint avers that he has been in occupation of the said land parcel openly and without any hindrance from the registered owner or from anybody else for more than twelve (12) years and in the circumstances he ought to be registered therein by operation of adverse possession. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that *“every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”* Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

“It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.

In the instant suit the claim is clearly one of adverse possession. Section 38 of the Limitation of Actions Act states:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land.”

The land in this suit is registered under the Registered Land Act which is one of the Acts referred to in Section 37 of the Limitation of Actions Act.

Order 37, rule 7 of the Civil Procedure Rules states that in Adverse possession;

- (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.*
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.*
- (3) The court shall direct on whom and in what manner the summons shall be served.*

I find that this suit was brought by way of a plaint and not in the prescribed manner as discussed above. Order 37 rule 7 is drafted in mandatory terms. This suit is fatally defective and I strike it out with no orders as to costs as the same was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE