



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 34 OF 2020

(FORMERLY NAROK ELC NO. 48 OF 2019)

DANIEL KIPILAT ROTICH & 32 OTHERS PLAINTIFFS

VERSUS

DAVID SIRONGA TUKAI1ST DEFENDANT

THE LAND REGISTRAR NAROK.....2ND DEFENDANT

RULING

1. Proceedings herein commenced when the plaintiffs filed Originating Summons dated 23rd September 2019 at ELC Narok. The matter was later transferred to this court. Among the questions they wish determined in the summons is whether they have acquired title to the parcel of land known as Narok/Cis Mara/Ololulunga/161 by adverse possession.
2. The 1st defendant responded to the summons by filing Notice of Preliminary Objection dated 23rd October 2019, which is the subject of this ruling. In the objection, they contend that the originating summons is fatally defective and incompetent and seek its striking out on the following grounds:
 1. That the plaintiffs originating summons dated 23rd September 2019 violates the mandatory provision Order 37 Rule 7(2) of the Civil Procedure Rules.
 2. That a violation of the mandatory provision of Order 37 Rule 7(2) of the Civil Procedure Rules renders the entire suit fatally defective and incompetent calling for the said suit to be struck out with costs to the first defendant.
3. The objection was canvassed through written submissions. Both the plaintiffs and the 1st defendant filed submissions. The 2nd defendant did not participate in the hearing of the objection.
4. For the 1st defendant, it is argued that Order 37 Rule 7(2) of the Civil Procedure Rules has a mandatory requirement that the originating summons seeking adverse possession be supported by an affidavit to which a certified extract of the title to the land in question is annexed. It is further argued that the originating summons herein does not comply with the rule since all that is annexed is a copy of the title document and a copy of a certificate of official search and since both do not amount to a certified extract of title. In support of those submissions, the cases of **Serah Muthoni Kimani v John Wanyoike Gerald [2014] eKLR**, **Samuel Kipngeno Koech v Agnes Wambui Gitonga [2016] eKLR** and **Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) & 3 others [2018] eKLR** are cited. The 1st defendant therefore urged the court to uphold the objection and strike out the originating summons with costs.
5. In response, the plaintiffs argue that they have complied with the rule since an original of a certificate of official search was annexed to the supporting affidavit and further that since the title to the suit property was issued under the Registered Land Act (now repealed), a certificate of official search is equivalent to a certified extract of title in view of the provisions at section 36 (3) of the said Act. The cases of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR**, **Serah Muthoni Kimani v John Wanyoike Gerald** (supra) and **Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) & 3 others** (supra) are cited. The plaintiffs therefore urge the court to dismiss the objection. Citing Article 159 of the constitution, they urge the court to uphold substantive justice by giving them a chance to file a further affidavit to exhibit certified copies of title and certificate of official search.
6. I have considered the objection and the respective submissions. The law on preliminary objections needs no detailed treatise. For a preliminary objection to be valid it must raise a pure point of law. The objection is argued on the assumption that all the facts pleaded by the

other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** and **Oraro v Mbaja [2005] eKLR**.

7. The objection herein is based on Order 37 rule 7 of the **Civil Procedure Rules** which provides:

- (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.** [Emphasis supplied]

8. I have perused the record herein and I note that originating summons is accompanied with an affidavit to which is annexed a copy of the title document and a copy of a certificate of official search in respect of the suit property as at 23rd September 2019. Both annexures are photocopies. As I stated in **Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) & 3 others** (supra), a certified extract of title is not the same thing as a copy of the title deed. The reason why a certified extract of title is needed is to ascertain that the defendant is the registered owner of the suit property as at the date the case is filed. The certificate of official search is issued pursuant **section 34** of the **Land Registration Act** which entitles any person who requires an official search in respect of any parcel to receive particulars of the subsisting entries in the register upon payment of the prescribed fee. Further, under **section 35** of the Act, the certificate of official search is conclusive evidence of its contents. The section provides:

- (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.**
- (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.**
- (3) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.**
- (4) No process for compelling the production of the register, or of the cadastral map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court.**

9. In view of the foregoing provisions of law and as was held by the Court of Appeal in **Johnson Kinyua v Simon Gitura Rumuri** (supra), the certificate of search herein adequately satisfies the requirements of Order 37 rule 7 of the **Civil Procedure Rules**. Further, the rule does not require that an original of the certified extract of the title be annexed. Whether or not an original is required is a matter best determined during the directions contemplated by **Order 37 rule 18** or at the trial stage.

10. In the result, I am satisfied that the originating summons herein has met the basic requirements under Order 37 rule 7 of the **Civil Procedure Rules**. The preliminary objection lacks merit. I dismiss it with costs to the plaintiffs.

11. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 28th day of May 2020.

D. O. OHUNGO

JUDGE