



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 77 OF 2016**

**MARY WAMBUI GAITHO & 203 OTHERS.....PLAINTIFFS**

**VERSUS**

**UTHERI WA LARI COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**KENNEDY PULEI..... 2<sup>ND</sup> DEFENDANT**

**TINANKA OLE KANTIM..... 3<sup>RD</sup> DEFENDANT**

**PASTOR SILAS OLE KOIL .....4<sup>TH</sup> DEFENDANT**

**NEKURSAI OLE MUSEL.....5<sup>TH</sup> DEFENDANT**

**KORIO OLE TUUKUO..... 6<sup>TH</sup> DEFENDANT**

**KINTALEL OLE NTINA..... 7<sup>TH</sup> DEFENDANT**

**SABAYA OLE KOTIKASH ..... 8<sup>TH</sup> DEFENDANT**

**SENTO NGUSSUR OLE MASARI .....9<sup>TH</sup> DEFENDANT**

**PAUL PARKINYIARO LEKERIN ..... 10<sup>TH</sup> DEFENDANT**

**TEKERO OLE POREKA .....11<sup>TH</sup> DEFENDANT**

**RULING**

1. Proceedings herein commenced when the plaintiffs filed plaint on 9<sup>th</sup> March 2016 and later an amended plaint on 8<sup>th</sup> September 2017. The plaintiffs aver in the amended plaint that they are registered proprietors of the parcels of land known as Longonot/Kijabe Block 2/1 to 7956 (Utheri Wa Lari), hereinafter “the suit properties”. They aver that the suit properties are subdivisions of a parcel of land that was formerly known as Land Reference Number 11192 and accuse the 2<sup>nd</sup> to 11<sup>th</sup> defendants of among others entering the suit properties, erecting structures and farming thereon without their consent. The 2<sup>nd</sup> to 11<sup>th</sup> defendants filed a defence in which they denied the plaintiffs’ allegations and a counterclaim against the 1<sup>st</sup> defendant herein, the plaintiffs, the Deputy Commissioner Naivasha Sub County and the Attorney General. They aver in the counterclaim that they and their ancestors have occupied the parcel of land that was formerly known as Land Reference Number 11192 since time immemorial. They therefore seek judgment against the 1<sup>st</sup> defendant herein, the plaintiffs, the Deputy Commissioner Naivasha Sub County and the Attorney General for:

- 1. A declaration that the 1<sup>st</sup> to 11<sup>th</sup> plaintiffs being the representative of the Kedong Valley (Kitet) Maasai Community are the rightful owner of all that parcel of Land known as Land Reference Kijabe/No. 11192 (now subdivided to Land Reference Number Longonot/Kijabe/Block 2-(Utheri wa Lari) 1 to 7956) by virtue of adverse possession.*
- 2. AN order directing the District Land Registrar-Nakuru to cancel and/or revoke all the Titles issued to the 2<sup>nd</sup> to 203<sup>rd</sup> defendants to wit: Title deeds for Land Reference Longonot/Kijabe Block 2 (Utheri wa Lari Company Limited) 1 to 7956.*
- 3. An mandatory injunction be issued for the 1<sup>st</sup> to 11<sup>th</sup> plaintiffs to be registered as the proprietors of the said parcel of land*

namely Land Reference Kijabe/No. 11192 (now Land Reference Longonot/Kijabe Block 2 (Utheri wa Lari Company Limited) 1 to 7956 in place of the above named Utheri wa Lari Company Limited in whose name the said parcel of land is currently registered.

4. A Permanent Injunction to issue against the Defendants restraining them either by themselves, their servants or agents or any other persons whomsoever from entering, transferring, surveying, alienating, wasting, apportioning or in any other manner interfering with the Plaintiffs peaceful and quiet occupation and enjoyment of the Land Reference Kijabe/No. 11192 Longonot/Kijabe Block 2 (Utheri wa Lari Company Limited) 1 to 7956.

5. Costs of this suit.

6. Any other relief(s) that the Honourable Court may deem fit and just to grant.

2. This ruling is in respect of Notice of Preliminary Objection dated 17<sup>th</sup> July 2019, filed by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> to 11<sup>th</sup> defendants' aforesaid defence and counterclaim. The objection is on the following grounds:

1. THAT the 2<sup>nd</sup> to the 11<sup>th</sup> defendants' counter-claim dated 29<sup>th</sup> August 2018 violates the mandatory provision of 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 counter-claim fatally defective and incompetent calling for the said counter-claim to be struck out with costs to the First Defendant.

3. The objection was canvassed through written submissions. The 1<sup>st</sup> defendant as well as the 2<sup>nd</sup> to 11<sup>th</sup> defendants filed submissions. Although the plaintiffs did not file any submissions, counsel appearing for them indicated to the court that they support the objection. I have considered the objection and the submissions. The gist of the 1<sup>st</sup> defendant's case is that the counterclaim in so far as it comprises a claim for adverse possession offends **Order 37 rule 7 (2)** of the **Civil Procedure Rules**. The said rule provides:

**7. (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.**

4. A perusal of the 2<sup>nd</sup> to 11<sup>th</sup> defendants' aforesaid defence and counterclaim shows that prayer 1 thereof is for an order that they have become owners the suit properties by virtue of adverse possession. That naturally brings their claim under the requirements of **Order 37 rule 7 (2)** of the **Civil Procedure Rules** which demands that they annex a certified extract of the title to the suit properties. Further perusal of the defence and counterclaim shows that they did not comply with the rule.

5. The law relating to preliminary objections is that a preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. That means that a party opposing a preliminary objection should not do so by filing a replying affidavit. Yet in this case the 2<sup>nd</sup> to 11<sup>th</sup> defendants filed a replying affidavit sworn by Kennedy Pulei to which he annexed a certified extract of title in respect of Land Reference Number 11192, thus supplying that which the 1<sup>st</sup> defendant had contended that their counterclaim is defective for want of.

6. The court has a duty to ensure that justice is done without undue regard to procedural technicalities and that disputes are resolved expeditiously and affordably. These are some of the expectations cast upon the court by **Article 159 (2) (d)** of the **Constitution of Kenya**, **Sections 1A and 1B** of the **Civil Procedure Act** and **Section 3** of the **Environment and Land Court Act, 2011**.

7. The Court of Appeal addressed the issue of the court's duty to do substantive justice in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR** as follows:

**... In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...**

**The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...**

8. The constitutional as well as statutory edict requiring the court to rise to its higher calling to do substantive justice are sufficient grounds for this court to depart from the general rule that a party opposing a preliminary objection should not do so by filing a replying affidavit and for this court to take note of the annexed a certified extract of title, as I hereby do, for the ends justice. The general rule however remains and this court will not hesitate to apply it in appropriate cases. I further take into account that since the claim for adverse possession herein is by way of counterclaim, pre-trial directions will be taken as is required by **Order 11** of the **Civil Procedure Rules** and necessary adjustments regarding documents needed for trial may be made at that point. That is also the spirit of **Order 37 rule 18** of the **Civil Procedure Rules**. In the circumstances of this case, I find no merit in the preliminary objection since the 2<sup>nd</sup> to 11<sup>th</sup> defendants have availed a certified extract of

title in respect of the suit property.

9. In the end, the preliminary objection dated 17<sup>th</sup> July 2019 is dismissed. Costs in the cause.

10. 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 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 4<sup>th</sup> day of June 2020.**

**D. O. OHUNGO**

**JUDGE**