



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO.31 OF 2009 (O.S)

IN THE MATTER OF THE L.R NO. KERICHO/SOSIOT/205

AND

IN THE MATTER OF SECTION 35 OF THE LIMITATION OF ACTIONS ACT

(CAP) – LAWS OF KENYA)

AND IN THE MATTER OF THE ESTATE OF LATE KIBET ARAP SANG (DECEASED)

BETWEEN

JOEL KIPKORI KOECH.....PLAINTIFF/APPLICANT

VERSUS

RACHAEL NGENO.....1ST DEFENDANT/RESPONDENT

ANNAH C. SANG.....2ND DEFENDANT/RESPONDENT

DENNIS K. BETT.....3RD DEFENDANT/RESPONDENT

RULING

(Originating Summons claiming adverse possession; no extract of register annexed to the supporting affidavit; preliminary objection that suit ought to be struck out; extract of register is mandatory but plaintiff allowed time to file the extract of the register; costs of preliminary objection however to defendant)

This suit was commenced on 3rd April, 2009 by way of an Originating Summons taken out pursuant to the provisions of **Order XXXVI Rules 3, 3D and 12** of the **Civil Procedure Rules**, then prevailing at the time. The applicant's claim is that he is entitled to be registered as proprietor of 12.5 acres out of the land parcel Kericho/Sosiot/205 which is said to be registered in the name of Kibet arap Sang (deceased), of whom the respondents are administrators. The Originating Summons was accompanied by a supporting affidavit sworn by the applicant, but the same was not accompanied by an extract of a certified copy of the register of the title of the claimed property.

The respondents have now raised a preliminary objection, seeking orders that the suit ought to be struck out, for the reason that the Originating Summons was not accompanied by an extract of the register of the

title as required by the then **Order XXXVI Rule 3D** of the **Civil Procedure Rules**.

Mr. On'ganyi for the respondents, relied on the case of *Njuguna Ndatho vs Masai Itumo & 2 Others, Court of Appeal at Nakuru, Civil Appeal No. 231 of 1999* to support the preliminary objection. I have however not seen any relevance that the said decision has, as it did not deal with the issue of whether or not an Originating Summons should be struck out if not supported by an affidavit which does not annex an extract of the register. I have also taken note of the submissions of Mr. Joshua Mutai for the applicant, who with respect, did not in his submissions, address the point whether the Originating Summons should be dismissed for not annexing the extract of the register in the supporting affidavit. He dwelt on other matters which are completely not in issue.

I have considered the matter. **Order XXXVI Rule 3D** of the old **Civil Procedure Rules**, drawn in similar fashion to the current **Order 37 Rule 7** of the current rules of 2010, provided as follows :-

“Rule 3D (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.”

The above rule was in force at the time that this Originating Summons was filed. Strictly therefore, the Originating Summons had to be accompanied by an affidavit which annexed an extract of the register, for Order XXXVI Rule 3D (2) was drawn in mandatory terms. Failure to annex the register would mean that the Originating Summons is defective.

That said, should I strike out the Originating Summons ? I think striking out the Originating Summons would be harsh to the applicant. The fairest order in my view is to order the applicant to file a further supporting affidavit annexing the extract of the register which is claimed in this Originating Summons. I take shelter in the provisions of **Article 159 (2) (d)** of the **Constitution, 2010**, which requires the Court not to be to sacrifice substantial justice at the altar of procedural technicalities. It is more or less the approach taken when a plaint is filed but not accompanied by a verifying affidavit. I do not see what prejudice the defendant stands to suffer since the matter has not commenced and is still in the preliminary stages. Any inconvenience can be compensated by an award of costs.

I therefore order the applicant to file and serve a further supporting affidavit annexing a certified copy of the extract of the register of the suit property within the next 21 days. In default, the suit will stand struck out with costs.

I think the respondents were within their rights to raise the objection. The costs of this preliminary objection will therefore be shouldered by the applicant (plaintiff).

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 2nd DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:

Mr. J.K. Mutai h/b for Mr. Joshua Mutai for Applicant

Mr. S.G. Ong'anyi present for Respondent