



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 353 OF 2009

JOHN MUCHEMI NDUNGU

PETER NGULU KIMULI KORI KAMUYU

(Suing as the officials of MAILI SABA)

MWENGENYE SELF HELP GROUP..... PLAINTIFFS

VERSUS

UPASANA KENT (Sued as the administrator of the estate of Ranbir s/o

KEHARCHAND KENT) DEFENDANT

UNITY 45 HOUSING CO-OP SOCIETY LTDINTERESTED PARTY

RULING

I have before me the Defendant's application dated 15th August 2013 for ruling. In the application the Defendant seeks the following orders:-

1. That the plaintiff's suit herein be struck out as against the Defendant,
2. That the costs of the suit and the application be borne by the plaintiff.

The application is premised on the following grounds set out on the body of the application.

(a) That the suit as drawn and filed is an abuse of court process for the following reasons:-

- i. The Defendant is not the registered proprietor of the property known as **L.R. NO.11531/9**, the suit property and was not the registered proprietor of the suit property at the time of filing the suit in the year 2009.
- ii. The Defendant sold the property to the interested party herein and transfer thereof was concluded and registered at the Ministry of Lands in the year 2002,
- iii. That the documents of title at the Ministry of Lands have been publicly available to any persons interested in searching since the year 2002.
- iv. Under section 38(1) of the Limitations of Actions Act (chapter 22 of the Laws of Kenya) therefore adverse possession orders cannot be claimed against the Defendant as the suit herein seeks,
- v. The Defendant has no interest whatsoever in the suit property,

vi. Maintenance of the suit against the Defendant will be an abuse of court process since the suit as drawn is incurably and hopelessly defective.

(b) It is in the interest of justice to grant the reliefs sought herein.

The application is further supported on the grounds contained in the supporting affidavit by **Upsana Kent** one of the Executors of the will of the late **Rainbir Kent** sworn on 15th August 2013. In the said affidavit the said **Upsana Kent** deposes that the property **L.R. NO.11531/9** formed part of the estate of the late **Ranbir Kent** and that the property was pursuant to an agreement of sale dated the July 1999 sold and transferred to **Unity 45 Housing Co-operative Society Limited** and the transfer thereof dated 1st July 2002 was duly registered at the Lands Office on **29th July 2002** as **I.R.71208/3** as per the Agreement of sale and Transfer annexed to the affidavit and both marked as “**UK-1**”. The defendant thus deposes that the defendant has no interest whatsoever in the suit property, the same having been sold to the interested party aforesaid. The Defendant therefore contends the plaintiff’s suit as against the Defendant is an abuse of the court process and that the same ought to be struck out.

The plaintiffs oppose the application by the Defendant and rely on the replying affidavit sworn by **Katiku Kasina** Chairman **Mali Saba Mwengenywe Youth Self Help Group** sworn on 30th September 2013. The plaintiffs depose that the Defendant’s application is fatally defective, incompetent, insincere and an abuse of the due process of the court and a mischievous attempt to confuse the court and the legal issues. The plaintiffs claim to have been in exclusive occupation and user of the suit premises since May 1997. The plaintiffs avers that the timing of the instant application is suspect seeing that this is the first time that the alleged sale and transfer of the suit property to the interested party is coming up. The plaintiffs asserts that their claim has merit and that in the interest of justice the matter ought to be allowed to proceed to full trial so that the various issues and the documents in issue can be interrogated at the trial.

To contextualize the Defendants application before the court it is essential to give a brief background to the plaintiffs suit. The plaintiffs by an originating summons dated 9th July 2009 instituted this suit against the **Defendant under the provisions of the then order XXXVI Rule 3d of the Civil Procedure Rules (current order 37 Rule 7) and section 38 of the Limitation of Actions Act** seeking an order that owing to the fact that they have been in continuous occupation of the piece or parcel of land known as **L.R. NO. 11531/9** situated in Nairobi measuring 16.73 hectares since May 1997 a period of more than 12 years they have become entitled to ownership of the said land by virtue of adverse possession and they ought to be declared as owners and be so registered in place of the Defendant/Respondent. The plaintiffs through a supporting affidavit sworn by one **Peter Ngulu Kimuli** on 9th July 2009 averred that they were allowed by the Provincial administration to move into the suit land in 1997 and that they have ever since been in occupation of the land where they have been carrying out the business of brick-making, pig rearing and poultry farming activities without any interference or interruption by the registered owners.

Under paragraph 6 of the affidavit sworn by the said **Peter Ngulu Kimuli** in support of the originating summons the plaintiffs depose thus:-

6. That on 21st April 2008, we caused an official search to be conducted at the Nairobi Lands Registry over the suit land that we occupy where upon we established that the same is registered as L.R. NO. 11531/9 being a subdivision of the mother parcel L.R. NO.11531 owned by the estate administered by the Respondent herein. Annexed hereto marked “PNK5” is a copy of the official search.

The search annexed as “**PNK5**” was a copy of the mother title in respect of **L.R NO. 11531** (original Numbers 6829 and 6830) which in total comprised three hundred seven acres (less Road Reserve of seven acres) or thereabouts. The search therefore does not show that **L.R.NO.11531/9** at the time the suit was filed was registered in the name of the Defendant. Indeed Entry NO. 14 registered against the title shows that one **Sukhder s/o Keharchand** was pursuant to a Transfer (partition) registered as owner of **L.R. NOS. 11531/5 and 11531/6** while one **Ranbir s/o Keharchand** was registered as owner of **L.R. NO.11531/4** measuring 59.63 Hectares.

The Chief Land Registrar by a letter dated 18th November 2013 annexed and marked “PMK1” to a supplementary affidavit sworn by **Peter Mburu Kamau** on 18th November 2013 affirms that property title **NO. I.R.71208** of **I.R. NO.11531/9** is registered in the name of “**Unity 45 Housing Co-operative Society Limited**” pursuant to a transfer registered on 29th July 2002 as **I.R.71208/4**. The Chief Land Registrar further in the said letter asserted that the registration of the plaintiffs as the owners of the suit property **L.R NO. 11531/9** was irregular and the entries made on the mother title **Nos. 16-18** were forgeries. The Chief Land Registrar attached to the said letter a certified official search of Title **NO. I.R.71208 of L.R. NO.11531/9** dated 18th November 2013 which shows as follows:-

- i. **(Ranbir s/o Keharchand was registered as owner of L.R NO.11531/9 on 5/3/1997 when a certificate of title was issued to him.**
- ii. **That on 29/7/2002 Grant of letters of administration of the estate of Ranbir s/o Keharchand to Nidhi Kent and Upsana Kent as “ Administrators” were registered against the title.**
- iii. **Transfer to Unity 45 Housing co-operative Society Limited for Kshs.17,000,000/- was registered against the title on 29/7/2002.**

The search certificate was issued on 18th November 2013 and going by the certificate of search it is patently clear that the Defendant ceased to be the registered owner of the suit property way back in July 2002 when the property was transferred to the interested party.

The parties filed written submissions articulating their respective positions in the matter. The Defendant reiterates the grounds in support of the application and submits under section 38(1) of the Limitation of Actions Act Cap 22 Laws of Kenya an application and order of adverse possession can only be made against the person who is then registered as proprietor of the land the subject of the application. The Defendant having not been the registered owner in 2009 when the plaintiff filed the instant suit, the Defendant submits the plaintiff’s suit against the Defendant is an abuse of the court process and that there cannot be anything to go to trial against the Defendant as no cause of action exists against the Defendant and no order can be made against the Defendant.

The plaintiffs submit that the application by the Defendant is belated coming nearby five years after the suit was filed. The plaintiff asserts that the authenticity of the documents that gave ownership to the interested party is in issue and that the matter should be allowed to proceed to trial so that these documents can be proved. The plaintiffs further assert the suit raises trial issues touching on fraud which need to proceed to trial for the court to adjudicate. The plaintiff further asserts that the Defendant’s application is in the nature of a preliminary objection which is inappropriate where the facts and issues are in dispute as in the present case. The plaintiffs contend the suit needs to be heard so that the court can ascertain the facts and the issues raised in the case.

Under section 38(1) of the Limitation of Actions Act (Cap 22 of the Laws of Kenya) a suit for adverse possession can only be brought against the registered owner.

Section 38(1) provides:-

38.(1) 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 proprietor of the land.

My interpretation and understanding of the above provision is that a claim for adverse possession can only be made against the person who for the time being is the registered proprietor of the land in respect of which the claim for adverse possession is made. The applicant in my view must satisfy the court that the person against whom he has brought the claim is the registered owner of the suit property otherwise there would be no basis to sustain the action.

Order 37 Rule 7 of the Civil Procedure Rules provides that an application for adverse possession under

section 38 of the Limitation of Actions Act shall be made by originating summons and order 37 Rule 7(2) provides that:-

37. (7)(2) The summons shall be supported by an affidavit to which a certified abstract of title to the land in question has been annexed.

The essence of annexing an abstract of title to the affidavit in support of the originating summons is so that the court can verify who the registered owner of the property is and the particulars of the property and so as to avoid parties dragging persons who have no interest in the property claimed to court. As observed earlier the abstract of the title annexed to the affidavit supporting the originating summons was that of the mother title before the subdivision that gave rise to the parcels set out under entry 14 of the abstract of title being **L.R NOS.11531/3-6**. The suit property appears to have been created following a subdivision of **L.R. NO.11531/4** as the certificate of Title **I.R.71208** indicates the original Land Reference of **11531/9** was **11531/4/5** which denotes a subdivision of **L.R.NO.11531/4**. It is clear therefore that the applicants did not annex an abstract of title to show who the registered owner/proprietor of **L.R.NO.11531/9** was as at the time of filing the suit and hence there was no compliance with order 37 Rule 7(2) of the Civil Procedure Rules.

The search dated 18th November 2013 exhibited as “**PMKI**” in the supplementary affidavit of **Peter Mburu Kamau** shows the property **L.R.NO.11531/9** (the suit property) was as at the time the applicants filed the suit in 2009 registered in the name of “**Unity 45 Housing co-operative Society Limited**” and not in the name of the Defendant. The official search in my view represents the status of the suit property in as far as the records of the Ministry of Lands are concerned. The records constitute public records which would have been accessible and available to the plaintiffs at the time they filed the suit and I agree with the Defendant that the plaintiffs would have through exercise of due diligence have been in a position to verify the ownership of the suit property to enable them to bring the action against the proper and appropriate party. Under section 26(2) of the Land Registration Act NO.3 of 2013 a certified copy any registered document by the Registrar is receivable in evidence in the same manner as the original. Section 26(2) of the land registration Act provides:-

“A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original”.

The Land Registrar has vide the official search of 18th November 2013 certified that the Defendant is and was not the registered owner in 2009 when the plaintiffs commenced this action. I accept the evidence as per the official search having regard to the instrument of Transfer dated 1st July 2002 was properly executed stamped and registered as **I.R.NO.71208/3** on 29th July 2002. I therefore hold and find that the plaintiffs cannot sustain an action for adverse possession against the Defendant, he being not the registered owner of the suit property.

Having found and held that the Defendant was not the registered owner of the suit property in 2009 when the plaintiffs filed the instant suit there cannot be any triable issues as between the plaintiffs and the Defendant. The plaintiffs suit as against the Defendant raises no cause of action and is an abuse of the process of the court and there can be no basis to sustain the same. I accordingly order that the suit by the plaintiffs against the defendant be struck out.

I award the costs of the application and the struck out suit to the Defendant.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this 14TH day of JULY, 2014.

J.M. MUTUNGI

JUDGE

In the presence of:

.....For the Plaintiff

..... For the Defendants