



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 703 OF 2017**

**JOSEPH OMOL KOWITL.....PLAINTIFF/APPLICANT**

**VERSUS**

**MICHEAL OKWORO WANGA.....DEFENDANT/RESPONENT**

**RULING**

1. This ruling is with regard to a preliminary objection dated 16<sup>th</sup> July, 2020 and filed in court on 17<sup>th</sup> July 2020, on points of law to the instant suit initiated by Mr. Nelson Jura learned counsel for the defendant, Michael Okworo Wanga. The preliminary objection is anchored on the grounds:-

***i. That the originating summons as filed by the plaintiff in this suit is incurably defective for failure to annex an abstract of title as mandatorily required by order 37 Rule 7 (2) of the civil Procedure Rules 2010.***

***ii. That this suit should be struck out with costs to the defendant for failing to comply with the mandatory requirements of order 37 Rule 7 (2) of the Civil Procedure Rules 2010.***

2. Notably, the present suit concerns a portion of land measuring approximately zero decimal five (0.5) acres of the parcel of land known as LR No. Gem/Kanyanjwa/683 measuring approximately two decimal four hectares(2.4Ha) in area (the suit land herein). The same is contained in Registry Map Sheet number 5 and it is located within Homa Bay County.

3. The plaintiff through H. Obach Partners Advocates commenced the suit by way of an originating summons under Section 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules,2010 seeking the following orders:-

1. **THAT** the plaintiff be declared entitled by adverse possession to a portion measuring 0.5 acres of the piece of land registered in the land Titles Registry **LR NO. GEM/KANYANJWA/683** situated in Homa-Bay county which he has developed and occupied by constructive trust.

2. **THAT** the title issued to the defendant be cancelled and the said plaintiff be registered as the sole proprietor of the said portion of land measuring approximately 0.5 acres of that piece of land known as **LR NO. GEM/KANYANJWA/683** situated in Homa-Bay County.

3. **THAT** costs of this application be provided for.

4. The originating summons is premised on grounds 1, 2 and 3 set out on it's face which include; that the plaintiff has been in adverse possession of the suit land for over 46 years and if the orders sought are not granted, he stands to suffer irreparable loss and damages. The originating summons is further supported by a 12-paragraphed affidavit annexed thereto and it's contents are noted accordingly.

5. By a 22-paragraphed replying affidavit sworn on 21<sup>st</sup> July 2017 and duly filed in court on 25<sup>th</sup> July 2017, the defendant termed this suit deficient, premature and fatally defective thus, 'sought its dismissal with costs. That the plaintiff's claim is null and void, mischievous and an abuse of the process of the court. He therefore, denied the claim in it's entirety.

6. The defendant stated that he is the sole and absolute proprietor of the suit land. To fortify his assertion, he relied on copies of documents marked as "MOW-1(a), 1(b), 2(a), 2(b), 2(c), 3 and 4 annexed to the affidavit which include; a copy of certificate of official search, title deed and photographs of the suit land.

7. On 28<sup>th</sup> July, 2020, this court ordered and directed that the preliminary objection be argued by way of written submissions and gave timelines thereof. On 17<sup>th</sup> September 2020, the court extended the said timelines.

8. In his submissions dated 3<sup>rd</sup> August 2020 duly filed in court on 4<sup>th</sup> August 2020, learned counsel for the defendant referred to the grounds of the preliminary objection and the originating summons initiated under Section 38 (1) of the Limitation of Actions Act (Cap 22 Laws of Kenya) and Order 37 Rule 7 of the Civil Procedure Rules, 2010. He submitted that since an extract of title to the suit land is not annexed to the originating summons, the same is not merited hence, should be struck out with costs.

9. To buttress his submissions, counsel cited the Court of Appeal decision in *Kweyu-vs- Omuto (1990) KLR 709* that **Order 37 Rule 7(supra)** is a mandatory legal requirement. On the same breath, he relied on persuasive authorities of *John Wambura and another-vs-Anakletus Wambura (2017)eKLR*, *Nicholas Oracha Omeny and another-vs-Richard Olunga Migau and another Migori ELCC No. 210 of 2017 and Ishmael Busolo Watuko-vs-Joseph Busolo and 3 others (2013)eKLR*, by Kaniaru J, Omollo J and this court respectively.

10. Learned counsel for the plaintiff filed no submissions in spite of the timelines given as per paragraph 7 hereinabove. To that extent, the plaintiff was accorded a fair hearing under Article 50(1) of the Constitution of Kenya, 2010; see *Re Hebtullah Properties Ltd (1976-80) KLR 1195* by Simpson J and Chesoni JJ (as they then were).

11. I have duly considered the preliminary objection, the originating summons, the replying affidavit and the defendant's submissions. Therefore, is the preliminary objection merited based on its two (2) grounds?

12. On the first ground, the originating summons is brought pursuant to Section 38(supra) regarding registration of title to land or easement acquired under the Act. Clearly, the section refers to section 37 of the same Act in regard to application of the Act to registered land under inter alia, the Registered Land Act chapter 300 Laws of Kenya now repealed by Section 109 of the Land Registration Act, 2016(2012) (The LRA herein).

13. In the case of *Wainaina-vs-Murai and others (1976-80)KLR 289*, Simpson J (as he then was) made an observation which I endorse as it is relevant hereto. He held in part:

***“The land in question is registered under the Registered Land Act, an Act cited in Section 37.....”***

14. The originating summons is also mounted pursuant to **Order 37 rules (1) and (2) (supra)** which reads;

***“The application under Section 38 of the Limitation of Actions Act shall be made by originating summons.***

***“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed (Emphasis added).***

15. Clearly, at paragraph 3 of his supporting affidavit to the originating summons, the plaintiff deposed thus;

***a. “That I am the proprietor of a portion of that land registered as LR No. Gem/Kanyanjwa/683 by adverse possession and is competent to swear this affidavit.”***

16. On his part, the defendant deposed at paragraph 4 of his replying affidavit that:

***“That I know of my own knowledge that I am the registered owner of all that parcel of land otherwise known as Gem/Kanyanjwa/683. Copy of the official search and title deed to that effect hereto annexed and marked as Exhibit MOW-1(a) and (b).” (Emphasis laid)***

17. Both the plaintiff and the defendant referred to the suit land, LR No. Gem/Kanyamwa/683 in their respective pleadings. So, has the suit attained the threshold in **Section 38 and Order 37(1) and (2) (supra)**?

18. The term “Title” referred to under the said legal provisions, is defined in the **Black’s Law Dictionary, 10<sup>th</sup> Edition at page 1712** infra;

***“Legal evidence of a person’s ownership rights in property, an instrument (such as a deed) that constitutes such evidence.”***

19. It has emerged from the material availed to this court that the defendant's title to the suit land is under great challenge herein. In the case of *Munyu Maina-vs-Hiram Gathiha Maina (2013)eKLR*, the Court of Appeal stated:

***“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership...”***

20. In the foregoing, title is linked to proprietorship of the property in question. In Section 3(a) of the LRA, the term **“proprietor”** means:

***“In relation to land or lease, the person named in the register as the proprietor.”***

21. It is noted that the LRA, does not define the term "Title". Nonetheless, the certificate of official search and title deed, annexed to the defendant's replying affidavit and marked as Exhibits "MOW-1(a) and (b)" respectively, are quite indicative of title in respect of the suit land.

22. This court is aware of **Article 159(2)(d) of the Constitution of Kenya, 2010** on undue regard to procedural technicalities. **Section 19(1) of the Environment and Land Court Act, 2015(2011)** also speak to the said Constitutional provision.

23. In the case of *Kanwal Sagit Singh Dhiman v Kashavji Jivraji Shah (2015)eKLR*, the Court of Appeal applied the decision in *Mbogo and another v Shah (1968)EA 93* and observed that:-

*"...The courts exist for the purposes of dispensing justice, and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests..."*

24. Moreover, in the case of *Philip Chemwolo and another-vs-Augustine Kubende (1982-88) KAR 103*, the Court of Appeal held:

*"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits." (Emphasis supplied).*

25. In the final analysis, it is abundantly clear from the entire pleadings herein that the plaintiff's failure to comply with **Order 37 Rule 7 (supra)** is curable through the defendant's replying affidavit and possible amendment of the originating summons further to **Article 159 (2) (d), Kanwal and Chemwolo cases (supra)**. Whereas I note **Kweyu Wambura and Watuko cases (supra)**, the same are distinguishable in the circumstances. On that score, the second issue is resolved thereby.

26. Thus, the preliminary objection dated 16<sup>th</sup> July, 2020 and filed in court on 17<sup>th</sup> July, 2020 is devoid of merit. I proceed to disallow the same. Costs be in the cause

**DELIVERED, SIGNED and DATED at MIGORI in OPEN Court this 27<sup>TH</sup> day of OCTOBER, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Jura learned counsel for the defendant

Ms. Apondi learned counsel for the plaintiff

Tom Maurice- Court Assistant