REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT 62 OF 2009

ATAKO CHONDO ISSA :::::::::::::::::::::::::::::::::::: PLAINTIFF

~VRS~

JOHN ANDANJE SHIUNDU :::::::::::::::::::::::::::::::: DEFENDANT

RULING

The Defendant has asked under sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act and Orders 2 rule 15 (1) (b), (c) and (d), 40 rules 4 and 7 and 51 rules 1, 3 and 15 of the Civil Procedure Rules to have the originating summons herein struck out and dismissed with costs, and the injunction order made on 22/3/2011 and issued on 13/4/2011 to be discharged and set aside. The injunction order was made on 11/7/2011 and issued on 13/4/2011. It was *ex-parte*. The application was to be heard on 19/10/2011 but was taken out by consent and scheduled to be heard on 18/6/2012. The Plaintiff did not attend to prosecute the same. Interim orders had been extended but have now lapsed.

Regarding the application to strike out the originating summons, the Defendant's grounds were that the suit was scandalous, frivolous or vexatious; may prejudice, embarrass or delay the fair trial of the suit; and was otherwise an abuse of the process of the court.

The originating summons was brought under sections 37 and 38 of the Limitation of Actions Act (Cap.22) and Order 36 rule 3D of the Civil Procedure Rules and was filed on 30/7/2009. In it the Plaintiff sought to be declared to have become entitled to 4.4 Ha of land parcel no.North Wanga/Kholera/372 by adverse possession after having peacefully occupied it for a period of over 76 years continuously and without interruption. The parcel is in the name of the Respondent since 2009. He asked that it be found that such registration was null and void in view of the claim of adverse possession. He asked that the name of the Respondent be cancelled and his inserted in the register as the proprietor.

In the supporting affidavit, the Plaintiff stated that he was born on what is not known as North Wanga/Kholera/372 in 1921. In 1970 he became the registered proprietor. In 1974 he wanted to sell it to one Francis Magera Maloba but they could not agree on the purchase price and size of the land. He refunded the purchase price. However, Maloba fraudulently got himself registered as the proprietor. Since 1974 the parcel has changed hands to Rumani Wangara, Mohamed Ramadhan, Peter Kadima, Trevor Kadima and then to the Respondent. None of these people has ever taken possession of the suit land and therefore he has openly, peacefully and continuously occupied and possessed the same. He has extensively developed the land and erected houses thereon. He does sugarcane farming on the land and

sells the same to Mumias Sugar Company Ltd. In 1997 his wife Khadija Odinga Watako died and he buried the remains on the land. It is on this basis that he claims to have become entitled by adverse possession.

In the affidavit supporting the present application the Defendant has indicated why the suit should be struck out. He stated that:

a) the suit is frivolous and vexatious as the Plaintiff has no *locus standi* to institute the same because the evidence exhibited shows that the first registered owner was Isa Wataku and not himself;

b) the person who fraudulently got registered and the subsequent proprietors were not joined as parties;

c) the (the Defendant) bought the suit land for valuable consideration from a third party and is in occupation;

d) the Plaintiff acknowledged in letter dated 29/4/2008 that he was a squatter on the suit land; and

e) since the suit was filed no summons to enter appearance were taken out or served by the Plaintiff, and no action has been taken to prosecute the suit.

A pleading is scandalous if it alleges indecent, offensive or improper acts, omissions or motives against the other side which are unnecessary in the proof of a plaint or defence; it is frivolous if it has not substance, is fanciful or is trifling; is vexatious if it has no foundation, is irrelevant, has no chance of succeeding or is merely brought to annoy; and tends to prejudice, embarrass or delay the fair trial of the action if it is evasive, ambiguous, immaterial, obscuring or concealing the real questions in issue between the parties **(Mpaka Road Development Company Ltd v. Abdul Gafur Kana t/a Anil Kapuri Pan Coffee House [2001] 2 EA 468; Lynette B. Oyier and Another v. Savings and Loan Kenya Ltd, HCCC no.891 of 1996 at Nairobi).** A pleading is an abuse of the process of the court if it is frivolous or vexatious, or both.

Mr. Osundwa for the Defendant did not seek to demonstrate why his client thought that the suit fell for striking out under Order 2 rule 15 (1) (b), (c) or (d), or that it was in any other manner a candidate for striking out. It should be pointed out under Order 2 rule 15 the Court is not called upon to determine whether the action or defence will or will not succeed, which is the duty of the trial court, but to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated. Secondly, a pleading will not be struck out unless it is demurrable, and the rule is acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution **(D.T. Dobie and Company (K) Ltd v. Joseph Mbaria Muchina and Another [1982] EA 1).** The court has to see that the Plaintiff has got no case at all, either as disclosed in the statement of the claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the contents of the pleadings were highly improbable, and one which it was difficult to believe could be proved. The court should always bear in mind that justice is better served when the parties are allowed to call evidence and to bring witnesses, and for these to be subjected to the usual scrutiny of cross-examination, and a decision arrived at on merits.

The Plaintiff has pleaded that he has been in possession and occupation of the suit land for over 76 years and that this has been open, peaceful, continuous and without interruption. In **Parklands Properties Ltd v. Patel [1981] KLR 52** there was an application to strike out in a suit claiming adverse possession. It was held that the issue whether a party's possession of a piece of land is adverse is a matter of evidence, and the decision thereon depends upon whether the party alleging adverse possession successfully establishes the particulars of adverse possession pleaded. This can only be done during the trial.

The Defendant contended that he is in occupation after he purchased the suit land and gave valuable consideration. The affidavit supporting the originating summons alleged that the Defendant acquired the title in 2009. The Defendant annexed an agreement dated 11/9/2008 showing that was when he bought the suit land for Ksh.900,000/=. The Plaintiff stated that since 1921 he has been on the suit land, except that

in 1974 he wanted to sell it to Francis Magera Maloba but the agreement fell through. The question shall be when time begun to run for the purpose of adverse possession. Had the Plaintiff been on the suit land for over 12 years at the time when the Defendant bought the same? It is also material that whether the Defendant was an innocent buyer for value without notice will be an issue for trial.

The Plaintiff's names are Atako Chondo Issa. He stated that he was the first registered proprietor of the suit land. The exhibited title deed shows that on 22/5/2070 Isa Watako became the first registered owner. The Defendant states that the two are different people. It will be up to the the Plaintiff to show that he is the *"Isa Watako"* in the register.

Lastly, the Defendant stated that the suit land has changed hands severally up to the time he became the registered and absolute owner, and that this change of hands will work against the Plaintiff's claim of adverse possession. My view is that change of ownership alone cannot defeat a claim in adverse possession. Further, in **Maweu v. Liu Ranching & Farming Cooperative Society Ltd [1985] KLR 430, 434** the Court of Appeal observed as follows:

"Adverse possession is a fact to be observed upon the land. It is not to be seen in title, even under Cap.300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he has acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession."

It should also be pointed out that the Plaintiff is saying that none of these owners ever came to the land to check if it was occupied, or at all, and to claim or occupy it. All these claims, once again, will be subjected to inquiry at trial.

The Defendant then took the position that the suit should be struck out because summons to enter appearance were neither taken out nor served. However, in paragraph 3 of the supporting affidavit he concedes that the originating summons was served to his caretaker and that is how he became aware of the suit and went to instruct an advocate who filed a notice of appointment. In my view, the failure to taken out summons to enter appearance or to serve the same would, in the circumstances, be a technical lapse which would not defeat an otherwise serious claim by the Plaintiff over land he says he has lived on with his family for over 76 years. I find that the defect would not take away the jurisdiction of the court to hear and determine the suit.

In conclusion, I find that the application to strike out the suit is not merited and dismiss it. The application was not defended and therefore costs will not be awarded.

Dated, signed and delivered at Bungoma this 4th day of July, 2012.

A. O. MUCHELULE

JUDGE