



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CASE NO. 24 OF 2019**

CATHERINE WANJA NJOKA.....1<sup>ST</sup> PLAINTIFF

DOROTHY KAGENDO MURIUKI.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

JOHN NJAGI DAN.....DEFENDANT

MUTEGI DAN.....PROPOSED INTERESTED PARTY

**RULING**

1. This ruling concerns a Notice of Preliminary Objection dated 2<sup>nd</sup> June, 2020 filed by the defendant. The objection reads as follows:

**NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE** that the defendant shall object to the entire suit and urge this honourable court to strike it out on the following grounds: -

1. That the suit is null and void *ab initio* and is an abuse of the court process.
2. That the suit offends the law and in particular the provisions of order 37 rule 7 of the Civil Procedure Rules.

**DATED AT CHUKA THIS 2<sup>ND</sup> DAY OF JUNE 2020.**

**MUTHOMI GITARI & CO**

**ADVOCATES FOR THE DEFENDANT**

2. The objection was canvassed by way of written submissions.
3. The defendant’s submissions are pasted herebelow without any alterations whatsoever: -

**DEFENDANTS SUBMISSIONS IN SUPPORT OF THE NOTICE OF PRELIMINARY OBJECTION DATED 2<sup>ND</sup> JUNE, 2020**

May it please you my Lord, the defendant has raised a preliminary objection on a pure point of law against this suit.

The two main issues for determination are ;

1. *Whether failure to annex an extract to title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Code Cap 21 Laws of Kenya renders a suit incurably defective.*
2. *When does time start to run in a claim for adverse possession against a person who is an administrator of the estate of a deceased person?*

**ISSUE 1**

The preliminary objection is anchored on **Order 37 Rule 7** (1) and (2) of the Civil **Procedure Rules, 2010** which reads;

***“An 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 is question has been annexed.”***

Under **section 2 of the Land Registration Act 2016(2012)**, “**certificate of title**” means a certificate of title in the prescribed form issued under section 30 of the same Act. All subsisting entries in the register affecting the land in question must be shown in the certificate of title.

**Sections 24, 25 and 26 of the Land Registration Act 2016(2012)** provide for interests conferred by registration, rights of proprietor and certificate of title to be held on conclusive evidence of proprietorship respectively. Under **section 2 of the same Act**, the term “**proprietor**” is defined as the person named in the register as the proprietor.

The defect in the originating summons strikes at the root of proprietorship of the suit land as provided for under **Article 40 of the Constitution of Kenya,2010**. So, the defect being a fundamental one cannot be cured under any circumstances as there exists no title to the suit land.

**In Joseph Dennis Odondo v Meshack Juma Omollo & another [2019] eKLR**, *the issue before court was whether the original summons was incurably defective for failure to annex an extract to title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Code Cap 21 Laws of Kenya. Court held that the failure to attach the extract to the title rendered the suit incurably defective.*

**ISSUE 2**

My Lord , the other issue before you is; When does time start to run in a claim for adverse possession against a person who is an administrator of the estate of a deceased person?

In the present case, the suit land was registered under the repealed Registered Land Act (Cap 300) and the Plaintiffs did not bother to attach a copy of the land register (green card) to accompany the originating summons to show that the land had been registered in the names of a deceased person as at 30<sup>th</sup> January 2019.

The Plaintiff/Applicant has further not disclosed before this honourable court that the suit land has been the subject of succession cause No.758 of 2015 at the High Court of Kenya at Chuka and is currently the subject of Civil Appeal No.33 Of 2019 at the Kenya Court of Appeal at Nyeri.

That the defendant who is an administrator of the suit land became registered with the land in March 2019. As such , the time for adverse possession against the defendant herein could not run against the defendant prior to the year 2019 as he had no proprietary interest in the suit property

The court of Appeal in **FRANCIS GITONGA MACHARIA vs MUIRURI WAITHAKA[1998]eKLR** held that *the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property....”*

It is thus apparently clear that the Plaintiffs claim based on adverse possession is premature and therefore incompetent. It is not capable of being referred.

My Lord, for the reasons and authorities we have given above, we submit that the originating summons before you has no merit. We pray that the same be dismissed and costs be awarded to the defendant .

**DATED AT CHUKA THIS.....DAY OF.....2020**

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**MUTHOMI GITARI & CO**

**ADVOCATES FOR THE DEFENDANT**

4.The Plaintiffs’ submissions are pasted herebelow without any alterations whatsoever: -

**SUBMISSIONS BY THE PLAINTIFFS ON THE NOTICE OF PRELIMINARY OBJECTION DATED 02/06/2020**

Your Lordship, the following comprises of submissions by the plaintiffs in relation to the preliminary objection raised by the defendant against the entire suit.

**Introduction:**

Your Lordship, the preliminary objection as drawn raises two issues, one of which is too general and abstract in its wording.

However, from the written submission proffered by the defence, the issues have been framed into:-

(a) Whether the suit offends the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010

(b) When does time start to run against an administrator of an estate of a deceased person for purposes of computing time in a claim for adverse possession.

We shall proceed to submit on the issues as framed by the defendant.

**Order 37 Rule 7(2) of the Civil Procedure Rules, 2020**

Your Lordship, the defendant's objection has its foundation on the requirement that a party instituting suit based on a claim for adverse possession must attach to the affidavit in support of the originating summons an extract of the title to the land in question.

What is an extract to title as envisaged by Order 37 Rule 7 (2)?

In **SERAH MUTHONI KIMANI vs JOHN WANYOIKE GERALD [NRB ELC NO. 791 OF 2013 (OS)]** it was held,

*'The purpose of annexing an extract of the title is so as to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietors of the suit land'.*

The issue that begs address in order that parties do not bog down the court with semantics is whether the trial court can, with precision, determine the parcel the subject of the instant proceedings and the proprietor thereof.

Your Lordship, the requirement to attach an extract of title to the affidavit was addressed by the Court of Appeal in **JOHNSON KINYUA vs SIMON GITURA RUMURI [NYERI CACA NO. 265 OF 2005]** as thus:-

*'Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate'.*

The court continued,

*"In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law'.*

As it were Your Lordship, the subject parcel of land falls within the realm of the Land Registration Act, 2012 which effectively succeeded the Registered Land Act Cap 300.

Your Lordship this position has been adopted in:-

**DANIEL KIPILAT ROTICH & 32 OTHERS vs DAVID SIRONGA TUKAI & ANOR [NAKURU ELC NO. 34 OF 2020]** where the court stated,

*"In view of the foregoing provisions of law and as was held by the Court of Appeal in JOHNSON KINYUA SIMON VS SIMON GITURA RUMURI (supra), the certificate of search herein adequately satisfies the requirements of Order 37 Rule 7 of the Civil Procedure Rules".*

**SERAH MUTHONI KIMANI (SUPRA)** where the court held on the same issue that:-

*"I am guided by the decision of their Lordships that a certificate of official search is sufficient".*

In sum, it is our submission that the suit as filed does not offend the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.

**A claim for Adverse possession against an administrator of the estate of a deceased**

Your Lordship, quite surprisingly and against the rules of evidence and procedure, the issue of the defendant being an administrator to an estate has been introduced in these proceedings by way of written submission.

Your Lordship, this takes us back to the introductory part of these submissions where we said the first ground of the preliminary objection was abstract.

In **SALIM SAID KOI vs HATIMY GROUP LIMITED [MSA HCCC 76 OF 2007] (OS)** the court pronounced itself as follows:-

*‘The later requires that any party who raises any preliminary objection to be crystal clear in his notice otherwise the objection should not be accepted because it brings the element of surprise’.*

In any case Your Lordship, the direction taken by the defendant on this issue does not raise a pure point of law but issues of fact that will require argument.

For instance, how is the court expected at this point in time to delve into whether the defendant is an administrator of an estate or not. Or whether there are other suits pending in the courts and their impact on the present proceedings.

In **JOSEPH KIBAARA M’ICUGA vs M’CHABARI KINORO [CHUKA ELC NO 15 OF 2019]** the court while addressing its mind on the issue of a pure point of law stated,

*‘In the facts and circumstances of this case, two issues arise. The 1<sup>st</sup> one is if or if not the applicant has achieved the threshold for the period of occupation of the suit and for a declaration that adverse possession has accrued. Obviously, this issue invites arguments which can only be resolved at the hearing of the suit’.*

Further Your Lordship, the fact that the defendant became the registered owner of the suit land on 08/03/2019 does not stop time for purposes of adverse possession from running. Again it is an issue that requires argument.

In conclusion we submit that the preliminary objection lacks merit and we pray that the same be dismissed.

We so humbly pray.

**DATED AT CHUKA THIS ..... DAY OF .....2020**

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**FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES**

**ADVOCATES FOR THE PLAINTIFFS**

5. I have carefully considered the submissions and the authorities proffered by the parties in support of their diametrically divergent assertions. All the authorities proffered by the parties are good authorities in their facts and circumstances. I, however, opine that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. Nevertheless, in arriving at my determination in this matter, I have taken into account the principles annunciated in the authorities. I do not find the need to regurgitate those principles as those principles are reproduced in the parties’ submissions in the first part of this ruling.

6. The defendant argues two main issues;

- a) That the plaintiffs did not attach a certified copy of the title to the subject land when filing their suit.
- b) That the defendant only became registered as owner of the land in dispute in March 2019 and hence the 12 years threshold for accrual of a claim for adverse possession has not been achieved.

7. The plaintiffs say that a certificate of official search is good enough to demonstrate ownership of the subject land. They also say that the issue of when the period necessary for adverse possession to accrue is an issue that attracts arguments and hence is not a pure point of law.

8. I need not reinvent the wheel. In the case of **Daniel Kipilat Rotich & 32 Others Versus David Sironga Tuka & Another [Nakuru ELC No. 34 of 2020] eKLR**, the court said:

*“In view of the foregoing provisions of law and as was held by the Court of Appeal in Johnson Kinyua Simon Versus Simon Gitwa Rumuri (Supra), the certificate of search herein adequately satisfied the requirements of Order 37 Rule 7 of the Civil Procedure Rules.”*

9. In this matter, the plaintiffs have provided a certificate of official search. In the circumstances, ground 2 in the objection founders.

10. By the manner, ground 1 in the application is framed, it, without doubt, attracts arguments. It says: **“1. That this suit is null and void ab initio and is an abuse of the process of court.”** It is nebulous and necessarily invites canvassing. It is only in his submissions that the defendant introduces the issue of when time for accrual of adverse possession starts to run. The way it is crafted and urged, it is not a pure point of law.

11. In the circumstances, the following orders are issued:

- a) The Notice of Preliminary Objection dated 2<sup>nd</sup> June, 2020 and filed by the defendant is hereby dismissed.
- b) Costs shall be in the cause.

**Delivered in open Court at Chuka this 24<sup>th</sup> day of November, 2020 in the presence of;**

**CA: Ndegwa**

Muthomi Gitari for the defendant.

Catherine Wanja Njoka – 1<sup>st</sup> Plaintiff.

**P. M. NJORGE**

**JUDGE**