



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 492 OF 2017

GEOFFREY KIRECHO KAMIRU - PLAINTIFF

VS

MAINA KARUIRE - DEFENDANT

JUDGMENT

1. The Plaintiff /applicant filed the Originating Summons dated 14/12/16 seeking the following orders interalia that :-

a. That a declaration that L.R LOC.20/GIKINDU/MIRIRA /4833 (suit land) belongs to the Plaintiff.

b. That the Deputy Registrar of this Honourable Court be authorized to sign transfer form and all necessary documents on behalf of the Defendant to facilitate the registration of L.R LOC.20/GIKINDU/MIRIRA /4833 in favour of the Plaintiff and production of the original title deed, the Defendant's Personal Identification Number photograph and copy of Identity Card be dispensed with while registering the transfer in favour of the Plaintiff.

c. Costs of the suit.

2. The application is based on the grounds stated as follows;

a. The Plaintiff has been in continuous and uninterrupted physical occupation of the suit property from the year 1984.

b. The Plaintiff has done extensive developments on the suit property.

c. As a result, the Plaintiff has acquired adverse possession of the suit land.

3. In his supporting Affidavit the Plaintiff deponed that he entered into an agreement of sale on the 9/7/84 wherein he purchased the suit land from the Defendant and thereafter took possession of the same. That later the Defendant became unavailable to transfer the suit land to him. He stated that he has developed the land which he has occupied for a period in excess of 12 years.

4. The Defendant entered appearance through the law firm of Wahome Gikonyo & Company Advocates but failed to file a statement of defence. The Plaintiff applied for judgment in default and listed the matter for formal proof.

5. During the *exparte* hearing, the Plaintiff adopted his supporting affidavit as his sworn testimony. He reiterated the contents of the supporting affidavit and stated that he has been in occupation since 1984 and has made developments on the land.

6. The Plaintiff filed written submission wherein counsel submitted that the Plaintiff has established his cause for adverse possession by virtue of his continued occupation in line with Section 7 and 13 of the Limitations of Actions Act, Cap 22 which interalia provide that the right for adverse possession can only accrue and such period can only run when someone is in possession.

7. He also submitted that the Plaintiff's developments on the land demonstrates intention to dispossess the Defendant's rights .He relied on the case of **Lawrence Muiruri Njuguna Vs- Charles Mwenja Mulwa Eklr (2017)** where the Court held that *animus possipondi* to dispossess must be demonstrated .This is by open uninterrupted occupation and use of the land in a manner that is hostile to the Defendant's rights.

8. The key issues for determination at this stage are; whether the originating summons are competently before this Court; whether the

Plaintiff has established title by way of adverse possession. If the first issue is answered in the affirmative then there will be no need to go into the merits of the second issue in the suit.

9. Section 38 (1) of the Limitations of Actions Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [Section 37](#) of this Act, 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”.

10. Order 37 Rule 7 of the Civil *Procedure Rules* as follows:

a. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

b. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

11. The Court has noted above that the title documents have not been produced nor does it form part of the pleadings before this Court. The Plaintiff must prove the fact that the Defendant is the registered proprietor of the suit land. In fact, the law is that the title document must be annexed to the originating summons. The wording of the above Order is mandatory. The Court cannot issue orders in vain. Adversity of a title must be established as against a known owner and not in a vacuum.

12. In **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR** the Court of Appeal stated as follows:

“That the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D (2) of Order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case, the appellant did not annex the certified extracts of land title LR Nos 1756 and 1757 before the sub-division or even after the sub-division. The burden was on the appellant to produce the certified extracts of title in respect of the suit properties.”

13. Similarly, in the case of **Moses Chepkonga Cherono v Margaret Njoki Kinyanjui [2017] Eklr D.O Ohungo.J** also held that failure to annex a certified extract of the title to the land is fatal to the Plaintiff’s claim.

14. The Court finds that the Plaintiff has failed to comply with the provisions Order 37 of the Civil Procedure Rules.

15. Consequently, this suit is struck out for being incompetent.

16. I make no order as to costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 31ST DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Makobu HB Nganga for the Plaintiff

Defendant – N/A

Irene and Kuiyaki, Court Assistants