



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 172 OF 2018

MUSA KIPKOSKEI LABATT.....PLAINTIFF

VERSUS

LABAN KIPKEBUT BARKOTON.....DEFENDANT

RULING

(Suit for adverse possession; no extract of title annexed; only material being a title deed which does not cover 12 years to the date of filing suit; applicant's suit struck out).

1. This suit was commenced through an Originating Summons which was filed on 18 April 2012. In the Originating Summons, the applicant has sought orders that he be declared to have acquired title to the land parcel Nakuru/Sururu/1873 (the suit land) by way of adverse possession. He contended in his suit that he is the lawful owner of the suit land as it was allotted to him by the Government in the year 1994. He annexed an allocation letter. He averred that upon allocation, he took possession and constructed a home to settle his family. He also planted trees, maize and other crops. It is his position that prior to filing of the suit, he had been in possession for 18 years without interruption. The land is said to be registered in the name of one Wilson Barkutan Kipkorir who is now deceased but the respondent is mentioned as one of the administrators of his estate. It is averred that in the month of March 2012, the respondent came with a title deed which showed his late father as the registered proprietor and threatened to evict him. He has also offered that he filed a dispute at the Land Disputes Tribunal in the year 2006 against the deceased and that an award was made in his favour.

2. The respondent filed a replying affidavit vide which he stated that this land was allotted to his father, the late Kipkorir. The deceased was later issued with a title deed which he annexed to his replying affidavit. He claimed that the applicant has never lived on the suit land and that it was in the year 2002, when a squatter by the name of Richard Miningwo Kiptui, trespassed into the suit property which led his father to file a case at the Chief Magistrate's Court in Nakuru, being Nakuru CMCC No. 221 of 2006 seeking his eviction. The case was heard and concluded in favour of his late father and a decree was annexed. He has stated that the decree was executed and Mr. Kiptui evicted from the suit land and his structures on the land demolished. He averred that since his eviction, his late father took possession until 14 August 2009 when he died. In the year 2011, he moved into the suit land and constructed a semi-permanent house that he has been resident in since. He further deposed that the award of the Land Disputes Tribunal was never adopted as it was declared illegal by the Chief Magistrate's Court. He contended that the applicant lives in Rongai about 5 hours away from the suit land. He stated that in March 2012, the applicant came to the land and destroyed his fence. He was then arrested and charged in Nakuru CM Criminal Case No. 1220 of 2012 with malicious damage to property and a copy of the charge sheet was annexed.

3. When the matter first came before me on 29 May 2018, I noticed that the Originating Summons was not accompanied by a certified copy of the register and none was annexed to the Supporting Affidavit contrary to the provisions of Order 37 Rule 7 (2). The whole of Order 37 (7) provides as follows :-

(1) An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

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

(3) The court shall direct on whom and in what manner the summons shall be served.

4. It will be noted that sub rule (2) makes in mandatory that a person filing a claim for adverse possession needs to annex a certified extract of the title. When I noted this, I gave the petitioner opportunity to annex one within 30 days or risk his suit being struck out as being incompetent. No extract of the register was filed within 30 days. On 5 February 2019, when the matter was mentioned, Mr. Aim, learned counsel for the applicant, requested for more time to obtain the extract of the register. I allowed him another 30 days and directed that the matter be mentioned on 18 March 2019. On this day, Mr. Aim did not appear and neither was the applicant present. No certified extract of the register had been annexed. For that reason alone this suit is liable to be struck out.

5. As I stated earlier, the rules do require that one needs to annex an extract of the register to a claim for adverse possession. The reason for this is not far to find, for it is important to ensure from the register, that the applicant has a clean 12 years when the title is not under the Government or any other entity for which a claim for adverse possession cannot be maintained. I could have overlooked this requirement if the applicant had displayed some sort of title which covers at least 12 years to the time that this suit was filed, for it is the law that one must clock 12 years of continuous uninterrupted possession, to sustain a suit for adverse possession. None was filed by the applicant. The respondent however filed a title deed and when I look at it I can see that it was issued on 24 January 2004 with Wilson B. Kipkorir (deceased) as registered owner. His name is the second entry. It is common ground that the suit land was a Government allocation and I infer that the Government was the first proprietor. The Government therefore ceded interest on 24 January 2004. It is from this time that one could start counting time for a case of adverse possession. This suit was filed on 18 April 2012, which is just over 8 years from the time title was received.

6. It is therefore not possible for the applicant to sustain this suit for he has not demonstrated a title capable of adverse possession that covers 12 years before filing suit. There is no point in having this case proceed for hearing because it is clear that the applicant will never prove adverse possession for want of a title that covers a period of 12 years before he filed suit.

7. That being the case, I have no option but to strike out this suit. It is hereby struck out with costs to the respondent.

8. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 9th day of April 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No appearance for the plaintiff.

No appearance for defendant.

Court Assistant: Janepher Nelima/Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU