



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 07 OF 2019 (OS)

LUKA KIRIMI WILLIAM.....APPELLANT

VERSUS

ROBERT MIRITI MURIANKI.....RESPONDENT

RULING

1. The Notice of Preliminary Objection in this matter reads as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that on the 13th day of May, 2019 at 9.00am, in the forenoon or so soon thereafter, counsel for the defendant/applicant will contend as a preliminary point of law to be determined in limine that:

1. The land parcel No. Lower East Magutuni Adjudication Section P/N NO. 656 is not registered and the title has never been issued.

REASONS WHEREFORE the defendant/applicant shall be praying that the plaintiff/respondent suit be struck out with costs to the defendant/applicant.

DATED AT CHUKA THIS 2ND DAY OF MAY, 2019

FOR: KIJARU, NJERU & CO.

ADVOCATES FOR THE DEFENDANT/APPLICANT

2. The plaintiff, the defendant and their advocates, M/S KIJARU M. BENSON, for the defendant, and MEENYE & KIRIMA, for the plaintiff, did not come to court on **17th June, 2019** when the Notice of Preliminary Objection was to be heard. The court satisfied itself that the plaintiff's advocate was properly served with the apposite hearing notice on **22nd May, 2019** and stamped a copy thereof as confirmation that the notice had been indubitably received. There was, therefore, no excuse regarding why both advocates and their clients were not in court.

3. There is, therefore, no satisfactory explanation as to why this Preliminary Objection should not be dismissed. However, the dismissal which I will eventually give, will in a way benefit the defendant who was also, with the plaintiff, a principal author of the non-hearing of this Notice of Preliminary Objection.

4. The Originating Summons that spawned this suit reads as follows:

ORIGINATING SUMMONS

UNDER SECTION 38 OF THE (sic) ACTION (sic) ACT SEC. 30 F AND G OF THE REGISTERED LAND (sic) AND ORDER XXXVI RULES 3D & 3F (sic) OF THE CIVIL PROCEDURE RULES.

LET LUKA KIRIMI OF KAARE SUBLOCATION WITHIN THARAKA NITHI DISTRICT HEREIN WITHIN 15 DAYS OF SERVICE UPON HIM OF THIS SUMMONS ENTER APPEARANCE TO THIS SUMMONS WHICH IS ISSUED BY THE PLAINTIFF HEREIN LUKA KIRIMI WILLIAM IN AN APPLICATION FOR THE FOLLOWING QUESTIONS AND RELIEFS

THAT IS;

(a) The plaintiff is entitled to 5 acres by reason of adverse possession in parcel No. 656 Magutuni Adjudication section registered in the name of Robert Miriti Murianki, comprising of 5 acres.

(b) The said 5 acres from Land Parcel P/NO. 656 Magutuni Adjudication section be transferred to the plaintiff Luka Kirimi William as a proprietor, by empowering the executive officer to sign the necessary documents, for subdivision and transfer.

(c) Costs of this case be awarded to the plaintiff.

WHICH APPLICATION is supported by the affidavit of Luka Kirimi William and on the grounds that:-

1. The applicant took possession with the direct permission of the respondent and he has been there for over 12 years.

DATED AT MERU THIS 2ND DAY OF APRIL, 2019

FOR: MEENYE & KIRIIMA

ADVOCATES

5. Courts' judicial time should not be spent on pyrrhic ventures. Courts should not proceed to hear matters whose conclusions are self-evident especially where past precedents are unequivocal in apposite determinations. The only ground on the face of the apposite Originating Summons is: ***"That the applicant took possession with the direct permission of the respondent and has been there for over 12 years."*** I deem this ground to constitute veritably self-inflicted injury. In all circumstances, occupation of land with the permission of the owner of land cannot be a ground for declaration that the claimant is entitled to ownership of land through the doctrine of adverse possession. The occupation be it for more than 12 years or longer is not enough. The occupation must be hostile to the registered owner's title.

6. In the case of Samuel Miki Waweru versus Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), The Court of Appeal opined as follows:

"...It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in Jandu versus Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted..."

7. Without delving into other issues such as the ground in the Preliminary Objection that land parcel **NO. LOWER EAST MAGUTUNI ADJUDICATION SECTION P/NO.656** is not registered and the title has never been issued, which issue was not canvassed as both parties absented themselves during the day the Preliminary Objection was poised to be heard, I do note that Order 37 Rule 7(2) of the Civil Procedure Rules laconically states: "The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed ." In this matter, no such title has been annexed.

8. It is clear that the Originating Summons has been carelessly drafted. It is addressed to the plaintiff rather than to the defendant. Order XXXVI Rules 3 and 3F of the Civil Procedure Rules is no longer in existence and the applicant/plaintiff wrongly purports to have based this suit upon it.

9. I opine that where a litigant has pellucidly filed pleadings which suggest that he or she wants his claim to fail, like in this case where the plaintiff laconically and unequivocally has averred that he has been in occupation of the suit land with the permission of its owner and therefore rendering his claim veritably meritless, a court of law has a duty to invoke its inherent powers, as granted by section 3A of the Civil Procedure Act, and make an appropriate order for the ends of justice to be met AND to prevent abuse of the process of the court. In this matter, that order is that this suit be dismissed forthwith.

10. It is noted that in his replying affidavit, the defendant states that at an A/R objection hearing at Maara District Magutuni Adjudication section, a Judgment was delivered on **25th October, 2012** which Judgment ordered that the suit land belonged to the defendant. The plaintiff has not indicated if or if not he appealed against the judgment. I opine that if the parties participated in dispute proceedings as recently as on 13th February, 2013, only six years ago, a claim for adverse possession may not be tenable. BUT I make no determination concerning this issue as this is one of the areas which would have been canvassed had this court allowed the matter to escalate to hearing, which eventuality this court has stopped through this ruling.

11. As the plaintiff and the defendant have contributed to the non-hearing of this Notice of Preliminary Objection, I will issue no order as to costs. Parties will bear their own costs.

12. For avoidance of doubt, I issue the following orders:

a) The Notice of Preliminary Objection dated **2nd May, 2019** and filed by the **defendant** is **hereby dismissed** with **no order as to costs**.

b) This suit, in its entirety, is hereby dismissed with no orders as to costs.

Delivered in open Court at Chuka this 17th day of June, 2019 in the presence of:

CA: Ndegwa

Plaintiff and his advocate – absent

Defendant and his advocate - absent

P. M. NJORGE

JUDGE