



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 01 OF 2019 (OS) (FAST TRACK)**

**IN THE MATTER OF LAND PARCEL NUMBER SOUTH THARAKA/TUNYA “A”/390**

**AND**

**IN THE MATTER OF SECTIONS 7, 37 AND 38 OF THE LIMITATION OF ACTIONS ACT AND ORDER 37 RULE 8 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**JAMES MUTUGI MWITHI.....PLAINTIFF**

**VERSUS**

**DEDAN MUGO MWANGI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed suit No. 225 of 2017. However, service by substituted service was effected upon Daniel Mugo Mwangi whereas it was intended to be served upon Dedan Mugo Mwangi. Vide a **ruling delivered on 13<sup>th</sup> November, 2018**, this suit was dismissed. The apposite ruling is reproduced herebelow.

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 225 OF 2017 (OS)**

**IN THE MATTER OF LAND PARCEL NUMBER THARAKA/TUNYAI “A”/390**

**AND**

**IN THE MATTER OF SECTIONS 7, 37 AND 38 OF THE LIMITATION OF ACTIONS ACT AND ORDER 37 RULE 8 OF THE REGISTERED LAND ACT**

**BETWEEN**

**JAMES MUTUGI MWITHI.....PLAINTIFF**

**VERSUS**

**DANIEL MUGO MWANGI.....DEFENDANT**

**RULING**

1. This ruling concerns an application dated **29<sup>th</sup> October, 2018** which states that it has been brought to court under Order 8 Rule 1(i) and Rule 3(i) AND under Order 5 Rule 17(i) of the Civil Procedure Rules. It seeks orders that:

i) The annexed amended originating summons be deemed to have been properly filed upon payment of the prescribed filing fee.

ii) Alternatively the plaintiff be given leave to amend his originating summons and the same be deemed to have been properly filed upon payment of the prescribed fee.

iii) The plaintiff be given leave to serve the amended originating summons on the defendant Dedan Mugo Mwangi by advertising it once in the Daily Nation Newspaper.

iv) The cost of this application be costs in the cause.

2. The application is supported by the affidavit of **JAMES MUTUGI MWITI**, the plaintiff and has the following grounds:

a) When drawing the pleading in this case either our advocate on record erroneously wrote the name of the defendant as Daniel instead of Dedan or the secretary typed the name Dedan wrongly.

b) Without noticing the error our advocate filed the papers and did not notice the mistake until the day of the hearing of this case when he perused the abstract of title of the parcel of land in question and also noticed the name South was missing in the title.

c) The proposed amendment or correction of the name will not prejudice anybody.

d) The suit was filed on 5<sup>th</sup> April, 2017 by my advocates on my instructions.

e) I do not know the defendant and all my efforts to trace him and have him served with the Originating Summons have proved fruitless.

f) I was all along looking for Dedan Mugo Mwangi and I did not know the suit documents had the name Daniel Mugo Mwangi.

g) It is imperative that the Originating Summons be served before this suit is heard, hence the necessity for the order.

3. The application is supported by the affidavit of the plaintiff which states:

**I, JAMES MUTUGI MWITHI** of care of Post Office Box Number 68, Marimu, Tharaka Nithi make oath and state as follows:-

1. That my name is James Mutugi Mwithi and I am the deponent herein.

2. That I am the plaintiff herein and therefore competent to make this affidavit.

3. That I am informed by Mr. Kaai, our advocate on record, that when drawing the pleadings in this case he either erroneously wrote the name of the defendant as Daniel instead of Dedan or the secretary typed the name Dedan wrongly.

4. That without noticing the error our advocate filed the pleadings and did not discover the mistake until the day the matter came up for hearing.

5. That he noticed the mistake when I handed him the abstract of title.

6. That he also noticed the name South was omitted in the description of the suit land.

7. That I verily believe that the correction of the names will not prejudice anybody.

8. That the suit was filed on 5<sup>th</sup> April, 2017 by my advocates on my instructions.

9. That I do not know the defendant and all my efforts to trace him and have him served with the originating summons have proved fruitless.

10. That I was all along looking for Dedan Mugo Mwangi and I did not know the suit papers bore the name Daniel Mugo Mwangi.

11. That it is imperative that the Originating Summons be served before the suit is heard. Hence, the necessity for the order sought.

12. That I make this affidavit in support of my application the facts deponed herein being true to the best of my knowledge, information and belief.

4. The plaintiff's Originating Summons dated **13<sup>th</sup> March, 2017** takes the following form:

**LET DANIEL MUGO MWANGI** of Tunyai Tharaka Nithi District within 15 days after service on him enter appearance to this summons which is issued on the application of **JAMES MUTUGI MWITHI** who claims to have acquired title by way of adverse possession of Land Parcel Number **THARAKA/TUNYAI 'A'/390** currently registered in the name of Daniel Mugo Mwangi, the defendant for the determination of the following question:-

- a) Whether the defendant is the registered proprietor of land parcel number Tharaka/Tunyai 'A'/390.
- b) Whether the plaintiff has been in occupation of the said parcel of land adversely for a period in excess of 12 years.
- c) Whether the defendant's title to the said parcel of land has been extinguished by virtue of the plaintiff's adverse possession.
- d) And if so whether the plaintiff has acquired title to the said parcel of land and whether he should be registered as the proprietor thereto in place of the defendant.
- e) What orders should be made as regards costs.

**Dated this 13<sup>th</sup> day of March, 2017**

**KAAI, MUGAMBI & CO.**

**ADVOCATES FOR THE PLAINTIFF**

5. It is clear that from the outset, the plaintiff was claiming a declaration that he was entitled to ownership of the defendant's Land Parcel No. THARAKA/TUNYAI 'A'/390 by way of adverse possession. The defendant's name was given as DANIEL MUGO MWANGI. This was the name under which this suit was filed.

6. A claim for ownership of land by adverse possession is a claim that must be crafted meticulously. If it succeeds, it deprives a registered owner of land his property. It bestows upon an applicant ownership of property which initially did not belong to him. Therefore, the process leading to the determination of ownership of another person's land by any applicant by way of adverse possession must be handled very carefully.

7. Daniel Mugo Mwangi cannot all of a sudden become Dedan Mugo Mwangi. These are two different names of different persons. A person can only be known by one name. Introduction of another name after a suit has been filed suggests introduction of a different suit. I opine that amendments subsumed by order 8 of the Civil Procedure Rules cannot be allowed to change the original name of the defendant. This is a backdoor way of filing a different suit. Any orders granted in the original suit are automatically vacated when a new defendant is introduced. This renders the original suit veritably inchoate. For that reason an order for substituted service cannot issue.

8. I note that the advertisement dated **31<sup>st</sup> May, 2018**, purporting to effect substituted service names the defendant as Daniel Mugo Mwangi. The plaintiff wants to substitute that name with Dedan Mugo Mwangi. As I have already said these are names of two different persons, whether or not both exist being immaterial.

9. In the circumstances, I dismiss this application.

10. I also dismiss this suit in its entirety.

11. It is also so ordered.

Delivered in open court at Chuka this **13<sup>th</sup> day of November, 2018** in the presence of:

CA: Ndegwa

Mark Muriithi h/b Kaai Mugambi for plaintiff

**P.M. NJOROGE,**

**JUDGE.**

2. The plaintiff filed another suit on **22<sup>nd</sup> January, 2019**. In this suit he was allowed to effect service by way of substituted service. He did so through the Daily Nation edition of **13<sup>th</sup> June, 2019**.

3. The apposite Originating Summons reads as follows:

**ORIGINATING SUMMONS**

Let Dedan Mugo Mwangi of Tunyai, Tharaka Nithi District within 15 days after service on him enter an appearance to this summons which is issued on the application of James Mutugi Mwithi who claims to have acquired title by way of adverse possession of land parcel Number South Tharaka/Tunyai "A"/390 currently registered in the name of Dedan Mugo Mwangi, the defendant for the determination of the following questions:-

- a) Whether the defendant is the registered proprietor of land parcel number South Tharaka/Tunyai "A"/390.

- b) Whether the plaintiff has been in occupation of the said parcel of land adversely for a period in excess of 12 years.
- c) Whether the defendant's title to the said parcel of land has been extinguished by virtue of the plaintiff's adverse possession.
- d) And if so whether the plaintiff has acquired title to the said parcel of land and whether he should be registered as the proprietor thereto in place of the defendant.
- e) What orders should be made as regards costs.

4. PW1, the plaintiff asked the court to adopt his witness statement dated **28<sup>th</sup> December, 2018** as his evidence in this suit. The statement reads as follows:

**WITNESS STATEMENT FOR JAMES MUTUGI MWITHI**

My name is James Mutugi Mwithi and I am the plaintiff herein. My father is deceased but my mother is alive. The parcel of land known as South Tharaka/Tunyai "A"/390 is registered in the name of Dedan Mugo Mwangi, the defendant.

I have lived on this piece of land for a period in excess of 20 years openly and with the knowledge of the defendant. I was born and grown on this land, married and built homes for my family's shelter.

What I know is that in the years 1980s the defendant was a government Land Surveyor who was charged with the duties of demarcating and consolidating the lands in the area of South Tunyai, in Tharaka. He surveyed our family land allocated it to himself and subsequently got registered as the owner in 1988.

My other family members and I have always lived on this land. When our late father died he was buried on this land. My family members and I have extensively developed it by planting trees and various crops.

The defendant has never, apart from having the title, claimed ownership of it nor has he ever interfered with my occupation of it and he has never lived there.

I and my family have adversely occupied this particular land for a period in excess of 12 years and I verily believe that the defendant's title to it has been extinguished and I have acquired title to it.

I am therefor praying this honourable court to have me registered as the absolute owner and proprietor of the parcel of land in question in place of the defendant.

**DATED AT CHUKA THIS 28<sup>TH</sup> DAY OF DECEMBER, 2018.**

**JAMES MUTUGI MWITHI**

**PLAINTIFF**

5. PW1, **in his oral evidence**, told the court that he had acquired title to the suit land by way of adverse possession. He told the court that he was **29 years** old. He **gave garbled oral evidence**, which was not included in his witness statement, to the effect that when he went to obtain his title at the lands registry, he found that the suit land was registered in the names of the defendant. He told the court that he had **lived on the suit land for 25 years** and **was born thereon**. He further testified that he had a house on the suit land and had planted trees, among them mango trees, thereon. He averred that **no one had ever asked him to vacate the suit land**. He told the court that his **family had buried his father on the suit land**.

6. PW1 was categorical that he was the eldest son in his family. He told the court that his family had 5 boys and 2 girls. He also **told the court that he wanted the suit land to be registered in his name in trust for himself and other members of his family**.

7. PW2, Sabera Gakundi Mwithi, asked the court to adopt her witness statement dated **28<sup>th</sup> December, 2018** as her evidence in this suit. She told the court that the plaintiff was her son and she wanted the court to have the land registered in the name of the plaintiff who would hold it in trust for himself and other members of her family.

8. PW2, told the court that the plaintiff was not her eldest son and this evidence contradicted that one of the plaintiff who had said that he was the eldest male son in the family. She also told the court that she had 4 girls and 3 sons. This contradicted the plaintiff's evidence that she had 5 boys and 2 girls.

9. PW2 gave a list of her children as follows:

- a) Beatrice Kathambi
- b) Charity Kaindi

- c) Virginia Muthoni
- d) John Kimathi
- e) Alice Karimi
- f) James Mutugi (plaintiff)
- g) Gerald Mugambi

10. It is pellucid that in his evidence, the plaintiff has **exhibited dishonesty** in several respects. In **ELC No. 225 of 2017 (OS)** which was **dismissed** by this court for **having sued** the name of a person who was **not the registered owner of the suit land**, he told the court that he was **born in 1988**. This would make him **31 years old**. In his **oral evidence** in this suit, he told the court that he was **29 years old**. In his **garbled evidence**, he told the court that he discovered that the land was not registered in his name when he went to the land registry to obtain his title. He also **told the court** that he was the **eldest son in his family**. He also did **not seem to know how many boys and girls were members of his family**.

11. Assuming that the plaintiff is 29 years old, 12 years ago he was only 17 years old. He had not attained the age of majority. Neither his claim that he is 29 years in this suit nor his claim in ELC No. 255 OF 2017 (OS) that he was 31 years old could be ascertained. He could not produce his identity card in this suit which he had produced in ELC No. 255 of 2017 (OS). In ELC No. 255 of 2017, it was recorded that the plaintiff had obtained his identity card in 2016 when he was about 30 years old. This raises a fundamental question regarding the veracity of the identity card he produced in court. To obfuscate issues, in this suit, he only produced an abstract from police records dated 8<sup>th</sup> July, 2019 showing that he had lost his identification card No. 27070916. This may have been meant to discombobulate the court regarding the exact date of his birth. In 2016, he was about 29 years old. Kenyans do not ordinarily obtain identification cards at that age. Indeed, my observation is that the plaintiff could be in his early twenties. It is possible that he attained the age of 18 years in the year 2016. This means that when he filed his first suit in the year 2017, he was 19 years old. Going back 12 years, he would have been 7 years old when the 12 years period required for adverse possession to accrue commenced. This raises the issue of if or if not the period necessary to run for attainment of the threshold necessary for adverse possession to accrue can begin to run when a litigant is a minor and has not attained the age of majority.

12. As happens in **undefended cases**, courts cannot know if the evidence adduced is truthful or not. This is why such suits are amenable to successful reviews and appeals. On his evidence, the plaintiff is not entitled to the grant of his prayer for entitlement to ownership of the suit land by way of adverse possession. Nevertheless, he has proved on a very slim balance of probabilities, that his mother and family have occupied the suit land for a period exceeding twelve years.

13. **PW2's evidence, on a balance of probabilities, is truthful.** From the one sided evidence she has given, as the defendant has not given his side of the story, it is plausible that her family lives on the suit land. Very reluctantly, rather unorthodoxically, and with a heavy heart, I find that PW2's family has lived on the suit land for a period exceeding 12 years and its members are entitled to ownership of the suit land through the doctrine of adverse possession.

14. It would have been better had the defendant given evidence. However, service was properly executed by way of substituted service through notice in the Daily Nation Newspaper. Determining that the suit has been proved on a balance of probability in undefended cases is a dicey area. Inevitably that balance tilts to the plaintiff's advantage. The Black's Law Dictionary, Tenth Edition, equates balance of Probability to "preponderance of evidence". It states:

***"Preponderance of evidence: The greater weight of the evidence not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other".***

15. My mind has not wholly been sufficiently freed from all reasonable doubt. I, however, note that the family in this matter has brought this matter to court twice and in both cases has sought to effect service through substituted service. In the greater interest of justice and in consonance with Article 159(2)(d) of the Constitution, I find it necessary to eschew undue regard to procedural technicalities and award the suit land to the plaintiff's family through the doctrine of adverse possession. It is hoped that PW1 and PW2 have not committed perjury and contrived to execute a fraudulent scheme. Should this be the case, they are inviting serious consequences and veritable opprobrium.

16. Parties must be bound by their pleadings. PW1 and PW2 were unequivocal that they wanted the suit land registered in the name of the plaintiff as a trustee for himself and other members of his family. I give judgment in the following terms:

a) Land Parcel No. **THARAKA TUNYAI "A"/390** has devolved to the family of **Sabera Gikundi Mwachhi**, PW2, and all its members will hold it as **equal proprietors in common** AND for **avoidance of doubt, these members are:**

- a) Sabera Gakundi Mwachhi
- b) Beatrice Kathambi
- c) Charity Kaindi
- d) Virginia Muthoni

e) John Kimathi

f) Alice Karimi

g) James Mutugi

h) Gerald Mugambi

b) The registrar in charge of the register for **LAND PARCEL NO. SOUTH THARAKA/TUNYAI "A"/390** is hereby directed to **implement prayer (a) above.**

**Delivered in open Court at Chuka this 30<sup>th</sup> July, 2019 in the presence of:-**

CA: Ndegwa

Kaai Mugambi for the Plaintiff

**P.M. NJORGE**

**JUDGE**