



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 349 OF 2015 (O.S)**

**PAUL NJOROGI MWANGI.....PLAINTIFF**

**VERSUS**

**GEOFFREY GIOCHE KAMAU.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY NYAMBURA KINUTHIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Proceedings in this matter were commenced through Originating Summons dated 23<sup>rd</sup> November 2015. The plaintiff seeks to be declared to have become entitled to the parcel of land known as **Kiambogo/Kiambogo Block 2/7050 (Mwariki)** situated in Nakuru by adverse possession having occupied it for over 16 years since 1998.

2. The defendants entered appearance on 29<sup>th</sup> January 2016 through the law firm of Ikua, Mwangi & Company Advocates. It was stated in the Memorandum of Appearance that appearance was entered “for the estate of Geoffrey Gioche Kamau and Rosemary Nyambura Kinuthia ...” Subsequently, Notice of Preliminary Objection dated 23<sup>rd</sup> October 2017 was filed by the law firm of Ikua, Mwangi & Company Advocates “for the 2<sup>nd</sup> respondent”. This ruling is in respect of the objection.

3. The objection was pleaded as follows:

1. *The Originating Summon (sic) is incurably defective for violating express requirements of the law as no certified copy of title has been filed with the Originating Summon (sic).*
2. *The 1<sup>st</sup> respondent is deceased and the estate has not been enjoined in these proceedings.*
3. *Paragraph 3 of the supporting affidavit is clear that the claim herein is not for adverse possession but alleged sale.*

*REASONS WHEREFORE the 2<sup>nd</sup> respondent prays that the Originating Summon (sic) be struck out with costs.*

4. The objection was canvassed through written submissions. I have considered the objection and the submissions by both sides. The law on preliminary objections needs no detailed treatise. For a preliminary objection to be valid it must raise a pure point of law. The objection is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** and **Oraro v Mbaja [2005] eKLR**.

5. The objection is grounded on three reasons: that no certified copy of title has been filed with the Originating Summons, that the 1<sup>st</sup> respondent is deceased and that the claim herein is not for adverse possession but alleged sale.

6. Order 37 rule 7 of the **Civil Procedure Rules** dictates how claims based on adverse possession should be brought. It provides:

***(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.** [Emphasis supplied]

7. It is thus clear that the requirement of annexing a certified extract of the title to the land in question is mandatory. I have perused the affidavit in support of the originating summons and I note that a certified extract of the title to **Kiambogo/Kiambogo Block 2/7050 (Mwariki)** is annexed and marked **PMM 5b**. This limb of the objection thus fails.

8. The remaining two limbs of the objection are really matters of fact which require evidence to be taken. For example, the plaintiff did not state anywhere in the supporting affidavit that the 1<sup>st</sup> defendant is deceased. It is the defendants who have introduced this angle through the preliminary objection. In fact, I have perused the record and I haven't seen any replying affidavit by the defendants. That is unacceptable and cannot be the basis of a preliminary objection.

9. Lastly, the defendants argue that the claim herein is not for adverse possession but alleged sale. This too cannot be the basis of a preliminary objection since the court has to take evidence and determine if what exists is a sale transaction only or if there is more to it. In any case, the alleged sale is only said to have been between the plaintiff and the 1<sup>st</sup> defendant. The court still has to determine how that impacts on the 2<sup>nd</sup> defendant who is alleged to be the registered proprietor. Further, what starts as a sale transaction may mutate into a fertile ground for a claim for adverse possession. In **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** the Court of Appeal stated:

*... tenants in possession have no adverse possession. Time cannot run in their favour until the tenancy is terminated. The situation of a tenant as far as adverse possession is concerned is similar to that of a licensee and we therefore re-echo the decision of this Court cited by the learned counsel for the appellant, namely, the case of WAMBO v NJUGUNA 1983 KLR 172 at holding 4 where the Court held:-*

*“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”* .... [Emphasis supplied]

10. Thus existence of a sale transaction per se is not an automatic bar to a claim for adverse possession. The court will, upon taking evidence, see how it all unfolded.

11. In view of the foregoing discourse, I am not persuaded that the preliminary objection herein is well founded. It is hereby dismissed with costs to the plaintiff.

12. Ruling herein was to be delivered on 27<sup>th</sup> March 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 29<sup>th</sup> day of July 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

No appearance for the 1<sup>st</sup> defendant

Mr Maina holding brief for Mr Ikua for the 2<sup>nd</sup> defendant

Court Assistants: Beatrice & Lotkomo