



**REPUBLIC OF KENYA**

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

**ELC ORIGINATING SUMMONS No. 98 OF 2017**

**FORMERLY NAKURU (OS) No. 400 OF 2013**

**ESSOLLY ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**BENJOH AMALGAMATED LIMITED.....DEFENDANT**

**JUDGEMENT**

1. By consent, the Originating Summons dated 30<sup>th</sup> May 2013 and filed on the 31<sup>st</sup> May 2013 pursuant to the provisions of Section 38 of the Limitation Act and under Order 37 Rule 8 and 9 Order 37 Rule 3 and 8 of the Civil Procedure Rules was disposed of by way of written submissions.

2. In the said Originating Summons the Plaintiff herein, a Limited Liability Company sought for the following orders;

i. A declaration that the subject land being LR No. 12411/1 (IR No. 34775) and LR No. 12411/2 (IR No. 48084) Karati Location, Soth Kinangop, Nyandarua District belongs to the applicant ESSOLLY ENTERPROSES LIMITED.

ii. That this honorable Court pleases to order the Commissioner of Lands to issue titles in respect of the subject land to the applicant, ESSOLLY ENTERPROSES LIMITED and in default the Deputy Registrar, high court of Kenya at Nakuru be allowed to sign transfer of titles in favour of M/s Essoly Enterprises Limited.

iii. Costs be provided for.

3. The Originating Summons is premised on the grounds stated on the face of it as well as the supporting *Affidavit* of Essolom David Kamau the Director of the Applicant Company herein.

4. On the 24<sup>th</sup> July 2017, the Applicant sought directions to have the Originating Summons proceed for disposal by way of written submissions which application was allowed and the court directed that parties to file their submissions therein.

5. The Plaintiff filed their submissions on the 17<sup>th</sup> August 2018 wherein the Defendant filed theirs on the 30<sup>th</sup> August 2018.

**Plaintiff's Submission.**

6. Briefly, the Plaintiff's case was based on the fact that on the 25<sup>th</sup> November 2010, they purchased the suit lands for a consideration of Ksh 19,500,000/= wherein they have been in use and occupation of the same but the Defendant has been reluctant to sign the transfer of title documents which had greatly prejudiced the Plaintiff herein

7. That Plaintiff framed their issues for determination as;

i. Whether the Applicant entered into an agreement of sale over the subject suit land being LR No. 12411/1 (IR No. 34775) and LR No. 12411/2 (IR No. 48084) Karati Location, South Kinangop, Nyandarua District.

ii. Whether the Respondent is in breach of the agreement of sale dated the 25<sup>th</sup> November 2010.

iii. Whether the applicant is entitled to the reliefs sought.

8. On the first issue for determination, it was the Applicant's submission that there was no doubt that through a sale agreement dated the 25<sup>th</sup> November 2010, between him and the Respondent that they had bought the suit parcels of land from the respondent wherein they took possession of the same and have been in possession to date. That the sale agreement having been binding to both parties, each party was to honor their obligation to the other party. They relied on the decided case of **Curtis vs chemical cleaning & Dying Co. Ltd [1951], ALL ER 631** to buttress their argument.

9. The Plaintiff, on their second issue of determination argued that after having paid the purchase price in full, it was prudent that the Defendant should sign the transfer documents and the refusal to sign the same was in breach of clause 5 of their agreement and therefore prejudicial to the Plaintiff who was likely to suffer loss damage and embarrassment if the court failed to intervene. They relied on the case of **Samaki Industries (K) Ltd vs Bullin Bank & Another Mombasa HCCC No. 495 of 1999**.

10. The Plaintiff's further submission was that in cases of breach of contract, damages to be considered fairly and reasonably either as arising naturally from such breach and which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, are payable as was held in the case of **Hardley vs Baxendale (154) 9 Exch 214**.

11. Lastly, it was then Plaintiff's submission that since the Defendant had breached clause 5 of their agreement even upon full payment of Ksh 16,500,000/= purchase price and a deposit of Ksh 3,000,000/=, the Plaintiff was entitled to orders of specific performance since they had performed all terms of the agreement. They therefore sought for judgment against the Defendant in the terms so prayed.

#### **Defendant's submission**

12. The Defendant confirmed that indeed on the 25<sup>th</sup> November 2010, they had entered into an agreement with the Plaintiff for the purchase of the subject suits wherein the Plaintiff had paid the sum of Ksh 19,500,000/= and took possession of the said parcels of land and that indeed they were reluctant to sign the transfer of titles documents. That indeed they were not opposed to the orders sought in the Originating summons being granted as per the consent entered between the parties on the 26<sup>th</sup> June 2013.

#### **Determination.**

13. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

*'An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person'.*

14. Section 13 of the Limitation of Actions Act aforesaid further provides that:

*A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.*

15. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

16. Section 37 of the Limitation of Actions Act provides that:

*Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement 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."*

17. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

**(i) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**

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

18. The plaintiff has instituted the present Originating Summons in which they have asked the **Court** to declare the company as the absolute owner of parcel of lands known as LR No. 12411/1 (IR No. 34775) and LR No. 12411/2 (IR No. 48084) Karati Location, South Kinangop, Nyandarua District have purchased the same from the Defendant vide a sale agreement dated the 25<sup>th</sup> November 2010, and having taken immediate possession of the same. Facts which are not in dispute.

19. What comes out clearly in this case as matters for determination is;

i. Whether the Defendant is the registered owner of parcel of land parcel of land No. LR No. 12411/1 (IR No. 34775) and LR No.

12411/2 (IR No. 48084) Karati Location, South Kinangop, Nyandarua District.

ii. Whether the proceedings herein were authorized through a resolution of the company.

20. I have considered the submissions of parties herewith and make the following observations;

21. Indeed this matter was filed by the Plaintiff on the 31<sup>st</sup> May 2013, whereupon before the Defendant could file his response to the Originating Summons, parties recorded a consent which was to be adopted as an order of the court.

22. On the 19<sup>th</sup> July 2013 the matter was placed before the Hon Judge for adoption of the consent as an order, the Court made the following remarks;

*To me the consent as recorded raises a lot of question in my mind:-*

*iv) The commissioner of lands has not have named as a party in the OS yet in the consent he is being directed to issue titles*

*ii) The court is being asked to make certain declarations on ownerships of land without having heard the case*

*iii) the deputy registrar in been directed to sign transfer of titles in favour of the applicants*

*iv) There is no evidence provided that are the requisite payments have been made to the statutory bodies dealing with registration of land e.g. clearance certificates from the local authority, rates payments*

*I direct that the OS be set down for hearing and all the above documents to be provided during the hearing.*

23. The matter was not set down for hearing and it was upon the transfer of the same to this court upon its establishment, that the court suo motto issued a Notice to show cause as to why the matter should not be dismissed for lack of prosecution since the year 2014. Parties were to appear in court on the 4<sup>th</sup> April 2017 to show cause why the matter should not be dismissed.

24. On the said date, there having been no appearance by either party, the court, noted that since the year 2014, no steps had been taken by either party to prosecute the matter 3 (three) years down the lane and went ahead to dismiss the suit pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rule.

25. Vide an application dated the 10<sup>th</sup> April 2018, the Plaintiff/Applicant sought to reinstate the Originating summons and to have the same set down for hearing.

26. On the 28<sup>th</sup> May 2018 a consent was filed by parties conceding to the application dated the 10<sup>th</sup> April 2018 to have the Originating Summons reinstated for hearing which consent was adopted as the order of the court on the 28<sup>th</sup> May 2018 wherein the Originating Summons dated 30<sup>th</sup> May 2013 was re-instated for hearing and parties elected to dispose of the same through written submissions. It must be noted that the Defendant had neither filed their response and nor had the parties complied with directions of the 19<sup>th</sup> July 2013 as at the time they filed their respective submissions.

27. On the first issue for determination, I find that it is trite law that in order for a party to claim the relief of adverse possession, he/she must prove by evidence that the Defendant is the registered proprietor of the suit property. In the present matter, the Plaintiff herein relied on two agreements between them and the Defendant dated the 25<sup>th</sup> November 2010, to show that the Defendant sold to them LR No. 12411/1 Nyandarua **measuring approximately five (5) acres for Ksh 1,500,000 wherein a sum of Ksh 500,000/=** was to be paid at the execution of the Agreement. **The second agreement of the same date is in regard to the same parcel of land being LR No. 12411/1 Nyandarua** but this time measuring sixty (60) acres for Ksh 16,500,000/= wherein a sum of Ksh 3,000,000/= was to be paid at the execution of the Agreement.

28. The Plaintiff's submission was essentially that having bought the land and paid the full purchase price wherein the Defendant gave him vacant possession in the year 2010, but failed to transfer the land to them, that that he was now entitled to adverse possession of the said land.

29. I find that although the Plaintiff's claim was that they had been put in possession of the suit land in the year 2010, yet with due respect, a sale agreement is not the document that is envisaged by the law that needed to be adduced as evidence to prove ownership of a parcel of land.

30. Order 37 Rule 7 of the Civil Procedure Rules, 2010 on the other hand provides that an Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons and the summons shall be supported by an affidavit to which a certified extract of the title of the land in question has been annexed.

31. The above provisions lend credence to one conclusion; an order of adverse possession can only be made against a Respondent who is registered as an owner of land. (see **Wasui Vs Musumba (2002) KLR 396**).

32. It therefore follows that the party claiming for the relief of adverse possession must prove by producing in evidence that the Defendant is the registered proprietor of the suit property.

33. The production of the title or a certified extract of the title, in my view, can either be by way of an affidavit or during the hearing of the viva voce evidence. What is critical is that at the end of the trial, the Plaintiff must place before the court a title document or a certified copy of the extract of the title to prove that the person he has sued is the registered owner.

34. The Originating Summons dated the 30<sup>th</sup> May 2013 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.*

35. 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.

36. In the case of **Musa Kipkoskei Labatt v Laban Kipkebut Barkoton [2019] eKLR** the court held as follows:

*.....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.*

37. For the above reason, I find and hold that the Plaintiff has not proved on a balance of probabilities and I have no option but to strike out this suit.

38. On the second issue, for determination as to whether the proceedings herein were authorized through a resolution of the company, I find that this suit was commenced by ESSOLY ENTERPRISES LIMITED vide an Originating Summons dated the 30<sup>th</sup> May 2013. A look at the pleadings, it is clear that the Plaintiff is a limited liability company registered in Kenya wherein the supporting affidavit was sworn by Essollom Dvid Kamau who described himself as the Director of the Plaintiff Company.

39. The decision to have a resolution to authorize the filing of the suit in the name of the company emanated from a holding in the Uganda High Court in the case of **Bugerere Coffee Growers Ltd v Sebaduka & Another (1970) 1 EA 147**. which decision has been followed and applied in this country for a long time; The court in that case held:-

*“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case.*

40. In the case of **Omondi v. National Bank of Kenya and Others [2001] E.A. 177** Mr. Justice Ringera had held that;

*As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the defendants’ advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see **Salomon v. Salomon & Co. Ltd [1897] A.C. 22**). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors’ **functus officio**, it does not destroy the corporate existence and personality of the company.*

41. In the case of **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina, [2015] eKLR**, Gacheru J. had this to say;

*“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1<sup>st</sup> plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.*

42. In the case before me, the Plaintiff had not lodged in court, the resolution authorizing the institution of the suit. The Plaintiff had also not exhibited the letter of authority, pursuant to which the Supporting Affidavit was sworn. I therefore find that the proceedings, as they relate to the affairs of a limited liability company, were a nullity, having had not been sanctioned by a valid resolution of the company.

43. In the case of **Bugerere Coffee Growers(supra)** the court held that;

*Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”*

44. In the case of **Kyanzavi Farmers Company Limited vs. Mangu Ngolo HCCC No. 128 of 2008 Milimani Commercial Courts**, the Learned Judge held, *inter alia*:

*“Where an advocate is appointed to undertake the conduct of any proceedings on behalf of the company as a recognized agent such appointment must be made under the company seal. In this case it had been alleged that there was no such authority to institute these proceedings. It would have been a simple matter for the advocate who has instituted these proceedings to swear an affidavit verifying the source of his authority. However no such affidavit has been availed nor has any resolution of the company appointing him as an agent been availed. The sum total is that no authority to institute these proceedings in the name of the company has been demonstrated to this court and the suit is therefore incompetent.”*

45. It is therefore for the above captioned reasons that I hereby proceed to strike out the Originating Summon Costs to be met by the firm of Keronge Bosire & Company Advocates and Wachakana Advocates jointly and severally for acting without authority.

**Dated and delivered at Nyahururu this 23<sup>rd</sup> day of July 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**