



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 180 OF 2017 (O.S)

(Formerly Kisii Elc case No. 299 of 2016)

JOSEPH DENNIS ODONDO.....PLAINTIFF

VERSUS

MESHACK JUMA OMOLLO.....1ST DEFENDANT

LAND REGISTRAR RACHUONYO SUB-COUNTY.....2ND DEFENDANT

RULING

1. The defendant, Richard Otieno Ogwang (the original defendant herein) through learned counsel, Mr Odondi Awino of M/S Odondi Awino and Company Advocates raised a preliminary objection dated 9th May 2018 and filed on even date that the plaintiff's originating summons dated 26th September 2016 and amended on 18th December 2018, be struck out. The preliminary objection is based on the ground;

a) THAT the original summons is incurably defective for failure to annex an extract to title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Code Cap 21 Laws of Kenya.

2. By the amended originating summons brought pursuant to **section 58(1) of the Limitation of Actions Act (Cap 22) and Order 37 Rule 7 of the Civil Procedure Rules, 2010** and leave of the court obtained on 23rd January 2019, the plaintiff through learned counsel Veronicah Migai of Veronicah Migai and Company Advocates, is claiming to have acquired title to the suit land, LR NO. Central Karachuonyo/Kogweno Oriang/997 measuring 45 metres by 33 metres by way of adverse possession. Thus, the plaintiff claims for determination of issues 1 to 4 set out on the face of the amended originating summons and which I find superfluous to reproduce herein.

3. Briefly, the plaintiff claims that on 11th October, 1991, he bought the suit land from the defendant's father, Malaki Ogwang Agalo (Deceased) at Ksh 7,000/= being its market value at that time. That in the year 1999, the deceased attempted to sell the suit land to one Barret Odhiambo Atho who had offered a higher purchase price for the same. However, the plaintiff objected thereto and the intended purchaser received a refund of his money from the deceased, who died intestate thereafter before transferring the suit land to the plaintiff.

4. The plaintiff further claims that on 9th June 2016 the defendant was registered as the proprietor of the suit land through misrepresentation. That the defendant holds the title of the suit land in favour of the plaintiff by operation of the law hence provoking the instant suit.

5. The original defendant opposed the originating summons by way of his replying affidavit sworn on 23rd November, 2016 wherein he stated that the plaintiff's claim does not meet the minimum threshold for granting the orders sought therein. That similar allegations had earlier been raised by the plaintiff in Homa Bay High Court Succession Cause No. 120 of 2015 which was dismissed on 13th September 2016.

6. The original defendant therefore termed the originating summons devoid of merits. Therefore he sought dismissal of the same.

7. Pursuant to the court order of 6th March 2019, the preliminary objection was argued by written submissions dated 12th July 2019 and 10th June 2019 for the plaintiff and defendant respectively and succinctly as:-

a) The original defendant's counsel urged the court to dismiss and or strike out the originating summons with costs. He cited the case of Peter Gichuki Wanjohi v Julia Mumbi Muturi (2017) eKLR which adopted the decision in Titus Kigoro Munyi v Peter Mburu Kimani (2015) eKLR.

b) The plaintiff's counsel urged the court to grant the orders sought in the amended originating summons and relied on the case of Ruth Wangari Muigai v Edward Njuguna Mwangi (2015) eKLR and the case of Sammy Likuyi Adiema v Charles Shamwati

8. I have duly considered the entire amended originating summons, the replying affidavit and submissions of counsel for the respective parties in this matter. The issue for determination at this stage is whether the amended originating summons is incurably defective for this court to grant the orders sought in the preliminary objection.

9. It is trite law that a preliminary objection raised in a matter be on pure points of law and not on facts to be ascertained or what is sought is the exercise of judicial discretion; see **Mukisa Biscuits v West End Distributors Ltd (1969) EA 696 and Gitau vs Thuo and 2 others (2009) KLR 86.**

10. I also bear in mind that a preliminary objection raised at any stage of the proceedings in a matter should be disposed of first as held in **Gitau case (Ibid).** The plaintiff's case was closed on 25th April 2018 in the instant suit. The plaintiff (PW1) and his witness, Richard Onyango (PW2) adduced evidence whereby they relied on PEXhibits 1 to 6 including a certificate of official search dated 18th July 2016.

11. The preliminary objection is anchored on **Order 37 Rule 7** (1) and (2) of the Civil **Procedure Rules, 2010** which reads;

“An application under section 38 of the Limitation of Actions Act shall be made by originating summons;

The summons shall be supported by an affidavit to which a certified extract of the title to the land is question has been annexed.”

12. At **section 2 of the Land Registration Act 2016(2012)**, “certificate of title” means a certificate of title in the prescribed form issued under section 30 of the same Act. All subsisting entries in the register affecting the land in question must be shown in the certificate of title.

13. **Sections 24, 25 and 26 of the Land Registration Act 2016(2012)** provide for interests conferred by registration, rights of proprietor and certificate of title to be held on conclusive evidence of proprietorship respectively. Under **section 2 of the same Act**, the term “proprietor” is defined and I note it accordingly.

14. The suit land was registered under the repealed **Registered Land Act (Cap 300)** and a copy of the land register accompanying the amended originating summons shows that the land was registered in the name of the deceased as at 19th January 1984; see also the case of **Wainaina v Murai and others (1976-80) IKLR 383 at 289 and 290.**

15. Admittedly, rights and registration of land can be challenged on grounds of fraud, misrepresentation and adverse possession ;see the case of **Tayebali Adamji Alibhai v Abdulhussein Adamji Alibhai (1938) 5EACA** applied by **Kneller J in Kimani Ruchine and another v Swift Rutherford co Ltd and another (1976-80) IKLR 1500.**

16. In the instant suit, issue number 2 on the face of amended originating summons is sought against the original defendant, Richard Otieno Ogwang. Interestingly, his name is deleted according to the title of the amended originating summons and a copy of the suit land register thereof. In that regard, I agree with two (2) reasons given by the defendant's counsel in his submissions that the amended originating summons is incurably defective as envisaged under **Order 37 Rule 7(supra).** The defect in the amended originating summons strikes at the root of proprietorship of the suit land as provided for under **Article 40 of the Constitution of Kenya,2010.** So, the defect being a fundamental one cannot be cured under **Article 159 (2) (d)** of the same Constitution in obtaining circumstances.

17. In the result, I find merit in the defendant's preliminary objection dated 9th May 2018. Accordingly, I strike out the plaintiff's originating summons dated 26th September 2016 and amended on 18th December 2018 with costs to the defendant.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 18TH DAY OF SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In presence of :

Ms. Elizabeth Apondi holding brief for Veronicah Migai for the plaintiff.

Mr. Odondi Awino learned counsel for the defendant.

Court Assistant – Tom Maurice