



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

E.L.C CASE NO. 450 OF 2017 (O.S)

IN THE MATTER OF REGISTRATION OF TITLE TO LAND BY ADVERSE POSSESSION

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NUMBER LR. NO. MBOONI/KALAWANI/827

JEREMIAH WAMBUA.....PLAINTIFF/APPLICANT

VERSUS

PIUS MBENGEI MUSYOKIDEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Applicant's Notice of Motion Application dated 10th April, 2019 for orders;

- 1. That the Honourable Court be pleased to review the orders made on 25/02/2019.**
- 2. That this Honourable Court be pleased to order that the proceedings herein be deemed to have begun by filing a plaint.**
- 3. That the Defendant herein be at liberty to file a defence, counterclaim or any other documents.**
- 4. That costs do abide the application.**

The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Jeremiah Wambua, the Applicant herein, sworn at Machakos on 18th April, 2018 and 28th June, 2019 respectively.

2. Pius Mbengei Musyoki, the Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on the 20th May, 2019 and filed in court on 22nd May, 2019.

3. On the 14th May, 2019 the court directed that the application be disposed off by way of written submissions. On the 25th June, 2019, the Applicant filed his submissions dated 20th June, 2019. On the other hand, the Respondent filed his submissions on 05th July, 2019 the same being dated 03rd July, 2019.

4. Grounds 1, 2, 3, 4 and 5 of the application are that the Applicant's claim is based on constructive and trust (sic), that the Applicant also wishes to raise the issue of fraud, that the claim can only be entered in a plaint, that the court has a duty to hear parties on merit and not to dismiss them before they are heard and that to withdraw the matter herein and file a fresh suit is oppressive and costly.

5. In paragraphs 5, 6, 7, 8 and 9 of his supporting affidavit, the Applicant has deposed that he is advised by his advocates on record which he verily believes to be true that the issue at hand concerns procedure and not jurisdiction of the court, that it is unfair for him to be dismissed before he is heard (withdraw his claim), that it will also be improper to proceed with the claim in the current procedure knowing very well that it will fail, that withdrawing the originating summons and filing fresh suit means he will be conducted to costs and impair his ability to pursue a fresh claim and that his application should be allowed in the interest of justice and for the court to hear parties on merit.

6. In his further affidavit the Applicant has deposed in paragraphs 3, 4, 5 and 13 that the court has the power to order the proceedings herein to proceed as if it begun by way of a plaint under Order 37 Rule 19, that he has a valid claim against the Respondent, that he has been in possession of the suit premises for over seven (7) decades since land consolidation and that the rule under Order 37 was intended to among other things save parties the expenses of bringing a suit in the ordinary way.

7. The Respondent has deposed in paragraphs 8, 9, 10, 11, 12 and 13 of his replying affidavit that he is informed by his advocates on record which information he believes to be true that by ordering the proceedings herein to be deemed to have begun by filing of a plaint will not change the substance of the pleadings and the fact that the Applicant is not an adverse possessor of the land in issue against him, that the current claim of the Applicant is for adverse possession against title No.Mbooni/Kalawani/827 which he got the title deed on 05/11/2010 thus 12 years are not yet over, that the Applicant wants to bring a totally different claim of fraud against him as per ground 2 of his application, that the claim of adverse possession and constructive trust is quite different from claim of fraud and cannot be supported and/or approved by the same grounds and facts, that the Applicant has already admitted in paragraph 7 of his supporting affidavit to the application dated 10/04/19 that his claim as it is has no breath but bound to fail and that by reviewing the orders of 25/02/2019 will not bring any life to the current claim against him.

8. In his submissions, the Counsel for the Applicant cited Order 37 Rule 19 of the Civil Procedure Rules, 2010 which gives the court the power to convert an originating summons into a plaint. The Counsel added that whereas the Respondent dwells very much on what is required to sustain a claim of adverse possession, the issue is whether what the Applicant intends to raise can be dealt with in the summons. The Counsel urged the court to allow the application.

9. On the other hand, the Counsel for the Respondent submitted that no proper grounds as to why the orders sought should be granted and as such, the application must fail.

10. I have read the application together with the supporting and further affidavits. I have also read the replying affidavit as well as the submissions that were filed by the Counsel on record for both parties. A synopsis of the proceedings herein is that on the 09th October, 2017 the Applicant filed the originating summons dated 06th October, 2017. He sought the following prayers: -

1. THAT it be declared that the Applicant JEREMIAH WAMBUA has adverse possession of more than 12 years from 1958 acquired title to all that parcel of land known as and comprised in title L.R No.Mbooni/Kalawani/827 against the registered proprietor PIUS MBENGEI.

2. THAT it be declared that the Respondent who is registered as owner of the said piece of land hold the said land as trustee for the benefit of the Applicant.

3. THAT it be declared that the said land be registered in the name of Jeremiah Wambua in place of Respondent to be hived from LR No. Mbooni/Kalawani/827.

4. THAT the Respondent be ordered to pay the Applicant's costs of this suit.

The originating summons was supported by the affidavit sworn by the Applicant detailing the reasons why he should be declared to have acquired adverse possession of land parcel No. Mbooni/Kalawani 827 against the Respondent.

Contemporaneously with the originating summons, the Applicant filed chamber summons application dated 06th October, 2017 where he sought injunctive orders against the Respondent. The chamber summons application was supported by the Applicant's supporting affidavit sworn at Machakos on the 06th December, 2017. At paragraph 7 of the application, the Applicant filed a copy of judgment (JW2) in Tawa Resident Magistrate's Court criminal case No.253 of 2016 – Republic vs. Agnes Katulu Muendo who the Applicant has said is the wife. At paragraph 4 of the judgment (JW2) the learned Senior Resident Magistrate noted that plot No.827 was the subject of Machakos High Court Succession Cause No.558 of 2009 where the Court ruled that the said Mbooni/Kalawani/827 be shared equally amongst several beneficiaries who include the late Wambua Musyoki who was said to be the father in-law of Agnes Katulu Muendo, the wife of the Applicant herein.

11. Arising from the above, I do note that nowhere in the originating summons and the supporting affidavits has the Applicant shown whether or not the orders of the High Court in the said succession cause No.558 of 2009 were never implemented thereby denying him what he is entitled to from his late father's estate.

12. **Order 37 Rule 19(1) of the Civil Procedure Rules** provides;

“where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be committed as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or apply for particulars of those affidavits.”

13. Whereas I agree with the Applicant's Counsel that the court has the power to commit these proceedings as if the cause had begun by filing a plaint, the Applicant herein has not put forth sufficient reasons to warrant this court to so commit the proceedings herein. The Applicant has not in any way shown that he has brought this suit on his own behalf and on behalf of the estate of the late Wambua Musyoki. There are no allegations of fraud raised in the supporting affidavit to the originating summons. The Applicant cannot be heard to say that withdrawal of the suit would be oppressive and costly since having conceded that his suit stands no chance of success, costs must follow the event. In any case, there is nothing to show that the Applicant has discovered a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order of 25th February, 2019 was issued to warrant its review as is provided for under Order 45 Rule 1(1)(a) and (b) of the Civil Procedure Rules. I agree with the

Respondent's Counsel that the Application is meant to waste Judicial time. The hounorable action that the Applicant ought to take is to withdraw the originating summons so that he can file fresh claim.

14. The upshot of the foregoing is that the application lacks merit and I hereby proceed to dismiss it with costs to the Respondent.

Signed, Dated and Delivered at Makueni this 14th day of **October, 2019.**

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Nagwere holding brief for Mrs. Nzau for the Defendant present

No appearance for the Plaintiff

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

14/10/2019.