



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 105 OF 2017

JOSIAH NJOROGE NJUGUNA.....PLAINTIFF

VERSUS

INGOBOR FARM CO. (REGISTERED TRUSTEES).....1ST DEFENDANT

PAUL KIMUTAI LANGAT.....2ND DEFENDANT

RICHARD KIPNGENO LANGAT.....3RD DEFENDANT

DISTRICT LAND REGISTRAR4TH DEFENDANT

RULING

1. The plaintiff commenced proceedings herein by Originating Summons dated 9th March 2017. He seeks an order that he has acquired ownership of the parcels of land known as **Miti Mingi/Mbaruk Block 4/37** and **Miti Mingi/Mbaruki Block 4/38** (the suit properties) by adverse possession.

2. In the affidavit in support of the Originating Summons, he deposed that he entered into the suit properties in the year 1997 after the original title deeds of the properties were handed over to him by the 1st defendant. He annexed a copy of the title deed for each property. He added that in 1997, he became the registered proprietor of **Miti Mingi/ Mbaruk Block 4/37**. He annexed a copy of the title for the particular property.

3. The plaintiff further deposed that late in the year 2016, the 3rd defendant told him that he (the third defendant) had obtained title for **Miti Mingi/ Mbaruk Block 4/37**. Subsequently, the plaintiff conducted a search through his advocates and the search revealed that the 2nd and 3rd defendants became registered proprietors on 14th November 2012. The plaintiff did not annex a copy of the Certificate of Search.

4. The 2nd and 3rd defendants have so far not filed any replying affidavit. They however responded to the originating summons by filing Notice of Preliminary Objection dated 18th April 2017. The objection is in the following terms:

1. That the Originating Summons hereby filed violates the provisions of Section 38 of the Limitation of Actions Act, as the applicant herein has annexed a title deed showing that he is the proprietor of the suit parcel that he wants to acquire by way of adverse possession.

2. That the suit as filed violates the mandatory provisions of Order 37 Rule 7(2) as a certified copy of the register has not been annexed to the supporting affidavit.

3. That the Originating Summons as filed is incompetent as the plaintiff cannot purport to acquire land through adverse possession having annexed a copy of a title deed that is in his name over the.

5. Mr. Aim, learned counsel for the 2nd and 3rd defendants informed the court that the objection is only between the 2nd and 3rd defendants and the plaintiff. The 1st and 4th defendants did not participate in its hearing. Indeed, the record does not show any Memorandum of Appearance or any other document filed by or for the 1st and 4th defendants. Mr. Karanja learned counsel for the plaintiff, informed the court that he had not been served with any documents by 1st and 4th defendants.

6. The objection was argued by written submissions. Counsel for the 2nd and 3rd defendants argued that pursuant to the provisions of Order 37 rule 7 of the Civil Procedure Rules, proceedings seeking adverse possession must be brought by way of an originating summons supported by an affidavit to which a certified extract of the title to the land in question is annexed. Citing the case of **Wasui –vs- Musumba (2002) 1KLR 396**, counsel argued that an order of adverse possession can only be made against a respondent who is registered proprietor of the suit property. Counsel further argued that since the plaintiff had annexed a copy of the title deed for **Miti/Mingi Mbaruk Block 4/37 (Ingobor)** which shows that he is the registered proprietor, he cannot seek adverse possession against himself. As such, the suit is meaningless.

7. Further, citing the cases of **Samuel Kipngeno Koech –vs- Agnes Wambui Gitonga [2016] eKLR** and **Serah Muthoni Kimani –vs- John Wanyoike Gerald [2014] eKLR**, counsel submitted that the plaintiff had failed to annex extract of title and that this was fatal to the case. Accordingly, counsel urged the court to strike out the suit.

8. Counsel for the plaintiff submitted that the matter is still at its infancy stage since directions under Order 37 rule 16 have not yet been taken. He also cited Order 37 rule 18 and the case of **Richard Arap Chemunyani & 3 others –vs- Mipasi Ole Ngogoni Nakuru HCCC No. 160 of 2005 (Unreported)** and argued that the preliminary objection is premature.

9. In conclusion, counsel for the plaintiff urged the court to be guided by the provisions of **Article 159** of the **Constitution** to uphold substantive justice and the overriding objective of the court as opposed to technicalities. He also submitted that the Originating Summons is not so hopeless, so incorrigible or so dead that life cannot be breathed into it. Accordingly, he urged the court to dismiss the Preliminary Objection with costs.

10. I have anxiously considered the preliminary Objection and the submissions by the plaintiff and those of the 2nd and 3rd defendants as well as the authorities cited. The preliminary objection is on two issues: firstly, that the plaintiff has not annexed certified extract of title and secondly, that the plaintiff is the registered proprietor of the property that is the subject of the proceedings.

11. Procedural aspects of an action claiming adverse possession are found at **Section 38 (1) and (4) of Limitation of Actions Act** Chapter 22 Laws of Kenya and **Order 37 rule 7 of the Civil Procedure Rules, 2010**. Section 38 (1) and (4) of the aforesaid Act provides:

38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.

.....

(4) The proprietor, the applicant and any other person interested may apply to the High Court

for the determination of any question arising under this section.

12. Order 37 rule 7 provides:

7. (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.

13. There is therefore no doubt that the requirement that the originating summons be supported by an affidavit to which a certified extract of title to the land in question is annexed is a mandatory one. I have perused the supporting affidavit and the annexures thereto and I see no certified extract of title to the suit properties. Whereas copies of title deeds are annexed, the rule is specific that a certified extract of title be annexed. A certified extract of title is not the same thing as a copy of the title deed. There is good sense in the requirement that a certified extract of title be annexed as opposed to just a copy of the title deed. In proceedings where an order is sought that a litigant has become entitled to land by adverse possession, it is acutely important to identify with precision not only the land in question but also the registered proprietor thereof. Though the identity of the land may not be susceptible to regular changes, ownership may change frequently. Even though a photocopy of a title deed may show that such and such a person was the registered proprietor as at a certain date, there may have since been changes on the register. It is for this reason that a certified extract of title comes in handy since by looking at it and, in view of the date when it was signed by the registrar, one can be sure of the latest status on the register. Needless to state, the requirement of certification adds an extra layer of credibility as opposed to a photocopy of title deed which is not certified. I therefore have no hesitation in finding, as I hereby do, that the Originating Summons herein is in breach of the mandatory provisions of Order 37 rule 7 of the Civil Procedure Rules.

14. What are the consequences of failure to comply with Order 37 rule 7 of the Civil Procedure Rules? The 2nd and 3rd defendants argue that such a failure is fatal to the Originating Summons and should result in its striking out. The plaintiff on the other hand argues that such a shortcoming can be remedied under **Order 37 rule 18** before the matter is set down for hearing. The said rule provides:

18. At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

15. Procedural rules are important since they ensure orderly and just conduct of litigation. When a rule makes some action or step mandatory litigants have no choice over the matter: they must comply. This is the spirit of **Section 1A** of the **Civil Procedure Act** which provides:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

16. Order 37 rule 7 does not state what consequences should follow failure to annex the certified extract

of title. Consequently, the court has discretion to decide the fate of an originating summons. That discretion must be exercised in a judicious manner and with a view to rendering substantive justice in line with the provisions of Article 159 of the Constitution.

17. The old adage that procedure is the handmaiden of substance or justice remains valid. In **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR** the Supreme Court stated as follows:

[37] Service of a notice of appeal is crucial. Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

[38] We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.

....

[42] The sanctity of the record of appeal has been emphasized above in this ruling. The question then is whether the address of service is such a mandatory provision, that its exclusion falsifies the entire record, or is it an anomaly that can be cured by Article 159 of the Constitution? In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR”.

[43] Informed by the role that the notice of appeal plays, it is our considered opinion that such a document ought to be filed first before the appeal. However, while the rules require that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service does not warrant striking out of the appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply Article 159 of the Constitution, in order to render substantive justice. It is also our view that Article 163(4) (a) of the Constitution gives the appellant a ‘right’ to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced.

18. In the new dispensation, substantial justice is better served by giving the plaintiff an opportunity to

comply with the law more so in a situation such as the present one where the defendants have not demonstrated that any prejudice has been or will be occasioned to them if the plaintiff is given a chance to comply. I am in favour of giving the plaintiff a chance to comply with the provisions of order 37 rule 7(2). It is only upon failure to take advantage of such an opportunity that such drastic consequences as striking out should set in.

19. The other issue arising from the preliminary objection is whether the plaintiff is the registered proprietor of the suit property and therefore whether proceedings seeking adverse possession would be tenable. This particular aspect of the objection is tied to the one on certified extract of title. Once a certified extract of title is availed the issue of whether or not adverse possession is available would be one to be determined at the hearing of the originating summons since it goes to the merit of the dispute. Its determination will depend on evidence. A preliminary objection consists of a point of law which if argued may dispose of the suit. The question of whether the plaintiff is the registered proprietor of the suit property and therefore whether proceedings seeking adverse possession would be tenable cannot therefore be a valid ground of a preliminary objection.

20. In the end, I make the following orders:

a) The plaintiff to file and serve a supplementary affidavit and annex to it a certified extract of title in respect of the suit properties within 14 (fourteen) days from the date of delivery of this ruling. In default, the originating summons shall stand struck out with costs to 2nd and 3rd defendants.

b) Costs of the preliminary objection are awarded to the 2nd and 3rd defendants.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 6th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Karanja for the plaintiff

No appearance for the 2nd and 3rd defendants

Court Assistants: Gichaba & Lotkomoi