



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 381 OF 2017 (O.S)

WILLIAM KAMOIRO & 12 OTHERS.....APPLICANTS

VERSUS

NGARE MAIHU.....1ST RESPONDENT

MARK KARIUKI KAINGANAINE.....2ND RESPONDENT

RULING

(Preliminary objection seeking to strike out suit; suit being a claim for adverse possession and filed in the year 2016; title of the defendants procured in the year 2015; previous title having been of the Settlement Fund Trustees; argument that the time when the title was with the Settlement Fund Trustees cannot be counted to accumulate the 12 years required for a claim of adverse possession and suit is therefore a non-starter; settled that time when land is under Government and that includes the Settlement Fund Trustees cannot be counted; applicant cannot have accumulated 12 years to sustain a case for adverse possession; suit is premature and is dismissed with costs)

1. This ruling is in respect of a preliminary objection raised by the respondents in the following fashion :-

(i) That the applicant's suit as filed is a non-starter and grossly incompetent for the 12 years period required in a claim for adverse possession has not crystallized against the respondents since they acquired title to the suit parcel Naivasha/OlJORAI Phase 11/142 on the 22nd December 2015, whereas the previous owner of the suit title was the Settlement Fund Trustee which is a government institution of which a claim for adverse possession could not be computed against the said government institution.

(ii) That the applicants' suit is incurably defective for the affidavits in support of the applicants' case have been sworn by an individual namely David Kamoiro who is a total stranger to the suit thus lacking any legitimate interest to swear affidavits in this case.

(iii) That the applicants' suit is misconceived and an abuse of the court process whereby the same ought to be struck out with costs to the respondents.

2. The background leading to the above is that the applicants through an Originating Summons filed on 5 October 2016, brought inter alia pursuant to the provisions of Sections 17, 18, 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya, and Order 36 Rule 3D of the Civil Procedure Rules, contended that they are entitled to be declared the legal owners, through adverse possession, of the land parcel Naivasha/OlJORAI Phase II/142 (hereinafter referred to as "the suit land"). The supporting affidavit to the Originating Summons is sworn by one David Kamoiro. In his supporting affidavit, Mr. Kamoiro deposed inter alia that he is one of the applicants, and he is seized with the knowledge of the facts of the case. He averred that he has the authority of the other applicants in the matter and he annexed a copy of a signed authority. He deposed that he and the other applicants, have been residing on the suit land, measuring about 30 acres, since the year 1990, having been allocated the same by the Agricultural Development Corporation (ADC). He deposed that their occupation has been peaceful, open and un-interrupted until the year 2017, when the respondents sought to evict them, stating that they are the new proprietors of the suit land having been issued with a title deed on 22 December 2015.

3. The respondents filed an appearance and a replying affidavit to the Originating Summons, together with the Preliminary Objection noted above. In the replying affidavit, sworn by the 1st respondent, it is deposed that the respondents obtained a title deed on 22nd December 2015. It is also averred that Mr. David Kamoiro is a stranger to the case, and further, that the applicants have never been in occupation of the suit property. It is also deposed that the suit land is currently under subdivision. The issue of the 12 years not having been accumulated is further raised in the replying affidavit.

4. I invited both counsel for the applicants and the respondents to file submissions to the preliminary objection but only Mr. Kanyi Nguere,

learned counsel for the respondents, did so. Neither did counsel for the applicants, M/s Geoffrey Otieno & Company Advocates, appear at the hearing of the preliminary objection. The only submissions that I have are therefore those filed by counsel for the respondent. In the same, Mr. Kanyi has inter alia submitted that the land was previously under the Settlement Fund Trustees (SFT) and time could not run against this institution, as it is a public enterprise. He further pointed out that the title does not demonstrate ADC as having had any registered interest. He referred me to the cases of *Jabel Mohsen Ali & Another vs Priscilla Boit & Another (2014) eKLR*, *Samwel Ndung'u Gitu vs Danson Ndung'u & 2 Others, Nairobi CoA, No. 304 of 1997* (unreported). He also pointed out to me that David Kamoiro is not one of the applicants.

5. I have considered the above submissions of counsel and looked at the record herein, especially the Green Card to the suit land. The same shows that the first registered owner of the suit land was the SFT, which became registered as proprietor on 30 November 2011. The second registered proprietors are the respondents in this suit, who became registered on 22 December 2015. The central issue in this preliminary objection is whether the time when the SFT were registered as proprietor can count towards accumulating the time required (which is 12 years of continuous possession) for one to obtain title by way of adverse possession. This is not a new question, which was indeed settled by the Court of Appeal in the case of *Gitu vs Ndungu*, cited by Mr. Kanyi. In the said case, the Court of Appeal held that the time when the SFT is registered as proprietor, cannot count towards the 12 years required to obtain title by way of adverse possession. Counsel for the applicants has not provided me with any contrary authority to persuade me otherwise.

6. In our case, the applicants claim to have been in possession since the year 1990. However, it does seem that the suit land was under the Government hence the registration of the SFT in the year 2011. All this period cannot count towards accumulating the 12 years required to claim land by way of adverse possession. Time only started running in favour of the applicants on 22 December 2015 when the respondents, as private citizens, became registered as proprietors of the suit land. This case was filed on 5 October 2016 and not even one year had passed since the registration of the respondents as proprietors. It is therefore apparent that the applicants cannot sustain a claim for adverse possession since it is clear beyond peradventure that they can never demonstrate a possession that is of at least 12 years. For that reason alone, this suit must fail and is hereby dismissed with costs. Given that position, I find it unnecessary for me to address the point that this suit also ought to be dismissed for the reason that the supporting affidavit has been sworn by a person who is not a party to the suit.

7. The preliminary objection succeeds and this suit is hereby dismissed with costs.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 11TH day of April 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Kanyi Ngure for the respondents.

Ms. Rahab Muthoni holding brief for M/s Geoffrey Otieno & Co. Advocates for the applicants.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU