



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 149 OF 2012**

**(FORMERLY ELDORET HCCC NO. 51 OF 2004)**

**PAUL KIPTENAI K. BIRECH.....PLAINTIFF**

**VERSUS**

**NANDIKO LUKHUBWA.....1<sup>ST</sup> DEFENDANT**

**VICTORINE RUTTO.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Paul Kiptenai K. Birech (hereinafter referred to as the plaintiff)** has come to court by way of originating summons against **Nandiko Lukhubwa (hereinafter referred to as the 1<sup>st</sup> defendant)** and **Victorine Rutto (hereinafter referred to as the 2<sup>nd</sup> defendant)** for orders that he be registered as the proprietor of land parcel **No. Uasin Gishu/Kimumu/2896** having acquired ownership and or title through adverse possession and the titles of the defendants be declared as having been extinguished. The originating summons is grounded on facts that the first defendant was registered as the owner of parcel No. Uasin Gishu/Kimumu/142 which later came to be sub-divided and one of the resultant sub-divisional portions being parcel Number Uasin Gishu/Kimumu/2896, which he transferred to Victorine Rutto which had been purchased by the plaintiff on 1.8.1986 and the plaintiff has been in adverse possession of it as from that date to-date. The plaintiff claims to have an uninterrupted possession of the said land since 1.8.1986 he has acquired title by way of adverse possession and the titles of the defendants have been extinguished by the operation of the provisions of Limitation of Actions Act.

The 2<sup>nd</sup> defendant states that she is the duly registered proprietor of the land and that she in possession on purchase in the year 2003 and assigned one Godfrey Okoyo Mutola as the custodian. In essence, the 2<sup>nd</sup> defendant states that she is in possession, being the registered owner and that the plaintiff has no claim.

On the 15.8.2018, the 2<sup>nd</sup> defendant filed an application by way of Notice of Motion praying that the originating summons be struck out for disclosing no reasonable cause of action. The application is based on grounds:

- a. That the originating summons herein discloses no reasonable cause of action, it is scandalous, frivolous, vexatious and it is an abuse of the due process of the court.**
- b. That the 2<sup>nd</sup> defendant/applicant is the duly registered owner of the land parcel registration No. Uasin Gishu/Kimumu/2896, measuring approximately 0.2 Ha.**
- c. That the plaintiff/respondent had obtained ex-parte judgment against the 2<sup>nd</sup> defendant/applicant to the effect that the plaintiff/respondent be registered as the proprietor of the land parcel in question that is Uasin Gishu/Kimumu/2896 allegedly having acquired the same by way of adverse possession and that the titles of the 2<sup>nd</sup> defendant/applicant be declared as having been extinguished.**
- d. That the said judgment was later stayed and consequently, the 2<sup>nd</sup> defendant/applicant was granted leave to enter appearance and file defence/replying affidavit to the instant originating summons.**
- e. That alongside, the replying affidavit to the instant originating summons, the 2<sup>nd</sup> defendant/applicant filed a preliminary objection to the effect that the originating summons herein were prematurely filed and consequently offends the provisions of sections 7 and 13 of the Limitation of Actions Act, Cap. 22, Laws of Kenya.**

f. That a claim for adverse possession herein against the 2<sup>nd</sup> defendant/applicant is untenable since the suit land was registered in the 2<sup>nd</sup> defendant's applicant's name on 11<sup>th</sup> June, 2003 and this claim was filed in court on 5<sup>th</sup> May, 2004, just barely 9 months after the 2<sup>nd</sup> defendant/applicant had acquired the title to the suit land.

g. That the plaintiff/respondent has never possessed and occupied the suit land herein quietly, peacefully and openly for a period of 12 years hence his claim does not meet the threshold for adverse possession as captured in the Latin maxim, *nec vi, nec clam, nec precario*, that, one's 12 years possession period must be continuous, peaceful, not in secrecy and without the authority or permission of the true owner.

The application is supported by the affidavit of Victorine J. Rutto, which offends the provision of Order 2, Rule 15(2) of the Civil Procedure Rules, 2010 which provides that no evidence shall be admissible on grounds that the suit discloses no cause of action.

In the replying affidavit, Paul K. Birech in defect of the suit states inter-alia that the land was originally registered in the names of Nandiko Lukhubwa as Uasin Gishu/Kimumu/142 on 18.11.1988 having been originally registered in the A.F.T. in 1986. The portion he is claiming was registered in the 1<sup>st</sup> defendant's name and was sold to the plaintiff on 1.8.1986 for a sum of Kshs. 7,300. He claims to have taken immediate possession of the land. Victorine J. Rutto filed a further supporting affidavit raising issues of fact that need to go for full trial.

The 2<sup>nd</sup> defendant/respondent submits that the claim herein has not met the 12 years threshold for adverse possession since title was obtained on 11.6.2003 when the 2<sup>nd</sup> defendant was registered and yet the suit was filed on 5.5.2004 barely 9 months after title was obtained. Moreover, the 2<sup>nd</sup> respondent argues that a sale agreement cannot give rise to adverse possession.

The plaintiff in his part submits that the facts of this matter can be ascertained from the original green card when the suit property was known as Nandi/Kimumu/142 that was registered in the names of Nandiko Lukhubwa who sold a portion through the plaintiff. The consent of the Land Control Board was not given hence the plaintiff became a trespasser and therefore, the 12 years began running on the date the plaintiff entered the land in 1986. The plaintiff argues that he is in possession of the land as from 1986 and therefore he has satisfied the principle of adverse possession.

I have considered the application, the replies and the rival submissions and do find that the application does not meet the threshold of the provisions of Order 2, Rule 15 of the Civil Procedure Rules, 2010 which provides:

**“15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** restated these principles thus:

**“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -**

**“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”**

**We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-**

**“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”**

**We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”**

The same sentiments were echoed by **Danckwerts L.J** when the House of Lords considered a similar matter in **WENLOCK V MOLONEY**, [1965] 2 All E.R 871 at page 874, as follows:

**“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”**

The plaintiff claims that he bought the portion he is occupying in 1986 and took possession. At the time of taking possession, the parcel of land was known as Nandi/Kimumu/142. He claims to have acquired prescriptive rights against the 1<sup>st</sup> defendant and therefore, the transfer and registration of the property to the 2<sup>nd</sup> defendant was a nullity as he had already obtained rights in the property.

This issue cannot be determined summarily by striking out the plaint but through evidence. The allegation that the suit is scandalous, vexatious and abuse of the process of court have no basis at all as no evidence has been adduced to demonstrate the same. I do find that the originating summons raises a reasonable cause of action and the application dated 15.8.2016 is dismissed with costs.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of May, 2018.**

**A. OMBWAYO**

**JUDGE**