



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 259 OF 2014**

**(CONSOLIDATED WITH E & L CASE NO. 141 OF 2015 (OS))**

**SAKA DEVELOPERS LIMITED.....PLAINTIFF**

**VERSUS**

**MARY AOKO OMONDI.....DEFENDANT**

**RULING**

The application before court is dated 23.8.2017 filed by the Honourable Attorney General as the interested party in this matter. The applicant seeks orders that the judgment entered herein or decree extracted therefore and/or all consequential orders made herein be reviewed, varied, set aside and/or vacated forthwith and the matter be ordered to start *denovo*. That the interested party be granted leave to file its statement of defence and list of documents for proper trial.

The application is based on grounds that L. R. No. Eldoret Municipality/Block 6/274 measuring 0.0454 Ha is a leasehold interest where the Government of Kenya is the head lessor and that the judgment offends the provisions of Section 41(a)(i) of the Limitation of Actions Act Cap. 22 Laws of Kenya which prohibits claim of adverse possession over such land enjoyed by the Government of Kenya.

According to the Hon Attorney General, and rightly so, the Government of Kenya reserves the ultimate reversionary interest in the suit land so much so that any use of the land must be within the conditions of allotment thus the interest of the state demonstrated therein.

The Attorney General believes that he has a genuine and recognizable interest in the outcome of this case thus the need to have the orders issued herein set aside and enjoin applicants to determine the questions and issues raised finally and effectually. He states that the Honourable court was misled to believe that the plaintiff/respondent held an absolute interest contrary to the evidence on record in which the Government of Kenya is disclosed as a head lessor. That it is in the interest of justice that the interested party be enjoined to determine the issue as to whether an order of adverse possession is applicable in the circumstances of this case. That the applicant is not a party in the suit yet the prayers sought in the suit directly affects the interests of the Government as the head lessor and the applicant was condemned unheard and the applicants have all along been in the dark concerning the existence of this case and they stand to suffer irreparably if the decree and judgment of this Honourable court is executed. That it is therefore in the interest of public and interest justice that the applicants be granted leave to enjoin as co-defendants.

The application is supported by the affidavit of Dorothy Letting the County Land Registrar, Uasin Gishu who states that she is the custodian of the register for L. R. No. Eldoret Municipality Block 6/274 and confirms that the title is a leasehold. The government is a head lessor while the plaintiff is a lessee. She states that the court considered the issue of adverse possession without considering the head lessor. That she is aware that section 38 of the Limitation Actions Act allows any person to apply to be registered as a proprietor over an absolute interest by virtue of adverse possession if the person is able to demonstrate she dispossessed the land from the owner for a continuous and uninterrupted for a period of over 12 years.

That section 41 of the Limitation Actions Act prohibits anyone from claiming adverse possession of land owned by the government or which is otherwise enjoyed by the government and that under a leasehold title, as is in this case, the government of Kenya is head lessor defined under section 2 of Land Registration Act, 2012 (LRA) with rights and privileges reserved under sections 54 and 55 of Land Registration Act.

That the allotment and lease to a lease holder is made under special conditions which include continuous possession and use of the demised premises in default the lease automatically lapses or is overtaken by events and the land reverts back to the government of Kenya and in the upshot, she is aware that the doctrine of adverse possession does not apply over leasehold titles due to operation of the right of reversion in favour of Government of Kenya. That if indeed it is true that the plaintiff/applicant was never in possession or use of the suit land since the time of allocation it will be prejudicial for the court to deny the interested party to its statutory right of reversion which issue need to be determined through a trial.

That from the record, this Honourable court was under a mistaken belief or that it was made to believe that the interest in the suit land was

absolute interest which did not require the participation of interested party who has no right to reversion in absolute interest. The leasehold interest is preceded by an elaborate allocation which is an administrative rather than judicial process and the court cannot rely on adverse possession to vest the suit land to the defendant/respondent without participation of the agents of the interested party.

The applicant believes that the suit land vests with National Land commission which can alienate it upon reversion and the judgment dated 21.12.2016 defeats the said interests. That it is necessary and in the public interest to enjoin the applicant in order to determine the questions and issues raised herein finally and effectually. The applicant has a genuine cause hence craves for the leave of this court to ventilate the issues raised herein which would have been ironed out in the first instance had the applicant been made aware of the claims. That no party stands to be prejudiced should the orders sought herein be granted. That execution of judgment of this Honourable court before entertaining the interested party's claim shall greatly prejudice and defeat its reversionary interests. **Feisal Sadrudin Nurani** supports the application by the Attorney General.

**Mary Aoko Omondi** opposes the application and states that the issues before court are legal in nature hence not subject to review but appeal. She states that the parcel of land is not unalienated government land but it is alienated government land. Moreover, that this parcel of land is private land. According to the respondent, nothing precludes the application of the law on adverse possession on leasehold utilities.

I have considered the application herein and do find that the starting point is sections 37 and 39 of the Limitation Actions Act which the Attorney General and the defendants have avoided to cite either.

### **37. Application of Act to registered land**

*This Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the*

*Registered Land Act (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—*

*(a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;*

*(b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.*

### **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.*

*(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.*

*(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.*

*(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.*

*(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.*

### **41. Exclusion of public land**

*This Act does not—*

*(a) enable a person to acquire any title to, or any easement over—*

*(i) Government land or land otherwise enjoyed by the Government;*

(ii) mines or minerals as defined in the Mining Act (Cap. 306); [Rev. 2012]

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.

In a nutshell, the Limitation of Actions Act applies to the land that was previously managed under the Government Lands Act Cap 280 laws of Kenya (**repealed**) and registered under the Registered Lands Act Cap 300 Laws of Kenya (**repealed**). The only exception is public land under section 41 of the Act.

The Attorney General has no sufficient interest in this property in any manner whatsoever as the same is not public land due to the fact that it has been already been alienated as private land and a lease issued to the plaintiff. When the lease the lease expires the same will revert to the state. The subject matter is a leasehold interest in which the defendant has already acquired prescriptive rights of the unexpired period. **Chapter 5 of the constitution of Kenya 2010** states the principles and policy to be applied in land management and **Article 60** provides that all land in Kenya belongs to the people of Kenya collectively as a nation as communities and as individuals. Land is classified as public, private and community. **Article 62 of the constitution of Kenya 2010** read with **section 41 of the limitation of actions act cap 22 laws of Kenya** refer to public land whilst **Article 64** refers to private land. The land in dispute falls within the ambit of **Article 64** as it is a leasehold and therefore adverse possession applies.

The application for review herein is based on points of law as opposed to facts and therefore this court finds that the issues raised in the application if established, revolves on error of law. The error is not so apparent on face of record as it requires argument and determination. The applicants are entitled to take a different view from one taken by this court and if they believe that the court arrived at a wrong decision by misapplying the law then the applicants should appeal.

I do find no grounds for review of the decision of this court and that the applicant has no immediate sufficient interest in the matter as what is in dispute is the leasehold interest and not reversionary interest. Application is dismissed with costs.

**Dated and delivered at Eldoret this 20<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**