



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 457 OF 2017

(formerly Machakos HCCC No. 26 of 2015 (OS))

IN THE MATTER OF LR NOS. KAJIADO/ KAPUTIEI

CENTRAL/ 2303, 2304, 2305, 2306, 2307, 2308.

AND

IN THE MATTER OF LIMITATION OF ACTIONS

ACT CHAPTER 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 2 OF 2012

AND

IN THE MATTER OF THE REGISTERED LAND ACT

CHAPTER 300 OF THE LAWS OF KENYA (REPEALED)

BERNARD ITUMO MUNGAI & 7 OTHERS....PLAINTIFFS/APPLICANTS

VERSUS

PAUL KIMAKON & 3 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

What is before Court for determination is the Respondents' Notice of Preliminary Objection dated the 27th February, 2015 and filed on 2nd March, 2015 where they raise a Preliminary Objection to be determined in limine on the following grounds:-

1. That the Application and suit as filed is incompetent, bad in law and ought to be struck out with costs.
2. That the 3rd and 5th Plaintiffs have filed the suit on behalf of deceased persons yet no letters of administration have been obtained first hand.
3. That the Applicant has approached this Honourable Court improperly by way of an Originating Summons rather than by way of Plaint yet:
 - i. The Respondents are desirous of lodging a Counterclaim but cannot do so without a Plaint;
 - ii. The Applicants have raised issues of forcible eviction and fraud which issues can only be determined by way of Plaint;

iii. The Sale Agreements are contested/ disputed by the Respondents and therefore the Applicant ought to have approached this Honourable Court by way of Plaint;

4. That the issues being raised herein are complex in nature and therefore inappropriate for an Originating Summons following the decisions in:

- i. Floriculture Limited Versus Central Kenya Limited & 3 others Civil Appeal No. 121 of 1995;
- ii. Kibutiri Versus Kibutiri Civil Appeal No. 30 of 1982;
- iii. Wakf Commissioners Vs Mohammed (1984) KLR 346;
- iv. Kirit Babulal Bakrania Versus Champuben w/f Govindi Muwi Dodha & 2 others Civil Appeal No. 123 of 1993.

5. That the Application as filed is an abuse of the Court process

Both parties filed submissions in respect of the Notice of Preliminary Objection.

The Respondents submitted that the Application and suit are bad in law, incompetent and ought to be struck out because the Applicants have relied on the provisions of section 7 and 38 of the Limitation of Actions Act but this is not the subject matter of the suit as they are seeking cancellation of titles that were issued to the Defendants. They have relied on the case of **Cyril J Haroo & another Vs Uchumi Services Limited & 3 others (2014) eKLR** where O. A Angote Judge held that a suit filed contra to statute is incompetent and cannot be allowed to proceed. They contend that the Applicants approached the Court improperly by way of an Originating Summons rather than by way of Plaint and hence they are unable to file a Counterclaim. They further relied on the cases of **Siasa Pasua & 2 Others Vs Mbaruk Khamis Mohammed & Another (2012) eKLR**; and **Kibutiri Vs Kibutiri (1983) eKLR** to support their arguments. The Respondents opposed the application and stated that the Defendants'/ Applicants' preliminary objection does not purely raise points of law as they are disputing the Sale Agreements attached as evidence in the Originating Summons and these are facts contrary to the well established decision of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** that held that a preliminary objection should be in the form of a demurrer which should settle all issues leaving nothing. They insist that the Application and the suit are competent and properly before the Court and therefore not an abuse of court process as it was brought pursuant to Order 37 rule 7 (1) of the Civil Procedure Rules and Section 7 as well as Section 38 of the Limitation of Actions Act which makes provisions on the foundation of a claim over ownership of land based on adverse possession. They relied on various cases including **Francis Muriuki Gikigi & 2 others Vs Richard Muriithi Tiri & Another (2014) eKLR**; and **Peter Mbiri Michuki Vs Samuel Mugo Michuki (2014) eKLR**; to support their claim. They insist they approached the court properly by filing the present suit through Originating Summons since the claim herein is based on adverse possession. Further that by filing the present suit by way of Originating Summons (OS) and not by Plaint it is not fatal to the proceedings since the court has jurisdiction to convert a case which has been incorrectly brought by an Originating Summons so as to be continued as a normal suit, especially in instances where the issues raised therein are complex as well as controversial as to law or facts. They relied on the case of **Ngati Farmers Cooperative Society Ltd Vs Ledidi & 15 others (2009) eKLR** and Order 36 Rule 10 of the Civil Procedure Rules. They contend that the Defendants ought to have adduced evidence through a Replying Affidavit to the Originating Summons instead of the Preliminary Objection.

Analysis and Determination

Upon perusal of the materials presented in respect of the Notice of Preliminary Objection dated the 27th February, 2015 and filed on 2nd March, 2015, the following are the issues for determination:

- Whether the Application and suit as filed is incompetent, bad in law and ought to be struck out with costs.

I note that the Plaintiffs filed this suit seeking various orders including a claim for adverse possession. I note that there is no response filed in respect of the Plaintiffs' claim. I note the Defendants claim some of the people sued are deceased, yet they have not furnished court with any evidence to prove these averments.

It is the Defendants' contention that the suit herein is incompetent and bad in law as it was instituted by way of OS instead of a Plaint, which defeats their right to file a counterclaim.

Order 37 rule 7 of the Civil Procedure Rules states thus:

- '(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.'

I note the prayers and grounds in the OS seek orders of Adverse possession and brought under section 7 and 38 of the Limitation of Actions Act. In relying on the facts as presented and in relying on the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**, I find that the Preliminary Objection raised by the Defendants in respect of the OS and their inability to file a Counterclaim cannot hold as the Defendants have not filed any response to the said OS and the issues they are raising amount to facts and not law. I am further relying on the case of Ngati Farmers Cooperative (supra) where the court held that: '**Under Order 36 Rule 10 of the Civil**

Procedure Rules (Cap 21), there was jurisdiction to convert a case which has been incorrectly brought by way of Originating Summons, so as to continue as a normal suit. That would occur when it turns that the suit raised issues of pure law, Complex and controversial of facts. The issue of wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the Appellant.'

From a cursory look at the OS, I note it raises complex and controversial facts which would be pertinent to be heard and determined. Further, the PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS stipulates the Overriding Objective of Proceedings in the Environment and Land Court as follows:

'1. In the exercise of its authority and Jurisdiction, the Environment and Land Court shall at all stages of any trial be guided by Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act No. 19, 2011 so as to facilitate:

- (a) Just;**
- (b) Expeditious;**
- (c) Proportionate; and**
- (d) Accessible resolution of disputes.'**

The said Practice Directions on proceedings in the Environment & Land Court are clear on what should guide the court and I find that by the Defendants raising this PO and yet they have not even filed a response to the OS is merely relying on technicalities. According to section 19(1) of the Environment and Land Court Act it stipulates that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

It is against the foregoing and in exercising my discretion that I proceed to dismiss the PO in its entirety. Costs will be in the cause.

Dated signed and delivered in open court at Kajjado this 19th day of June, 2018.

CHRISTINE OCHIENG

JUDGE