



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 210 OF 2017(O.S)

(Formerly Kisii ELCC No. 250 of 2016)

NICHOLAS ORACHA OMENY 1ST PLAINTIFF

MICHAEL WASHINGTON O. ONYANGO 2ND PLAINTIFF

-versus-

RICHARD OLUNGA MIGAN 1ST DEFENDANT

PITALIS KAUMBA MIGAN 2ND DEFENDANT

RULING

1. This ruling is in respect of the defendant's preliminary objection dated 14th July, 2017, seeking to strike out the plaintiff's originating summons dated 12th August, 2016 on the following grounds:-

a) THAT the Originating summons is incurably defective for failure to annex an abstract of title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure code 2010.

2. The plaintiffs are represented by learned counsel, Mr. G.S. Okoth. The defendants are presented by Ombati Otieno and Opondo Advocates.

3. By the originating summons, the plaintiffs have sued the defendants who claim to be in possession of a portion of land parcel No. Kanyada/Kanyango-Kalanya/1213(the suit property) for the determination of the following questions :-

a. Whether Richard Olunga Migan, the defendant herein has locus standi to be sued on behalf of Peter Wanjera Migan the deceased registered proprietor of the abovementioned parcel of land.

b. Whether the said plaintiff acquired their possessory rights through purchase of the same or not and whether the vendor put them in possession thereof and when did he do so.

c. Whether the said two defendants having been registered as joint proprietors of the said parcel of land as administrators of the deceased proprietor have obligation to fulfil the contractual obligations of the deceased.

d. Whether the plaintiffs and their kinsmen have cultivated the suit parcel of land or not, and if so for how long have they occupied the same or portions thereof.

e. Whether the two plaintiffs have acquired title to the said piece of land by way of adverse possession or not.

f. Whether the defendants who are now registered as proprietors after Succession proceedings have previously occupied, cultivated or in any way exercised possessory rights over the disputed portions of the suit land.

g. Who is to bear the costs of this suit.

4. The originating summons is anchored on; (a) The 1st plaintiff's supporting affidavit sworn on 12th August, 2016 and documents marked NOO -1 to NOO-3 namely sale of land agreement dated 19th November 1994, photos and a of official search dated 4th July 2016 showing caution lodged on 9th May 2016 by the 1st plaintiff (b). The 2nd plaintiff's supporting affidavit sworn on 12th August 2016 and documents

marked MW1, 2A and 2B (land sale agreement and two photos respectively).

5. The 1st and 2nd plaintiffs claim that they bought 2.5 acres and 1.0 acres of the suit property as shown on documents NOO-1 and MW-1 respectively from Peter Wanjare Migan (**deceased**) who had neither wife nor child. The deceased put the plaintiff's in possession of the portion of land of the suit property. In the year 2001, the deceased died before he could transfer the respective portions of land to the plaintiffs. Later, the defendants registered the suit property in their names following succession proceedings whereby the defendants became administrators of the estate of the deceased. The defendants then stopped the plaintiffs from cultivating the suit property and refused to transfer to the plaintiffs the two portions of land sold to them by the deceased.

6. In a replying affidavit sworn on 14/7/2017, by the 1st defendant, both defendants denied the plaintiffs' claim. They termed the suit incurably defective for failure to comply with provisions of law and that it should be struck out with costs.

7. The 1st defendant averred, inter alia, that the 2nd defendant and himself were the administrators of the estate of the deceased who died on 16th November 2004 and not in year 2001 as alleged by the plaintiffs. That the deceased owned the suit property but had not been issued with its title deed and the plaintiffs' claims for adverse possession in respect of the suit property is unsustainable. The defendants doubted the authenticity of document marked NOO-1 and MW-1 and termed the transactions strange. Death certificate of the deceased (ROM1) and grant of letters of administration in regard to the estate of the deceased issued in Homa Bay High court Succession cause No. 273 of 2014 on 7/7/2015 (ROM 2) are in support of the replying affidavit.

8. On 25th January, 2018 the court directed the parties to canvass the preliminary Objection by way of written submissions. Accordingly the defendants counsel filed submissions dated 13th March 2018 while the plaintiffs' counsel filed submission dated 29th November 2017.

9. In their submissions, the defendants' learned counsel identified two (2) issues for determination and cited the court of Appeal decision in **Mukhisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) EA 696**. He also relied on authorities including **Kweyu –vs- Omuto (1990) KLR 709**, **Symon Gatutu & 587 Others –v- EA PortLand Cement (2011) eKLR**, **Douglas Mwangi Muteru –v- Victoria Mere Dzila (2017) eKLR** and **John Wambura & Anor –v- Anakletus Wambura (2017) eKLR** to buttress his submissions.

10. Learned counsel for the plaintiffs cited **Order 37 Rule 7 (2) and Order 19 Rule 7 of the Civil Procedure Rules, 2010** as well as **Section 1A of the Civil Procedure Act and Section 19 of the Environment and Land Court Act (Cap 12A)** in his submissions.

11. I have carefully examined the entire pleadings, the preliminary objection, replying affidavit and submissions including the cited authorities. I am in agreement with the learned counsel for the defendants that the issues for determination are :-

i. Whether the Originating summons is incurably defective for failure to annex an abstract of title.

ii. Who is to bear the costs of the instant application?

12. The plaintiffs filed the originating summons for adverse possession pursuant to **Section 38(1) of the Limitation of Actions Act (Cap 22)** which provides:-

“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to 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.”

13. The procedure for an application under Section 38 (ibid) is to be found under **Order 37 Rule 7 of the Procedure Rules, 2010** which reads:-

“(1) An application under section 38 of the Limitation of Actions 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.”

14. The 1st and 2nd plaintiffs' supporting affidavits to the originating summons entail only copies of land sale agreements and photographs. There is no certified extract of the title to the suit property annexed to their affidavit in support of the originating summons.

15. In his replying affidavit, the 1st defendant stated that the transactions marked NOO-1 and MW-1 were unclear and untrue. He averred that title for the suit property had not been issued to **Peter Wanjare Migan in the year 2004**. He further averred at paragraph 9 of the affidavit, inter alia:-

“That the defendants reiterate that the land had trees planted by late Migan and same were not planted thereupon by the plaintiff.”

16. Notably the court of Appeal has restated that **Order 37 Rule 7** (supra) is a mandatory legal requirement; see **Kweyu case** (supra).

17. The instant claim is premised on proprietorship of the suit property by a registered owner. As already noted, it is a mandatory legal requirement that a certified extract of title to the land in question be annexed to an affidavit in support of an originating summons. The plaintiffs failed to annex the extract of title to land in question in their respective affidavits hence the omission is not curable under **Article 159 (2) (d) of the Constitution of Kenya, 2010, Section 1A of the Civil Procedure Act (Cap 21) and Section 19 (1) of the Environment and Land Court Act, 2015 (2011).**

18. In **Ismael Busolo Watuko –v- Joseph Busolo & 3 Other (2013) eKLR** A. Omollo J took the possession which I approve as she held that the applicants could not therefore invoke Article 159 of the Constitution when it was clear they made no effort in applying the law. She further held that failure to annex the certified extract of the title to the land in question was inexcusable hence the originating summons was incompetent;

19. Similarly, I endorse the decision in **John Wambura case** (supra) whereby A.K. Kaniaru J, held, inter alia:

“The originating summons filed herein does not have an extract of title as an annexure. And since the requirement to annex such extract is mandatory, failure to annex it makes the originating summons incompetent.” (Emphasis added)

20. In a nutshell, I find the preliminary objection merited. In light of the Originating Summons as filed, the above cited authorities and submissions by learned counsel for the defendants. I am inclined to uphold the defendant’s preliminary objection dated 14th July, 2017.

21. Afortiori, the originating summons be and is hereby struck out with costs to the defendants.

DELIVERED, DATED and SIGNED at MIGORI this 18th day of JULY 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. G.S. Okoth for the plaintiffs

Tom Maurice - Court Assistant