



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENT AND LAND DIVISION

HC ELC NO. 35 OF 2018 (OS)

**IN THE MATTER OF A CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION OVER THE PARCEL OF LAND
KNOWN AS KERICHO/EAST SOTIK NUMBER 203**

WESLEY KIPYEGON BOR.....1ST PLAINTIFF

GLADYS CHEROP SIGEL.....2ND PLAINTIFF

NANCY CHEPKOECH RONO.....3RD PLAINTIFF

WILLIAM KIPLANGAT TORONGEI.....4TH PLAINTIFF

MITEI CHERUIYOT JOSEPH.....5TH PLAINTIFF

RICHARD ARAP MUTAI.....6TH PLAINTIFF

NAUMY CHELANGAT BIRIR.....7TH PLAINTIFF

PETER KIPKORIR NGENO.....8TH PLAINTIFF

JULIUS CHERUIYOT RONO.....9TH PLAINTIFF

-VERSUS-

RICHARD PARES (Being sued as the Administrator of the estate of the

late KIPKORIR ARAP CHEBOGOIYO).....1ST DEFENDANT

MUTAI PARES (Being sued as the Administrator of the estate

of the late KIPKORIR ARAP (CHEBOGOIYO).....2ND DEFENDANT

THE LAND REGISTRAR BOMET.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Introduction:

1. The Plaintiffs commenced this suit against the Defendant by way of Originating Summons under section 7 of the Land Act 2012, Section 28 of the Land Registration Act 2012, Section 7, 37 and 38 of the Limitation of Actions Act, Order 37 Rule 7 of the Civil Procedure Rules and Articles 40 and 64 of the Constitution of the Republic of Kenya for determination of questions (a) to (o) enumerated on the face of the originating summons in which the Plaintiffs seek to be declared to have acquired varying portions of that land comprised in Title No. KERICHO/EAST SOTIK S.S/203.

2. Contemporaneously with the Originating Summons, the Plaintiffs filed a Notice of Motion Application dated 3rd May 2018, in which they seek the following interlocutory orders, in summary:-

a. Spent.

b. **THAT** pending the hearing and determination of this application the 1st and 2nd Defendant be ordered to unblock the road that was blocked to enable the Plaintiffs access to their respective homes in KERICHO/EAST SOTIK Parcel Number 203 (the suit property).

c. **THAT** the defendant be restrained from interfering with the plaintiffs' quiet possession and from trespassing on their respective parcels of land of the suit property.

d. **THAT** the Defendants be restrained from dealing any further in any way with the suit property.

e. **THAT** proceedings in Bomet High Court Succession Cause No. 35 of 2015 be stayed.

f. **THAT** proceedings in Bomet Principal Magistrates Court Criminal Cases 609 of 2018 and 635 of 2018 be stayed.

g. **THAT** titles issued pursuant to grant in Bomet Succession Cause Number 35 of 2015 in respect of land parcel number Kericho/East Sotik /203 be deposited in court.

h. **THAT** pending the Hearing and determination of this application, the Honourable Court do make a site visit on the suit property to ascertain the current status on the suit property

i. **THAT** a permanent injunction be issued against the Respondents restraining them from trespassing and interfering with the 1st Defendant's (sic) quiet possession of the suit land pending the hearing and determination of this application

j. Any other relief that this Court may deem fit to grant

k. That the costs of this application be provided for.

3. The application premised on the grounds on the face of the application and the supporting affidavit of WILLIAM KIPLANGAT TORONGEI the 4th Plaintiff/Applicant herein, sworn on the 3rd May 2018 in which he depones that the suit property is family land which the plaintiffs have been in occupation of for over 20 years.

4. He depones that titles were issued to Plaintiffs by the 3rd Defendant and that the 1st and 3rd Defendants were aware.

5. He further depones that the 1st and 2nd Defendants have blocked one of the roads on the suit land which had been in use for 20 years.

He states that some of the Plaintiffs or their wives have been arrested and prosecuted in Bomet Principal Magistrate's Court.

6. He depones that in effect the Plaintiffs are the legal owners of the land, and are therefore entitled to the reliefs sought.

7. The Defendants opposed the application and filed their Grounds of Opposition dated 15th May 2018 in which they state as follows:

a. **THAT** the Originating summons was not accompanied by an abstract of title.

b. **THAT** title number KERICHO/EAST SOTIK S.S/203 was closed and is no longer in existence.

c. **THAT** the purported purchase by the Plaintiffs of part of that previous title was null and void by virtue of the Provision of Section 45 of the Succession Act.

d. **THAT** the Plaintiffs have never been in adverse possession of the suit land.

e. **THAT** the 1st and 2nd Defendants were not party to the purported sale agreement and as administrators did not sell land to the plaintiffs.

f. **THAT** the Certificate of Confirmation of Grant in Bomet High Court Succession Cause Number 35 of 2015 has not been revoked or annulled.

g. **THAT** the estate has been fully distributed and consequently the plaintiffs' application has been overtaken by events.

h. **THAT** Articles 40 and 64 of the constitution cannot come to the aid of the plaintiffs.

8. The Defendants also filed a Replying Affidavit sworn by MUTAI PARES the 2nd Defendant on behalf of himself and the 1st Defendant.

In the said affidavit the 2nd Defendant denies that administrators of the estate of Kipkorir Chebogoioy sold any portions of land to the plaintiffs and if any such sale took place then it was contrary to the provisions of section 45 of the Law of Succession Act and the purported sale agreements do not bind the deceased's estate.

9. He depones that if the Plaintiffs entered into the suit property and developed the same then they did so without the permission of the beneficiaries of the deceased's estate and therefore such entry and development cannot be said to be adverse to the deceased's estate. He further depones that the estate of the deceased has been fully distributed in accordance with the Certificate of Confirmation of Grant issued in Bomet HC Succession Cause no. 35 of 2015. The mode of distribution was consented to by all the deceased's beneficiaries. He therefore depones that the Plaintiffs' actions were unprocedural and unlawful and they therefore have no cause of action against the Defendants.

10. The application was canvassed by way of written submissions but only the Respondent's counsel filed his submissions.

11. In his submissions, Mr Koske, learned counsel for the Defendant/ Respondents submits that the Plaintiffs' originating summons is defective as the plaintiffs did not annex an abstract of title to their originating summons.

12. Order 37, rule 7 (2) of the Civil Procedure Rules 2010 provides as follows;-

“7 (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”.

13. Counsel submits that the Plaintiffs did not annex a certified extract of the title as provided above. He submits that the said rule is couched in mandatory terms and it was therefore incumbent upon the P

laintiffs to proceed as provided by the rule.

14. In the case of **Mogoko Omanwa versus Norah K. Nyambati Kisii HCC No. 93 of 2007** the Originating Summons was dismissed for failure to annex the abstract of title. It was held in that case as follows;-

“A claim for adverse possession based on section 38 of Limitation of Actions Act must be brought by way of O.S supported by affidavit to which must be attached the abstract of title of land adversely claimed”.

15. What is provided for in Order 37 Rule 7 (2) of the Civil Procedure Rules cannot be wished away. It is a mandatory requirement in law which the Plaintiffs had to comply with and the Defendants submit that the suit and application ought to be struck out on this ground.

16. Counsel further submits that in their application, the Plaintiffs are seeking restraining Orders in respect of title Number KERICHO/EAST SOTIK S.S/203. It is the Defendants' submission that this land is no longer in existence and an order cannot be made against a title which is no longer in existence. The Court is referred to paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 of the Replying affidavit of MUTAI PARES the 2nd Defendant sworn on 15th May 2018 and filed the same day to which copies of search certificates marked as exhibit MP2, 4 (a) (b) (c) (d) (e) (f) (g) (h) (i), 5 and 6 are annexed.

17. It is counsel's submission that the Plaintiffs have failed to identify the portions of land they allege to be entitled to or that they have been in continuous, uninterrupted and peaceful possession of without the consent of the owners.

18. In the case of **Muranga ELC NO. 45 of 2017 Lawrence Mururi Njagana versus Charles Mwenga Mulwa** the Court aptly demonstrated the conditions upon which an Applicant must prove to sustain a claim for adverse possession. It is the Defendant's submission that the Plaintiffs did not plead that they have been in continuous, uninterrupted and peaceful possession of the suit land with the knowledge of and without the consent of the owner. He therefore submits that the Plaintiffs have not established a prima facie case with a probability of success.

19. In his further submission counsel states that interestingly, the plaintiffs have come to this Court to be declared as owners of parts of, what they call, “**the suit land by adverse possession**” and yet in paragraph 5 of the grounds of their Notice of Motion and paragraph 6 of the 4th Plaintiff's Supporting Affidavit, they claim that the land was surveyed and titles issued to them. Counsel submits that if titles were legally issued to the Plaintiffs, then why would they proceed against the Defendants on grounds of adverse possession?

20. He argues that if the Plaintiffs obtained titles then the process used or followed was contrary to section 45 of the Succession Act and this assertion that the Plaintiffs obtained titles negates their contention that they are entitled to some pieces of land by adverse possession.

21. He further argues that the Plaintiffs must have been unlawfully invited into the land by some of the beneficiaries who unlawfully sold them portions of the land. The Court is referred to paragraph 21 of the supporting affidavit of the 4th Plaintiff and paragraph 20 of the 2nd Defendant's Replying Affidavit.

22. Counsel submits that the Defendants lawfully filed succession proceedings in Bomet High Court Succession Cause 35 of 2015 and after the grant was confirmed to them the deceaseds' estate land was sub-divided and distributed as per the certificate of confirmation, which has not been revoked or annulled to date.

23. When the estate land was subdivided provision was made for access roads to all the beneficiaries portions and the Defendants were not under any obligation to provide access roads to the Plaintiffs. He refers the Court to exhibit MP3 where the map shows the access road to owners of the parcels land.

24. It is counsel's submission that the Plaintiffs have not met the conditions for the grant of restraining orders for the reasons above, and in particular;

- a. They failed to comply with provisions of Order 37 rule 7 (2) when filing their Originating summons.
- b. They failed to indicate the portions of land they alleged to be entitled to.
- c. They indicated non-existent title number.
- d. They have not demonstrated that they have a prima facie case in respect of their claim based on adverse possession.
- e. They have casually brushed aside the proceedings in Bomet High Court Succession Cause Number 35 of 2018 which are binding until revoked or annulled.

25. Counsel submits that the Plaintiffs' grievances, if any, cannot be addressed through a claim based on adverse possession and since the plaintiffs have failed to satisfy the requirements for grant of interlocutory injunction, their application ought to be dismissed with costs.

26. I agree with the Respondent's counsel that failure to annex an abstract of the title renders the suit invalid and I would have no basis to issue an injunction on an invalid suit.

27. Consequently, I find no merit in the application and I dismiss it with costs to the Respondents.

Dated, signed and delivered at Kericho this 30th day of August, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Koech for Mr. Koske for the 1st & 2nd Defendants/Respondents
2. Mr. Sang for Mr. Mugumya for the Plaintiff
3. Court Assistant - Rotich