



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 304 OF 2017

(FORMELY Kisii ELC NO. 67 OF 2014 o.s)

SUSAN WANCHARA ACHERI.....APPLICANT

VERSUS

MAURICE ADEK ODUOGI.....RESPONDENT

RULING

1. By a notice of preliminary objection dated 28th February 2018 and filed on 1st March, 2018, the respondent, MAURICE ADER ADUOGI is seeking to have an Originating Summons dated 19th February 2014 and filed on 20th February 2014 by the applicant, SUSAN NANCHARA ACHERA, struck out. The preliminary objection is based on the ground:

1. 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 Cap 21 Laws of Kenya.

2. The applicant is represented by learned counsel, Mr. R. Abisai. The Respondent is represented by learned counsel Mr. Odondi Awino.

3. The Originating Summons is brought pursuant to section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, Section 1A, 1B of the Civil Procedure Act and Order 37 Rule 7 of the Civil Procedure Rules whereby the applicant claims that she has acquired by way of adverse possession title to part of the suit land, L.R NO. Suna West/ Wiga/ 1298 measuring approximately 5ft by 100ft registered on the name of the respondent. She seeks an order of sub-division of the suit land to carve out an area measuring 50ft by 200ft and the same be registered in the name of the applicant with costs to the applicant. In support of the Originating summons, are the applicant's supporting affidavit sworn on 19th February 2014, a certificate of official search dated 27th January 2014 in respect of the suit land (SWA-1) and three photographs of a Posho Mill built on the land (SWA 2 3a and 3b).

4. The applicant further claims that she had been in long uninterrupted, quiet and peaceful occupation and possession of the suit land with the permission of the respondent since 2000. That the respondent sold the land to her, but he has refused to transfer the same to the applicant who has built on the suit land on which she depends for her livelihood.

5. The respondent opposed the Originating summons by way of a replying affidavit sworn on 28th February 2018. He averred, inter alia, that in the year 2000, he did not approach the applicant who is his sister in law for sale of a portion of his land and did not do so at Ksh 20,000 or at all. That the applicant approached him as a relative for a portion of land on which to erect a posho mill and he gave out the portion of the suit land measuring 50ft by 200ft subject to termination at any time. He denied the applicant's claim and termed the suit incurably defective hence bound to fail on the ground of the preliminary objection.

6. Learned counsel for the applicant filed submissions dated 3rd May 2018 wherein he submitted that Order 37 Rule 7 of the Civil Procedure Rules, 2010 is a mandatory legal provision with which applicant has failed to comply. He relied on the case of **John Wambura & another – v- Anakletus Wambura (2017) eKLR** whereby it was held that the requirement to annex extract of title to an affidavit is mandatory. He termed the originating summons incompetent and urged the court to strike it out with costs.

7. The applicant's learned counsel filed submissions dated 10th May 2018 and urged that a certificate of official search annexed to his supporting affidavit indicates that he is the owner of the suit land. That the certificate has served the purpose meant to be served by a certified extract of the title to the land. He cited the case of **ANN ITUMBI KISELI v JAMES MURIUKI MURIITHI (2013) eKLR, Article 159(2)(d) of the Constitution of Kenya, 2010 and Order 37 Rule 7 of the Civil Procedure Rules 2010** to fortify his submissions.

8. I have considered the Preliminary objection, Originating summons, the replying affidavit and submissions by counsel. The issue for determination at stage is whether the Originating summons is incurably defective and whether it should be struck out on the ground of preliminary objection.

9. The respondent's counterclaim is that the Originating Summons is incurably defective because it violates Order 37 Rule 7 of the Civil Procedure Rules, 2010 which reads:

1. An application under section 38 of Limitations 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. (Emphasis supplied)

10. On the other hand, the applicant contends that the certificate of official search dated 27th January 2014 serves the purpose that an extract of the title of land is meant to serve. That the omission is curable at Article 159(2) (d) and as held in **Kiseli case** (supra).

11. Article 159(2) (d) provides that justice shall be administered without undue regard to procedural technicalities. It is one of the guiding principles of judicial authority in Kenya. The Court of Appeal pronounced itself on the same in the case of **Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (2014) eKLR**, thus:

“Article 159 (2) (d) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This is a court of law and a court of equity;.....The court is bound to deliver substantive rather than technical and procedural justice...”

12. The respondent has referred to the certificate of official search and has invited this Court to treat it as good as a certified extract of the title of the suit land. In **Kiseli case** (supra) the ownership of the suit land was not contested and a certificate of official search was considered accordingly.

13. In the instant case, the certificate of official search is not even certified and the ownership of the land is uncertain. Moreover, the applicant's claim of ownership of the suit land by way of adverse possession, is denied at paragraph 16 of the replying affidavit. The preliminary objection at paragraph 18 of the affidavit was raised quite early in the case. The respondent maintains that the Originating summons is contrary to the mandatory legal provision. To that extent, I find this case distinguishable from the **Kiseli case** (supra).

14. This court is extremely conscious of Article (50) (1) of the Constitution of Kenya, 2010 with regard to right to fair hearing. Admittedly it is one of the fundamental rights and freedoms that shall not be limited as provided under Article 25(c) of the Constitution.

15. Be that as it may, the applicant sought to establish that the respondent is the registered owner of the suit land. Under section 26(1) of the Land Registration Act, 2012, a certificate of title is to be held by the court to be conclusive evidence of proprietorship. At the onset, the proprietorship of the suit land is pretty unclear and doubtful as a certified extract of the title to the land has not been annexed to the applicant's affidavit. I find the omission to be fundamental in nature which is not curable under Article 159(2) (d) of the Constitution of Kenya, 2010.

16. A fortiori, I strike out the applicant's originating summons dated 19th February 2014 rather than dismissing it. Costs shall be reserved.

Delivered, Dated, and Signed at MIGORI this 26th day of September 2018.

G.M.A ONG'ONDO

JUDGE

In Present:

Mr. Odondi Owino Learned counsel for the respondent.

Mr. Sam Onyango learned counsel holding brief for learned counsel for Abisai for applicant.

Tom Maurice – Court Assistant