REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C NO.181 OF 2017(O.S)

PETER MWANGI MATIMU......................1ST PLAINTIFF/APPLICANT

MARY WAMATA GACICIO.....................2ND PLAINTIFF/APPLICANT

JOYCE WANGUI KIMINDIRI................3RD PLAINTIFF/APPLICANT

JULIUS KIMAMO MAKENA.................4TH PLAINTIFF/APPLICANT

VS

SAMUEL A. KAIGI MUCHERU............DEFENDANT /RESPONDENT

RULING

1. The Applicants took out Originating Summons dated the 13/10/2010 and filed on the 14/10/10 under the then Civil Procedure Rules and section 7 and 38 of the Limitations of Actions Act and section 30 of the Registered Land Act (now repealed) and any other enabling provisions of the law.

2. The Applicants urged the Court to determine the following issues;-

a. That the Court do make a declaration that the Applicants have acquired by adverse possession an absolute title to a portion of land measuring 8.2 meters by 36 meters out of the land LOC 19/NYAKIANGA/838.

b. That an order be issued directing the Respondent to execute all documents and take all steps necessary to effect transfer to the Applicants of the portion of the land measuring 8.2 meters by 36 meters and in default thereof the said documents be executed by the Deputy Registrar of this Court.

c. The costs of the suit.

3. The Respondent vide a Replying affidavit dated the 28/10/2010 filed on the 11/11/2010 and another Replying affidavit dated the 28/9/2011 and filed on 29/9/11 responded to the Originating Summons.

4. The amended Originating Summons were amended and filed on 14/10/2013. And thereafter parties complied with pretrial directions in readiness for the hearing. The suit property therefore is now stated as LOC19/NYAKIANGA/2074 (suit land).

5. On the 18/7/18 the Applicants filed a motion under section 1A, 1B, 3A of the Civil Procedure Act, Orders 13 rule 2, 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. They sought orders as follows;

a. That judgment be entered for the Applicants against the Respondent as prayed in the amended Originating Summons dated the 14/10/13.

b. That the costs of this application be borne by the Respondent.

6. The application is supported by the grounds adduced thereto and the affidavit of Charles Mwangi Gachichio Advocate. In summary the Applicants aver that the Respondent has admitted the Plaintiff's claim in his replying affidavit sworn on the 28/10/10 and filed on 11/11/2010. That there is no defense to the Applicants' claim and urged the Court to enter judgment in the suit in the interest of justice.

7. The Respondent opposed the application by filing the grounds of opposition dated the 18/9/18 and filed on even date. The Respondent contends that the application is misconceived, vexatious and a blatant abuse of the process of the Court and urged the Court to dismiss it with costs.

8. Parties have filed written submissions which I have read and considered.

9. The Plaintiff submitted that the Applicants have averred that they entered into the suit land in 1978 and have been in open uninterrupted continuous possession for over 40 years todate utilizing it as an access road and the Respondent has taken no steps to interrupt the occupation. That the Respondent in 2011 attempted to fence off the suit land and block the Applicants but the same was forcefully removed by the Applicants and he caused the 1st Plaintiff to be arrested and charged in SRMCC Criminal case No 179 of 2011 at Kangema. The Applicants contend that according to the proceedings in the criminal case, the Respondent admitted that the Applicants have been in possession of the suit land since 1978. That the Learned Magistrate too in his judgment observed that the rights of the Respondent over the suit land had been extinguished by virtue of section 7 of the Limitations of Actions Act in favour of the Applicants.

10. Reciting the contents of the Replying affidavit dated the 28/10/10 the Applicants submitted that the said pleading is an admission by the Respondent under oath. That the Respondent in his replying affidavit dated the 28/9/11 seemed to deny the existence of the Applicants' occupation of the suit land and termed this second pleading an afterthought.

11. In a terse rejoinder the Respondent submitted that save for the Replying affidavit dated the 28/10/10, the Respondent has also filed another replying affidavit dated the 28/9/11 which the Applicants have conveniently left out unaddressed. He contended that the contents of the earlier replying affidavit were recanted and the Court is obliged to rely on the latter replying affidavit as evidence. The affidavit dated the 28/9/11 has not been struck out. It is on record. That it can be inferred that this was the replying affidavit to the amended Originating Summons. He faulted the Applicants for their quest for judgment through the back door.

12. Judgment on admission is provided for under Order 13 rule 2 of the Civil Procedure Rules as follows;

> "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court **may** upon such application make such order, or give such judgment, as the Court may think just". (emphasis is mine).

13. The above rule empowers the Court to make such order, or give such judgment, as it (Court) may think just. It is settled that a judgment on admissions is in the discretion of the Court and not a matter of right: see ***Mulla on the Code of Civil Procedure Act* at p 854**. The Court's discretion in the matter is unfettered, but as it was said in **Christopher Kiprotich v Daniel Gathua & 5 Others [1976] eKLR** that discretion must be exercised judicially.

14. The principles which guide the Court in exercising its discretion to strike out pleadings have been stated in **DT Dobie & Co. (Kenya) Limited *v* Muchina & Another [1982] KLR 1** and in many other cases. It is a power which should be exercised, *inter alia,* sparingly and with circumspection. This summary procedure does not enable the Court to hold a trial on the affidavits by engaging in minute and protracted examination of documents and facts of the case. Moreover, the Court would not strike out a pleading if it discloses an arguable case or raises a triable issue.

15. ***Madan, JA*** (as he then was) expressed himself as follows in this famous passage in ***Choitram v.* Nazari [1984] eKLR** :

> "Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…"

> "A judgment on admission is in the discretion of the Court and is given, if it is plain that there is a clear express or implied admission. Such admission must be clear, unambiguous, unconditional and unequivocal"

16. At p 856 ***Mulla on the Code of Civil Procedure*** *it* says that;

> "An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal."

17. In ***Gilbert v Smith* [1876] 2 CD 686 at pp 688 – 689**, Melisih LJ, referring to an equivalent English rule said:-

> "I think that rule was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the Plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the Plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the Plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action."

18. I concur with the position taken on page 856 in **Mulla on the Code of Civil Procedure** which states that;

"An admission is clear if the answer by a bystander to the question whether there was admission of facts would be "of course there was."

19. Admissions of facts as contemplated by Order 13 rule 2 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rule uses the words "or otherwise" which are words of general application and are wide enough to include admissions made through letter, affidavits and other admitted documents and proved oral admissions.

20. In order to successfully invoke the provisions of Order 13 rule 2 the test is therefore; whether the admission of the fact arises in the suit; whether such admissions are plain, unambiguous and unequivocal; whether the defence set up is such that it requires evidence for the determination of the issues and whether objections raised against rendering the judgement are such which go to the root of the matter or whether these are inconsequential making it impossible for the party to succeed even if entertained.

21. In the instant case it is the Applicants' contention that the Respondent made an admission in his replying affidavit dated the 28/10/10. In it, the Respondent stated as follows;

a. …………….

b. …………….

c. That I am the registered and sole proprietor of the LOC 19/GACHARGEINI /838 where I live and have been living since land demarcation.

d. That on or around 1978 the Applicants without my consent or legal excuse entered or trespassed into my above piece of land and started using a portion as a road of access.

e. That I have on several occasions requested and also cautioned the Applicants to cease from using the above portion of land but they have failed or refused.

f. That the Applicants claim that they have acquired the said portion by way of right and also their continuous usage is quite illegal as required by law.

22. The Applicants have contended that the above response is an admission. Secondly that the lower Court observed that the Respondent's right to the suit land has been extinguished and the land now belongs to the Applicants. This argument is bereft of merits because according to section 38 of the Limitations and Actions Act, the power to declare ownership by adverse possession is vested in the High Court (read ELC Court). I have read the judgment of the Honourable Learned Magistrate and he indeed advised the parties to seek redress in the High Court as far as title by adverse possession is concerned. It is at the very least misleading for the Applicants to rely on the so-called observation to persuade this Court that the Respondent indeed rendered an unequivocal admission in that regard. This line of argument is rejected.

23. Going per the decision of Madan J in the case of **Choitram v. Nazari** (supra) it is clear that the Replying affidavit under para 5 and 6 is adverting a defence against the Applicants' claim. What I understand the Respondent to be saying is that the claim of the Applicants either by right or continuous usage is illegal and that he has taken steps to keep the Applicants out of the suit land. Whether those steps are right as to interrupt long occupation is a matter for the trial Court to determine. In the view of this Court those two paragraphs cannot be said to be clear, unambiguous, unconditional and unequivocal admission.

24. I have also read the replying affidavit of the Respondent dated 28/9/11 and filed on 29/9/11 which the Applicants have not made any comments on despite it being on record save to term it an afterthought. There is no contestation as regards its being on record. Without going into the details of this affidavit, it is clear on the face of it that the Respondent has a defence to the Applicants' claim. Under para 5 and 6 he avers that he sold his land not to the Applicants but to one Romano Kirubi whom they agreed to give a portion of the land in exchange with his and that he and Romano have been using the said land for access to and from the main road. The Applicants on the other hand claim that indeed it is this strip of land that they have been using as an access road since 1978. Clearly these are contested issues that are best left to the trial Court to hear and determine based on the evidence of the parties.

25. The Court does not agree with the Respondent's submissions that this second replying affidavit was in response to the amended Originating Summons. I say so because the replying affidavit was filed on 29/9/11 while the amended Originating Summons was filed on 14/10/13.

26. In the end the Court has come to the conclusion that judgment on admission is not founded based on the reasons advanced above. There are contentious issues that the Court considers that the matter be heard on its merits.

27. The Application is dismissed with costs to the Applicants.

It is so ordered.

DATED AND DELIVERED AT MURANG'A THIS 20TH DAY OF DECEMBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ogeto HB for Gachichio for the 1st – 4th Plaintiffs/Applicant

Mbuthia HB for Mwaniki Warima for the Defendant/Respondent

Irene and Njeri, Court Assistants