



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

ENVIRONMENT & LAND CASE NO.776 OF 2012

EPHANTUS MIHIGO NGOTHO.....PLAINTIFF

- V E R S U S -

JOHN KONGWALEI SAWE.....1ST DEFENDANT

BARNABAS KIPROP KIPTUM.....2ND DEFENDANT

R U L I N G

(Suit being one for adverse possession; preliminary objection that suit is incompetent for failure to annex an extract of the register and for not having accumulated 12 years to sustain a suit for adverse possession; no extract of register annexed as required by the rules; land having been under SFT; time when land was under SFT cannot be calculated in a suit for adverse possession; 12 years not having lapsed from the time SFT relinquished their interest; preliminary objection upheld; suit struck out with costs)

This matter was commenced by way of an Originating Summons which was filed on 9 November 2011 pursuant to the provisions of Order 37 Rule 8 of the Civil Procedure Rules, and Section 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya. In the suit, the applicant (whom I will refer to as the plaintiff) has sought orders that he be declared as owner of the land parcel Uasin Gishu/Kimumu Scheme/3174 through the doctrine of adverse possession.

The suit is contested by the respondents (whom I will refer to as the defendants) who filed a replying affidavit.

The matter was fixed for hearing today but before the case could commence, Mr. Chebii, learned counsel for the defendants raised a preliminary point of law raising two issues. First, he submitted that the Originating Summons is incompetent for no extract of the register is annexed as required by the Civil Procedure Rules. Secondly, he presented a Green Card for the suit land, and submitted that the Settlement Fund Trustee (SFT) held title till the year 2003, and that the entire period when the land was under the SFT cannot be considered to compute time for a claim for adverse possession. He relied on Section 41 of the Limitation of Actions Act.

Mr. Nyamweya for the plaintiff, submitted that he has been ambushed as the issue was not brought to his attention earlier. He further submitted that time would start running from the period that the plaintiff claims to have purchased the land and taken possession, which is the year 1986.

I have taken note of the rival submissions. On the issue of ambush, the point raised by Mr. Chebii is a point of law which can be presented at any time of the proceedings. Advocates are presumed to know the law and be ready to respond to issues of law as they arise. In any event, I do not think that the issues raised by Mr. Chebii are of such a complex nature as to require the matter to be adjourned. The provisions of Order 37 are there to see, and it is correct as presented by Mr. Chebii, that Order 37 Rule 7(2) does require an applicant in a suit commenced by way of Originating Summons claiming adverse possession to annex a certified extract of the title to the land. The whole of Order 37 Rule 7 provides as follows :-

Order 37 Rule 7

- 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.*

It is thus the position of the law that the extract of the register, or green card, be annexed. None was annexed to the Originating Summons

and I do agree that to that extent the Originating Summons is incompetent.

There is good reason why there is need to annex the extract of the register. This is because the same shows the history of the land in question but there are entities against whom time cannot run for purposes of acquiring land by adverse possession. These need to be excluded from the computation of time.

Section 41 of the Limitation of Actions Act does provide as follows :-

41. Exclusion of public land

This Act does not—

- (a) enable a person to acquire any title to, or any easement over—
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the Mining Act (Cap. 306);
 - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - (iv) water vested in the Government by the Water Act (Cap. 372);
 - (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or
 - (vi) land vested in the trustees of the National Parks of Kenya; or
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.

It was settled by a five judge bench of the Court of Appeal, in the case of *Gitu vs Ndungu, Court of Appeal at Nairobi, Civil Appeal No. 304 of 1997, (2001)eKLR*, that land that is under the SFT is Government land and thus the time when this land is under the registration of the SFT cannot be computed for purposes of accumulating time in a claim for adverse possession. This position of the law has been followed in several decided authorities including the decision of Angote J, in the case of *Ann Itumbi Iseli vs James Muriuki Muriithi (2013)eKLR* where the court held the same view. In the case of *William Kamoiro & 12 Others vs Ngare Mahihu, Nakuru ELC No. 381 of 2017 (OS), (2018)eKLR* a preliminary objection, in similar terms to the objection raised herein, was raised, that the applicants could not present their claim for adverse possession as 12 years had not been reached after the SFT had relinquished their interest. The objection was upheld and the suit struck out.

In this case, I have seen for myself that the suit land herein was comprised in the land parcel Uasin Gishu/Kimumu Scheme/349. The SFT held title from 12 May 1986 to 8 April 2003 when the land was transferred to one Sawe Chepkwony. The land was then subdivided on 28 November 2007 to bring forth the land parcels No. 3169 – 3272. The suit land herein is parcel No. 3174 covered within the said subdivision. Time for purposes of suing for adverse possession thus started running on 8 April 2003 and not 1986 as argued by Mr. Nyamweya. From the 8 April 2003 to 9 November 2011, when this suit was filed cannot accumulate the minimum 12 years required to sustain a case for adverse possession.

It follows from the above that this suit is a non-starter and the preliminary objection is merited.

Given the above, I hereby strike out this suit with costs to the defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DECEMBER, 2018

HON. JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT – ELDORET

Delivered in the Presence of:-

Mr. Nyamweya for the Plaintiff

Mr. Chebii for the Defendants

Court Assistant - Topista