



**Etuku & another v Otabile (Environment & Land Case
2 of 2023) [2024] KEELC 5 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 5 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 2 OF 2023**

E ASATI, J

JANUARY 18, 2024

IN THE MATTER OF: LAND PARCEL NO WEST

BUNYORE/ESSABA/1345

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22

SECTION 37 AND 38

BETWEEN

ERNEST DAVID ETUKU 1ST PLAINTIFF

MOSES ONDOLI ETUKU 2ND PLAINTIFF

AND

ENOS MABINDA OTABILE DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion application dated 13th October 2023 brought by the Defendant pursuant to the provisions of Order 51 and Order 37 Rule 7 (2) of the Civil Procedure Rules. The application seeks for orders that: -
 - a. The Plaintiffs' Originating Summons be struck out for want of a certified copy of the register.
 - b. The Plaintiffs' Originating Summons be struck out for lack of locus by the Applicant to transfer the suit portion.
 - c. That the costs of the suit and of the application be awarded to the Defendant.
2. The application was based on the grounds that the Plaintiffs instituted the suit seeking title to the suit land by adverse possession. That the Plaintiffs failed to attach a certified copy of the register to the



Supporting Affidavit. That the Defendant herein is not the registered owner of the suit portion. That the suit is without merit and the same amounts to an abuse of the process of the court and that it is in the interest of justice that the suit be dismissed.

3. The application was supported by the averments in the Supporting Affidavit sworn by the Defendant on 13th October 2023 and the annexures thereto.
4. The application was unopposed. On 11/12/2023, Counsel for the Plaintiffs applied for more time to be able to file a response to the application. The application was consequently fixed for hearing on 15th January 2024 and the Plaintiffs given 14 days to file response to the application. On 15/1/2024 when the application came up for hearing there was no attendance on behalf of the plaintiffs. There was also no response filed by or on behalf of the plaintiffs in opposition of the application.
5. Counsel for the Defendant therefore presented the application on 15/1/2024 and prayed that the same be allowed as it was unopposed.
6. The first prayer in the application is that the Originating Summons be struck out as it was not accompanied with a certified copy of register in respect of the suit land. Perusal of the annexures to the Supporting Affidavit to the Originating Summons shows that indeed there is no copy of register annexed thereto. However, there is a copy of Certificate of Official Search in respect of the suit land, duly signed by the Land Registrar, attached to the said Supporting Affidavit.
7. Order 37 Rule 7 provides that: -

- “7 An application under section 38 of the [Limitation of Actions Act](#) shall be made
- (1) 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 what manner the Summons shall be served.”

The law requires an extract of the title to be annexed to the Affidavit in support of the Originating Summons. In my view, the purpose is to demonstrate from the very inception of the suit that the suit land exists and that it is registered in the name of the person against whom the orders under Section 38 of the [Limitation of Actions Act](#) are being sought in the Originating Summons. A Certificate of Official Search suffices for the purposes of Order 37 Rule 7(2). The Court of Appeal in *Johnson Kinyua v Simon Gitura Rumuri* [2011] eKLR held that:-

‘Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered [Land Act](#) and a search certificate under the Registered [Land Act](#) duly signed by the Registrar constitutes evidence of the entries set out in the certificate’.

8. I find that the Plaintiffs by filing the copy of Certificate of Official Search as an attachment to the Affidavit in support of the Originating Summons satisfied the requirement of the law.
9. The second prayer is for the Originating Summons to be struck out as the Defendant lacks locus. The Defendant deposed in paragraph 7 of the Supporting Affidavit that he has no proper title to pass to the Plaintiff as he has no interest whatsoever in the suit portion as he is not the registered owner thereof. To the Supporting Affidavit, the applicant annexed a copy of register (Green Card) in respect of the suit land certified by the Land Registrar on 13th October, 2023. The same shows that the suit land is currently registered in the name of one Titus Kitoto Otek I/D NO. 27967913 in whose favour the suit



land was registered on 7th July 2023. This was before 24th August 2023 when the suit herein was filed. The copy of register shows that the suit land was transmitted to the Defendant on 20th March 2023 vide Succession cause No. 50 of 2021 and that the Defendant subsequently transferred the land to the current registered proprietor on 7th July 2023.

10. The Plaintiff did not oppose the application. Vide the copy of register, the applicant has demonstrated that he is not the registered owner of the suit land. In the circumstances I find that he has no capacity to be sued for adverse possession as pleaded in the Originating Summons. It is noteworthy that the Defendant is sued in his personal capacity as registered owner and not in the capacity of administrator of the estate of the original registered owner.
11. In the circumstances, I agree with the Defendant that he lacks the capacity to be sued and that he has been wrongly joined in this suit. It is only fair that the suit against him be terminated.
12. On costs, though the law in Section 27 of the *Civil Procedure Act* is that costs follow the event, in the circumstances of this case, it is just that each party bear their own costs.
13. For the foregoing reasons, I find that the application has merit and allow it as follows:
 - i. The Originating Summons dated 21st August 2023 and the suit herein is struck out.
 - ii. Each party to bear own costs of the suit.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 18TH JANUARY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Patricia - Court Assistant.

No appearance for the Plaintiff.

Sibika for the Defendant/Applicant.

