



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 59 OF 2009 (O.S)

MADZO MWANGOLO HENRY.....PLAINTIFF

VERSUS

JAMES MUNGA ODONDI.....1ST DEFENDANT

ZAKARIA KARANJA KINYANJUI.....2ND DEFENDANT

CHARLES MAINA.....3RD DEFENDANT

GITAU MUCHUNU.....4TH DEFENDANT

RONALD KIBE KINYANJUI.....5TH DEFENDANT

RULING

1. In the Notice of Preliminary Objection dated 24th June, 2016, the Defendants have averred that the Originating Summons before the court is incompetent because the Applicant has not annexed to her Application a certified copy of the Certificate of Title as required by the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules.
2. According to the Defendants, the suit is also incompetent because it does not satisfy the provisions of Section 38 of the Limitation of Actions Act.
3. The Notice of Preliminary Objection proceeded by way of written submissions.
4. The Applicant's advocate submitted that the Plaintiff is confused in her claim because while she alleges in the Originating Summons to have been in possession of the suit land for over 38 years, she has stated in her witness statement that she had been in occupation of the suit land for thirteen (13) years.
5. Counsel submitted that the Plaintiff has not complied with the law; that the filing of an official search is not the same as filing a certified extract of the Title and that the Applicant has not given the definite period when time started running.
6. The Applicant's advocate went into details as to why the Plaintiff has not proved that she has been in possession of the suit land for more than twelve (12) years.
7. In his submissions, the Respondents' counsel submitted that all the court needs to be satisfied with is that the suit property is registered in favour of the Defendants; that the courts have found ingenious ways to circumvent the Rule and that the Plaintiff was unable to obtain copies of the Title in question.

8. In the Originating Summons dated 3rd June, 2009, the Plaintiff is seeking to be declared as the proprietor of parcel of land known as Kilifi/Roka/283 which she claims she has acquired by adverse possession.

9. The Plaintiff has annexed on the Supporting Affidavit a copy of the official search showing that the Defendants were registered as the proprietors of the suit land on 29th January, 1993.

10. Although it is true that Order 37 Rule 7(2) of the Civil Procedure Rules provides that the Plaintiff should annex an extract of Title to his Application, the requirement is meant to give the court the assurance that indeed the suit property is registered in favour of the person sued.

11. In the absence of an extract of Title, which essentially is a copy of the register, the Plaintiff can still have a good claim against the registered proprietor of the suit by either annexing on the affidavit a copy of the title or an official search. These documents, just like an extract of title, prove that firstly the property in question is registered and secondly, that the Defendant is the registered proprietor of the suit property.

12. In the event that the Plaintiff wants to show the people who have been previously registered as the proprietors of the suit property, then it follows that the extract of title (*the green card or white card*) will have to be produced in evidence.

13. However, in the absence of evidence to show that other than the Defendants there were other previously registered proprietors of the suit land, the failure to annex a copy of the extract of title on the Plaintiff's Affidavit is not fatal to the suit.

14. In any event, during the taking of directions, the parties may agree to proceed with the suit by way of *viva voce* evidence. In that case, the extract of title can still be produced during trial.

15. For the above reasons, I find the Notice of Preliminary Objection dated 24th June, 2016 to be unmeritorious.

16. The said Notice of Preliminary Objection is dismissed with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O. A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J. O. OLOLA

JUDGE