



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 153 OF 2009(O.S)**

**SAMUEL KIMANI NGANGA .....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KISEMEI NDICHU *alias***

**JOHN MBUGUA NDICHU .....DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling is in respect to the Defendant's Notice of Preliminary Objection dated 11<sup>th</sup> November, 2014 in which the Defendant has averred that the suit is defective because it offends Order 37 Rule 7 of the Civil Procedure Rules; that the Defendant was issued with a title in the year 2006 while the suit was filed in the year 2009 and that the Applicant is acting through agents.
2. The Notice of Preliminary Objection proceeded by way of written submissions.
3. In his submissions, the Defendant's advocate submitted that the Originating Summons does not frame issues as required by Order 37 Rule 7 of the Civil Procedure Rules.
4. Counsel submitted that although the Applicant has claimed that he bought the land, he did not obtain the consent of the Land Control Board; that the Plaintiff is a trespasser and that the Plaintiff has never applied for the extension of time to apply for the consent of the Board.
5. The Applicant's advocate on the other hand submitted that the court has the inherent jurisdiction to frame the issues; that the parties can frame issues by themselves; that such a technicality cannot affect the substantive issues before the court and that by the time the suit was filed in the year 2009, a period of twelve years had lapsed.
6. Counsel submitted that the period of adverse possession began when the father of the Defendant sold the land to the Applicant and when the consent of the Board was not obtained after the lapse of six months.
7. The Applicant's counsel further relied on the provisions of Section 30(1) and (g) of the Registered Land Act (*repealed*) which provides that registered land shall be subject to overriding interests which includes rights of a person in possession or actual occupation of land.
8. The Applicant's advocate relied on several authorities which I have considered.
9. This suit was commenced by the Applicant vide an Originating Summons dated 14<sup>th</sup> November, 2006.

10. In the suit, the Applicant is seeking for a declaration that he has acquired the title to a parcel of land known as Ngong/Ngong/37363 under the doctrine of adverse possession.
11. The Applicant's suit is premised on the grounds that he bought the suit land from the Defendant's father in the year 1992 and that the Defendant has wrongfully transferred the land to himself.
12. Order 37 Rule 7 mandates a party to commence proceedings for a claim of adverse possession by way of Originating Summons.
13. Although under Order 37 of the Civil Procedure Rules, a party is supposed to raise issues in the form of questions for determination by the court, such issues can be framed in different ways.
14. What is important while framing issues for determination by the court, is for the court to understand the issue(s) before it.
15. In that respect, the issue before the court as framed by the Applicant is whether the Applicant is entitled to title to the suit land by virtue of the doctrine of adverse possession and as provided for under Section 38 of the Limitation of Actions Act.
16. In addition, the court, after hearing the parties, is entitled to frame its own issues and address those issues in the judgment.
17. The Respondent's submissions that the Applicant has not framed issues in the Originating Summons for determination does not therefore arise in the instant case. That preliminary point of law is therefore dismissed.
18. The Defendant's counsel submitted that the suit is premature because the green card attached on the Originating Summons shows that the Defendant acquired the Title Deed in respect to the suit land on 27<sup>th</sup> January, 2006 while the suit was filed on 15<sup>th</sup> November, 2006.
19. While it might be true that twelve years had not lapsed from the date when the Defendant acquired the suit land, it is trite that in a claim for adverse possession, time starts running not from the period that the Defendant became registered as the proprietor, but from the time the Defendant's predecessor in title was registered as the proprietor of the land.
20. I have looked at the copy of the extract of the register. The said extract of the register shows that there is an existing Mutation, meaning that the suit property is a sub-division of a bigger piece of land.
21. The question of whether the suit property is indeed a sub-division of another parcel of land, and when that parcel of land was registered, will therefore be apparent at the hearing. The court cannot therefore at this stage ascertain, before receiving evidence, when the land that gave rise to the suit property was registered.
22. For those reasons, I hold that the Notice of Preliminary Objection dated 11<sup>th</sup> November, 2014 is unmeritorious and I dismiss it with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16<sup>TH</sup> DAY OF JUNE, 2017.**

**O.A. ANGOTE**

**JUDGE**