



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 52 OF 2015

JOHN WAMBURA1ST APPLICANT

GEOFFREY WAMBURA..... 2ND APPLICANT

VERSUS

ANAKLETUS WAMBURA..... RESPONDENT

R U L I N G

1. The two Applicants in the Originating Summons (OS) herein – **JOHN WAMBURA** and **GEOFFREY WAMBURA** – are claiming land parcel No. BUNYALA/BULEMIA/2692 by way of adverse possession. The claim is against the Respondent – **ANAKLETUS WAMBURA** – who is allegedly the registered owner. The Applicants are not claiming the whole land. The claim only portion of three (3) acres, which they claim to have been occupying for over 35 years. To the affidavit in support of the O.S., the Applicants did not annex an extract of title as required by Order 37 Rule 7(2) of Civil Procedures Rules, 2010.

2. That omission by the Applicants elicited a preliminary objection. The notice of that preliminary objection was filed here on 5/7/2017 and is dated 4/7/2017. The Respondents beef with the application is that it contravenes the requirements of Order 37 Rule 7 (2) of Civil Procedure Rules. To be precise, Order 37 Rule 7 of Civil Procedure Rules states as follows:

Order 37 Rule 7

1. An application under Section 38 of 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.

3. For our purposes, the interest is Sub-rule (2) which mandatorily enjoins that the supporting affidavit to an O.S. must have an extract of title as an annexure. I will revert to this later. A few things need to be highlighted first.

4. The Court records show that the applicants filed the O.S. herein on 26/5/2015. After filing, it is not

clear where the Applicant's went. Records do not show any single appearance by them in Court. The Respondent has all along shown greater interests than the Applicants to have the matter move forward.

5. And concerning the preliminary objection itself, the Applicants are well shown to have been served. In particular, the Court took a date for hearing of the objection on 19/9/2016. The date taken was 21/11/2016 and since the Applicants were not present, the Court directed that they be served. Records show that such services was effected on 5/11/2016 by one PETER NANJALA ODWORI. The Applicants are said to be father and son respectively. On 21/11/2016 the Applicant's did not appear despite being served. The Court directed the Respondent's Counsel to file submissions.

6. The submissions were filed on 18/1/2017. The submissions were short and apt. They reiterated what the notice of preliminary objection contained. Additionally, the Court was given the Courts ruling at KERICHO in ELC No. 05 of 2015 (O.S.) where Silas J dismissed an O.S. first because of omission to annex an extract of title and later refused to reinstate it when what was later availed to cure the problem happened not to be an extract of title.

7. I now revert to the issue of the alleged omission to file an extract of title. The Respondent is correct in his observations. The O.S. filed herein does not have an extract of title as an annexure. And since the requirement to annex such extract is mandatory, failure to annex it makes the O.S. incompetent. I agree generally with the ruling of Silas J. I also agree with the Respondent herein. The objection raised has merits and the O.S. herein is hereby struck out with costs to the Respondent.

Dated, signed and delivered at Busia this 19th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff/Applicant:

2nd Plaintiff/Applicant:

Defendant/Respondent.....