



**REPUBLIC OF KENYA**

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

**ELC CASE NO.217 OF 2015**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF**

**ACTIONS ACT, CAP 22**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE**

**RULES, 2010**

**AND**

**ACT NO.3 OF 2012.**

**AND**

**IN THE MATTER OF SECTION 54 OF THE LAND ACT NO.6 OF 2012**

**AND**

**IN THE MATTER OF LAND PARCEL LRKSM/15026/3**

**BETWEEN**

**ALEX OPIYO MWANDU.....APPLICANT**

**VERSUS**

**CITY MANAGER COUNTY GOVERNMENT OF KISUMU...1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The City Manager and County Government of Kisumu, hereinafter referred to as the Respondents, issued notice dated 18<sup>th</sup> July 2016 to raise preliminary objection to the suit commenced by Alex Opiyo Mwandu, the Applicant, through the originating summons dated 26<sup>th</sup> August 2015 citing the following three grounds;

“1. This suit is bad in law pursuant to the provisions of Section 41 of the Limitation of Actions Act

cap 22.

2. This suit is fundamentally defective in light of the provisions of Section 17 of the Limitation of Actions Act Cap 22.

3. This suit is defective for non-joinder of proper parties to the proceedings.”

2. The preliminary objection came up for hearing on the 31<sup>st</sup> May 2017 when Mr. Achura and Mr. Omondi for the Respondents and applicant respectively made their oral submissions as summarized hereinbelow;

**A: RESPONDENTS COUNSEL’S SUBMISSIONS;**

- That the originating summons is defective and does not meet the threshold for a claim based on adverse prosecution.
- That **Section 41** of the Limitation of Actions Act states that adverse possession does not lie against the Government.
- That the originating summons is defective for non-joinder.
- That the Applicant did not have continuous and uninterrupted possession of the suit property for more than 12 years required, by **Section 17 of the Limitations of Actions Act** as there was a court case in 2004 where one Catherine had sought his eviction.
- That the applicant did not move the court for adverse possession orders until after he was evicted contrary to **Section 38 of the Limitation of Actions Act**.
- That the suit land was originally parcel **L.R. NO.Kisumu 15026** and was acquired by the Government for public use and vested on the 2<sup>nd</sup> Respondent to hold in trust for the benefit of the County.

**B: APPLICANT’S COUNSEL’S SUBMISSIONS;**

- That the question of how long the Applicant has been on the suit land is a question of fact and not law and the suit should be allowed to go to hearing.
- That adverse possession is an issue of fact and not law and hence can only be decided after the suit is heard.
- That the Applicant and his fore fathers have been on the land for over 50 years and if it was compulsorily acquired, then the process was irregular, null and void as the applicant was not compensated.
- That by the time the applicant was being asked to vacate from the land, he had already acquired it through adverse possession for having been in occupation for more than 12 years.
- That the applicant has been in possession of the suit land openly and without force.
- That **Order 1 Rule 9 of Civil Procedure** Rules allows the court to determine the issues in a suit between the parties before it and such a suit cannot be defeated for reasons of non-joinder.
- That **Order 1 Rule 10 (2) of Civil Procedure Rules** allows the court to order the addition of a necessary party.
- That the issue of whether the 2<sup>nd</sup> Defendant is the registered proprietor of the suit land is an issue of fact and not law and can only be decided through hearing of the suit.
- That the preliminary objection dated 18<sup>th</sup> July 2016 be rejected with costs.

3. The following are the issues for the court’s determination;

a) Whether the suit is bad in law and defective in view of the provisions of **Section 17 and 41** of the Limitation of Actions Act Chapter 22 of Laws of Kenya.

b) Whether the suit should be struck out for non-joinder of proper party.

c) Who pays the costs.

4. The court has carefully considered the grounds on the notice of preliminary objection, the oral submissions by both counsels, the pleadings filed and come to the following conclusions:

a) That as properly submitted by counsel for the Applicant, **Order 1 Rule 9** of the Civil Procedure Rules requires the court to determine the suit before it as regards the rights and interests, of parties to that suit. That therefore the claim by the Respondents that one Catherine ought to have been enjoined in this suit does not on its own make the suit defective as appropriate orders may be issued as provided for under **Rule 10** of the said order.

b) That the question of adverse possession is an issue of law in that the adverse possessor who is interested to be registered with the land has to move the court in accordance with **Section 38** of the Limitation of Actions Act. That is the step the Applicant has taken in moving the court through the originating summons dated 26<sup>th</sup> august 2015.

c) That **Section 41** of the Limitation of Actions Act excludes “Government land or land otherwise enjoyed by the Government” from the provisions of the Act. That the land held by the 2<sup>nd</sup> Respondent falls in the definition of public land as it is held in trust for the public use in the County until and unless it is allocated to a private entity. The Applicant’s claim is not against a private entity or for private land. The claim is against the 2<sup>nd</sup> Respondent, which is a County Government, and over a public land in contravention of the provisions of **Section 41** of the Limitation of Actions Act. That accordingly the suit is for striking out as a non-starter.

d) That the provision of **order 37 Rule 7 of Civil Procedure Rules** requires that the originating summons be supported by an

“affidavit to which a certified extract of the title to the land in question has been annexed.” That though none of the parties has addressed the court on this issue, a perusal of the supporting affidavit sworn by Alex Opiyo Mwandu on 4<sup>th</sup> August 2015 shows that it does not have a certified copy of title for L.R. **Kisumu/15026/3** (suit land) in the name of the 2<sup>nd</sup> Respondent.

5. That for reasons set out above, the Respondents preliminary objection is upheld and the suit commenced by the Applicant vide the originating summons dated 26<sup>th</sup> August 2015 is hereby struck out with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THI 8<sup>TH</sup> .DAY OF NOVEMBER 2017

In presence of;

Applicant Non attendance

Respondents Non attendance

Counsel Non attendance

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**

**8/11/2017**

**S.M. Kibunja Judge**

**Oyugi court Assistant**

**Parties absent**

**Counsel absent**

**Court: Ruling dated and delivered in open court in absence of all parties and counsel. The Deputy registrar to notify the parties counsel of the delivery.**

**S.M. KIBUNJA – JUDGE**

**8/11/2017**