



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 05 OF 2015 (O.S)**

**SAMUEL KIPNGENO KOECH.....PLAINTIFF**

**VERSUS**

**AGNES WAMBUI GITONGA .....DEFENDANT**

**RULING**

***(Suit for adverse possession; suit struck out for the reason that no extract of the title was annexed; application to reinstate suit; applicant annexing a letter from the SFT; such letter not a substitute to the requirement that an extract of the title must be annexed; importance of annexing the extract of the title explained; suit remains dismissed for failure to annex a certified extract of the title)***

This case was commenced on **5<sup>th</sup> February 2015** by way of an Originating Summons taken out pursuant to the provisions of **Order 37 Rules 1 and 7 of the Civil Procedure Rules** as read together with **Sections 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya**. The case of the applicant is that he is entitled by way of adverse possession to the land described as **Sondu River Settlement Scheme Plot No. 552/5** measuring 7.5 acres. He has averred that he purchased the said land from the respondent **on 10<sup>th</sup> April 2002** at a consideration of Kshs. 375,000/= and that for over 12 years, he has been in peaceful, quiet, notorious and open possession of the said land.

To his supporting affidavit , the applicant annexed a copy of the said agreement, and a demand letter from the Ministry of Lands **dated 5<sup>th</sup> November 2010** seeking payment of the sum of Kshs. 29,785/= due to the Settlement Fund Trustees (SFT). However, no extract of the register was annexed to the affidavit contrary to the requirements of **Order 37 Rule 7 of the Civil Procedure Rules**, which is drawn as follows :-

***7. Adverse possession [Order 37, rule 7.]***

- 1) An application under section 38 of the 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.***

It will be seen from the above, especially at **sub-rule 2**, that it is mandatory, that the supporting affidavit in a suit for adverse possession, be accompanied by a certified extract of the title to the land being claimed.

When the suit came up before me on **22<sup>nd</sup> July 2015** for directions, I directed Mr. Migiro, counsel for the applicant, to file a further affidavit annexing a copy of the title within 14 days. I gave **12<sup>th</sup> November 2015** as the next mention date. No certified extract of the title had been filed by this day, and I gave the applicant a further 30 days to annex the same. On the next mention date, which was **24<sup>th</sup> February 2016**, neither the applicant nor his counsel appeared in court and no extract of title had been filed. I thought I had given the applicant enough time to comply with the provisions of **Order 37 Rule 7 (2)** and having not followed my directions, I found that the Originating Summons was incompetent and struck it out with costs.

Through a Motion dated **5<sup>th</sup> April 2016**, the applicant has filed an application seeking that the orders striking out his case be set aside or varied. The applicant has averred that **on 4<sup>th</sup> December 2015**, he filed a further affidavit annexing a letter dated **9<sup>th</sup> December 2015** from the District Land Adjudication Officer, Nakuru, confirming that the suit land was allocated to the defendant, but due to inadvertence or a mistake on the part of the registry personnel, the affidavit does not appear in the court file. It was averred that the applicant ought not to be punished due to a failure by the registry to put the said affidavit in the court record. The said further affidavit was annexed. The applicant has therefore urged me to reinstate his case.

The application is opposed by the respondent. She has inter alia averred that a letter from the District Land Adjudication Officer does not amount to a title deed and as such the orders sought cannot be granted.

Mr. Migiro for the applicant urged me to allow the application and reinstate the suit. He submitted that to date, the land which was owned by the Settlement Fund Trustee, does not yet have a title. He pointed me to the letters annexed by the applicant from the Lands Office. He submitted that the applicant deserves to be heard as the issue at hand is a mere irregularity.

Mr. Koske, counsel holding brief for Mr. Waiganjo Mwangi for the respondent, submitted inter alia that the applicant has not complied with the order requiring him to annex a copy of the title. He submitted that **Order 37 Rule 7 (2)** is couched in mandatory terms. He submitted that if the land is under the Settlement Fund Trustee, then an ordinary suit ought to be filed and not an Originating Summons.

I have considered the matter. There is no question that **Order 37 Rule 7 (2)** is couched in mandatory terms. The reason why it is so drawn is that a case of adverse possession is one directed at acquiring specific land, or a portion of that land, and the land needs to have been registered and to have a title. If the land in issue is yet to be registered, then that land cannot be the subject of a case for adverse possession; rather, it will be a case falling under the provisions of **the Land Adjudication Act, Cap 284 Laws of Kenya**. Such land needs to await the ascertainment of rights through the process of adjudication and one cannot claim adverse possession over it, for there will be nobody to sue, since there will be nobody holding any title.

This position is indeed brought out by the provisions of **Section 38 (1) of the Limitation of Actions Act**, which is drawn as follows :-

***Section 38 : Registration of title to land or easement acquired under Act***

***(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***

**Section 38** above refers to certain **Acts of Parliament**, cited in **Section 37**. The said statutes are the **Government Lands Act (Cap. 280)**, the **Registration of Titles Act (Cap. 281)**, the **Land Titles Act (Cap. 282)** or the **Registered Land Act (Cap. 300)** (all now repealed by the **Land Registration Act**,

2012 but titles still subsist as issued under those statutes). It follows that for a claim of adverse possession to be entertained in this country, the applicant must specifically identify the exact title of land that is the subject of the claim.

The extract of the title also has another significant importance. It does show the history of the proprietorship of the land in issue. This history is important in computing time, for there are some entities against whom one cannot claim adverse possession. So long as these entities remain the registered owners of the title being claimed, time cannot start running in favour of the occupant of the land in question. These entities are set out in **Section 41** of the Limitation of **Actions Act, CAP 22, Laws of Kenya**, which provides as follows :-

**S.41 Exclusion of public land**

***This Act does not—***

***(a) enable a person to acquire any title to, or any easement over—***

*(i) Government land or land otherwise enjoyed by the Government;*

*(ii) mines or minerals as defined in the Mining Act (Cap. 306);*

*(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);*

*(iv) water vested in the Government by the Water Act (Cap. 372);*

*(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or*

*(vi) land vested in the trustees of the National Parks of Kenya; or*

***(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.***

It seems to me from the documents availed by the applicant, that the land being claimed has been under the Settlement Fund Trustees. It has been held in various decisions, that land under the Settlement Fund Trustees is Government Land, and therefore one cannot claim adverse possession over such land. See for example the decision of the Court of Appeal in the case of ***Gitu vs Ndungu & 2 Others (2001) KLR 149***. The time which the Settlement Fund Trustees holds a charge over such land cannot be computed to sustain a claim for adverse possession.

I have seen the letter annexed by the applicant from the District Land Adjudication and Settlement Officer, Nakuru. It states that the **Plot No. 51 Sondu River Settlement Scheme** was allocated to Agnes Wambui Gitonga, the respondent. It further states that the land has been fully paid for but it has not been registered.

That letter to me is not the same as an extract of the title. Even land that is under the Settlement Fund Trustees would ordinarily have title. But assuming I am wrong on this, the said letter cannot help the applicant much because it does not state that the SFT has no further interest in the land and does not also state when full payment for the land was made. In other words, it does not state the exact period that the SFT ceased to have an interest in the land. It is not therefore possible to use that letter to compute time.

It follows that it will be futile to set aside my order striking out this suit as the applicant has not annexed any title as required by the rules. The letter annexed is not useful at all to a claim of this nature.

For the above reasons, I find no merit in the application dated **5<sup>th</sup> April 2016** and I hereby dismiss it with costs. The effect is that the suit herein remains as struck out with costs.

It is so ordered.

**Dated, Signed and delivered on this 29<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT**

Mr. Brian Langat holding brief for Mr. Migiro for Applicant.

Mr. Waiganjo Mwangi present for Respondent.

Court Assistant: Gladys Wambany