



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 4 OF 2015

LUCIA MUTHONI.....1ST APPLICANT

ESTHER MUTHONI MURIUKI.....2ND APPLICANT

VERSUS

BETHA WANJIRU MURIUKI

IRENE NJERI MURIUKI

CICILY WANGECHI MAINA

(Suing as Chairlady, Secretary, Treasurer respectively of

Utheri wa Kiratina Women Group).....RESPONDENTS

RULING

This is in respect to the applicants' Notice of Motion dated 19th June 2013 and the respondents' Preliminary Objection dated 21st July 2014 which, as agreed by counsel for the parties, were canvassed together by way of submissions.

The respondents had filed **WANGURU PRINCIPAL MAGISTRATE'S CIVIL CASE No. 79 of 2012** seeking judgment against the applicants in the following terms:-

(a) An order for the forceful eviction of the defendants, their servants, agents and/or anyone claiming on their behalf from Plot No. 2103 of Kiratina village through Court Brokers.

(b) Costs of the suit together with eviction costs.

(c) Interests on (b).

(d) Any other relief that this Honourable Court may deem fit and just.

The basis of the claim is not relevant for purposes of this ruling.

The applicants filed a defence to the claim but what is important is their counter-claim in which they sought the following orders:-

(a) A declaration that the defendants have acquired ownership of the plot No. 2103 Kiratina

village by way of adverse possession.

(b) In the alternative, specific performance of an agreement dated 26th April 2007.

(c) Costs of this suit at Court rates.

By the applicants Notice of Motion dated 19th June 2013, the applicants seek the following orders:-

(1) That this Honourable Court be pleased to withdraw from the lower Court and transfer WANGURU PRINCIPAL MAGISTRATE'S CIVIL CASE No. 79 of 2012 to itself for hearing and final determination.

(2) Costs of the application be provided for.

The said application is supported by the affidavit of **LUCIA MUTHONI** the 1st applicant and what is important is that she has deponed therein that they filed their defence to the respondents claim on 2nd July 2012 in which they included a counter-claim touching on adverse possession against plot No. 2103 and when the issue was raised in the subordinate Court, they were advised to file this application. They therefore pray that the **WANGURU PRINCIPAL MAGISTRATE'S CIVIL CASE No. 79 of 2012** be transferred to this Court since it is the one seized with jurisdiction to handle a claim for adverse possession.

The respondents filed a Notice of Preliminary Objection dated 21st July 2014 stating that this Court has no jurisdiction to transfer a suit filed in a Court without jurisdiction. And in a replying affidavit sworn by **BETHA WANJIRU MURIUKI** the 1st respondent herein, it is deponed, inter alia, that the land in dispute is owned by the National Irrigation Board and there can be no adverse possession against the Government as sought in the counter-claim and therefore it would be an act in futility to transfer the suit to this Court. Further, that a suit for adverse possession can only be initiated by way of an Originating Summons and transferring that suit to this Court will not cure that fatal defect. Lastly, that the subordinate Court lacks the jurisdiction to hear and determine the counter-claim and consequently, this Court lacks the jurisdiction under **Section 18 of the Civil Procedure Act** to transfer the suit filed in a Court without jurisdiction.

Submissions have been filed by the firm of **KINYUA KIAMA** Advocates for the respondents and **WANGECHI MUNENE** Advocates for the applicants.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

Section 18 (1) of the Civil Procedure Act empowers this Court to transfer suits from itself to subordinate Courts and vice-versa. It states:-

“On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:-

(a) transfer any suit, appeal or other proceedings pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceedings pending in any Court subordinate to it, and thereafter

—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn”

It is not in dispute that a claim for adverse possession which is the subject of the applicants’ counter-claim can only be tried by this Court. **Section 38 (1) of the Limitation of Actions Act** makes that clear in the following terms:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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” - emphasis added

While it is correct as submitted by counsel for the respondents that the civil jurisdiction of Magistrates Courts has been enhanced, it is clear from the provisions of **Section 38 of the Limitation of Actions Act** that the jurisdiction to handle cases of adverse possession remains the preserve of this Court.

It is not in dispute that prior to the filing of the defence and counter-claim, the subordinate Court had the jurisdiction to determine the respondents’ case. Indeed that was conceded in paragraph ten (10) of the plaint where the respondents pleaded that the cause of action was within the jurisdiction of the subordinate Court at **WANGURU**. The issue of jurisdiction of the subordinate Court has only arisen after the defendants filed their defence and counter-claim.

For a long time now, the law has been that a suit filed in a Court without jurisdiction cannot be transferred to another Court. This jurisprudence was founded on the Uganda Case of **KAGENYI VS MUSIRAMO & ANOTHER 1968 E.A 43** and has been followed by Courts in this country. The relevant passage in the judgment of **SIR UDO UDOMA (CJ UGANDA)** is as follows:-

“While it may be argued that since the provisions of Section 18 of the Act do not restrict the powers of the High Court in this respect, it is difficult to see how a wrongly constituted suit could be transferred to another Court for trial especially as the jurisdiction of the Court of origin of the suit which is a fundamental question, is involved”.

It is clear from the **KAGENYI** case (supra), that the issue of jurisdiction of the Court where the suit sought to be transferred was filed is only relevant where that suit was initially in a Court without jurisdiction. However, that issue cannot be raised where a subsequent event occurs following the filing of the suit. This could include, for instance, a change in the value of the subject matter or perhaps a change in the officer presiding over the Court. In the case now before me, and as per the respondents own pleadings, the Court at **WANGURU** was well seized of the jurisdiction to handle this dispute when it was initially instituted in that Court. And having been sued in that Court, the applicants were obliged to file their defences and only then could they raise the issue of jurisdiction. The **KAGENYI** case (supra) does not really aid the respondents because this case was first instituted in a Court with the requisite jurisdiction.

Most significantly however, with the coming into force of the new **Sections 1A and 1B of the Civil Procedure Act** and the promulgation of the 2010 Constitution, the **KAGENYI** case (supra) is no longer good law. The overriding objectives of **Sections 1A and 1B of the Civil Procedure Act** are to achieve, inter alia, the efficient and just determination of proceedings using the available judicial and administrative resources. The Constitution of Kenya 2010 on the other hand introduced the **Constitutional Principle** that in exercising judicial authority, Courts shall be guided by the need to administer justice without undue regard to procedural technicalities. I do not think that the above noble objectives can be achieved by applying the principles set out in the **KAGENYI** case (supra) and I share the sentiments expressed by **H. WAWERU J.** in **GRACE KOMO VS DAN NDWIGA NAIROBI HIGH COURT MISCELLANEOUS APPLICATION No. 27 of 2013** and also **NYAMWEYA J.** in **ABERDARE INVESTMENTS VS BERNARD WACHIRA & FIVE OTHERS 2014 e K.L.R.** I took the same view in **WILSON WACIRA KUBUTA & OTHERS VS DAINAH MUTHONI KUBUTA, KERUGOYA HIGH COURT MISCELLANEOUS APPLICATION No. 21 of 2015.**

The other issues raised by the respondents in paragraph 8 of the replying affidavit of **BETHA WANJIRU MURIUKI** is that a valid claim for ownership of land by way of adverse possession can only be initiated by way of an Originating Summons. It is true that **Order 37 Rule 7 (1) (2) and (3) of the Civil Procedure Rules** which provides for the manner of instituting a claim for adverse possession under **Section 38 of the Limitation of Actions Act** provides as follows:-

(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 is therefore correct that the law provides that a suit for adverse possession shall be instituted by filing an Originating Summons. In the case of **BWANA VS SAID 1991 K.L.R 454** the Court had ruled, inter alia, that

“... the proper procedure for asserting entitlement by way of adverse possession was vide an Originating Summons under Order 36 Rule 3D as it was then (now Order 37) and secondly, that it was not possible to correct the position by converting the action into a claim by way of an Originating Summons as there is no provision in the Civil Procedure Rules by which this could be done”

However, that position has now changed. In **MARIBA VS MARIBA C.A CIVIL APPEAL No. 188 of 2002 (2007) 1 E.A 176**, a claim for adverse possession had been brought by way of a plaint. The Court of Appeal did not consider that to be fatal and said:-

“While it is true that the suit was commenced by plaint instead of by procedure of Originating Summons, we do not consider the error to be fatal in view of the provisions of Order XXXVI Rule 10 of the Civil Procedure Rules. That provision requires the trial Court in an appropriate case, to continue proceedings commenced by Originating Summons as though the same had been begun by plaint”

More recently, in the case of **NGATI FARMERS CO-OPERATIVE SOCIETY LTD VS JOHN LEDIDI & 15 OTHERS C.A CIVIL APPEAL No. 64 of 2004 NKU**, the proceedings had been commenced by a plaint and a defence was filed introducing a counter-claim by way of adverse possession, as is the case now before me and the issue that arose was that the procedure was wrong. The Court of Appeal resolved that issue by saying:-

“We have anxiously considered the authority cited by Mr. Kahiga in urging us to fault the procedure adopted by the respondents in mounting the counter-claim but we are satisfied that it was not fatal to the claim. In reaching this conclusion, we are guided buy the decision of the predecessor of this Court in BOYES VS GATHURE 1969 E.A 385 in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the Court and no prejudice was caused to the appellant”

The above is binding on this Court and therefore the applicants’ counter-claim by way of adverse possession cannot be faulted.

Lastly, the respondents have deponed in paragraph six (6) of the replying affidavit of **BETHA WANJIRU MURIUKI** that the land subject of this suit is owned by the National Irrigation Board and they are licencees thereof and so an order for adverse possession cannot issue against the Government as sought in the counter-claim. It is of course correct that Under **Section 41 of the Limitation of Actions Act**, a claim for adverse possession cannot be brought against the Government. However, at this stage, it would be premature for this Court to make any finding on that without hearing the evidence that the

parties wish to present in support of their respective cases. That issue will therefore have to await the full trial. Besides, it must be remembered that the claim for adverse possession is an alternative remedy in the counter-claim as there is another claim for specific performance of an agreement allegedly entered into between the parties over the land subject of this suit on 26th April 2007. It would be in the interest of justice to have all these issues determined at the trial rather than make a summary decision on the pleadings without having had the benefit of considering the parties evidence.

Ultimately therefore, upon considering all the matters herein, I am not persuaded that the respondents' Preliminary Objection dated 21st July 2014 is well founded. I therefore dismiss it.

I am however satisfied that the applicants' Notice of Motion dated 19th June 2013 is well merited. I allow it in the following terms:-

1. WANGURU PRINCIPAL MAGISTRATE'S CASE No. 79 of 2012 BETHA WANJIRU MURIUKI & TWO OTHERS VS LUCIA MUTHONI & ANOTHER be transferred to this Court for hearing and final determination.

2. Each party to meet their own costs of this application.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Ruling dated, signed and delivered in open Court this 30th day of September 2016.

Mr. Mwangi for Ms Wangechi for Applicant present

Mr. Kiama for the Respondent absent.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016