



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 2274 OF 2007

LENSOL LIMITEDPLAINTIFF

VERSUS

SIMON MUCHAI MUNGAI1ST DEFENDANT

PETER KAMAU MBUTHIA.....2ND DEFENDANT

HUMPHREY MWANGI WAWERU3RD DEFENDANT

MORRISON K. MAINA4TH DEFENDANT

K. MAINA NDUNG’U5TH DEFENDANT

EPHANTUS KANJA MWANGI.....6TH DEFENDANT

JANE KAMANDE KARIUNGU7TH DEFENDANT

MACHARIA NGUGI8TH DEFENDANT

RULING

Introduction

The judgment in this suit was delivered on 24th April 2012. Thereafter, various objectors filed applications by Notices of Motion seeking orders for joinder and review of the said judgment. The first set of objectors files a Notice of Motion dated 23rd July, 2012 filed by the firm of M/s Omollo & Co. Advocates on behalf of Rose Apido Okello & 19 Others who claimed to have been in occupation of the suit property since 1989.

The second set of objectors filed a Notice of Motion dated 25th July, 2012 filed by the firm of M/s Muchoki Kanagatta & Co. Advocates on behalf of Rufus Mwangi & Another for and on behalf of members of Umoja III Residence Organization Self-Help Group, and who alleged to have resided in the suit property for over 12 years. The last and final set of objectors filed a Notice of Motion dated 21st August 2012 filed by the firm of Ochieng Opiyo and Company Advocates on behalf of Elizabeth Njeri and Others, who claimed to have constructed on and reside on the suit property and had not been made parties to this suit.

The Plaintiff then filed a Notice of Preliminary Objection on 24th August 2012 on the following grounds:

1. That the Objectors cannot under any written Law and/or otherwise claim adverse possession over private property.
2. That there are no *prima facie* reasons and/or legal reasons adduced to warrant the remedy of injunction as prayed for in the said applications.
3. That the Objectors/Applicants lack *locus standi* to institute and file the said application and the same ought to be struck out for non-conformity of the Civil Procedure Rules, 2010.
4. That the Plaintiff is entitled under the New Constitution to the right to own private property and peaceful enjoyment over the said land, and the applications are meant to deny the Plaintiff the fruits of the Decree issued in its favour on 9th May, 2012.
5. That the Plaintiff is the bonafide owner of the said parcel of land as found by the Court.

The ruling herein is on the said Preliminary Objection by the Plaintiff. The parties were directed by the Court to file and serve submissions on the Plaintiff's Preliminary Objection.

The Plaintiff's Submissions

The Plaintiff's counsel filed submissions dated 18th March 2013 wherein he argued that Plaintiff is the Decree-holder having obtained judgment against the Defendants herein pursuant to a Decree dated 24th April, 2012 which inter-alia ordered as follows:-

1. That the Defendants be and are hereby ordered to vacate the suit property, being L.R No. 209/9500/2 within three (3) months from the date of the judgment and in default an order of eviction to issue.
2. That the Defendants and their agents be restrained from interfering with the Plaintiff's ownership of the suit property.
3. That the Plaintiff be and is hereby awarded a sum of Kshs.40,000/= together with interest at the rate of 12% p.a as against the Defendants being damages for trespass.
4. That cost of the suit plus interest be awarded to the Plaintiff.

On the grounds of objection raised, it was submitted by the Plaintiff that firstly, the Objectors allude to a claim of adverse possession, and that the provisions of Section 38(1) of the Limitation of Actions Act provides as follows in this regard:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts in Section 37 of this Act.....he may apply to the High Court for an order that he be registered as the proprietor of that land.....in place of the person then registered as the proprietor of the land”.

However, that the Objectors have not as yet moved the Court for a claim of adverse possession, and neither are they entitled to such a claim for reasons that they have not been in continuous occupation of the suit property for more than 12 years as alleged without interruption from the registered owner. Further, that the Objectors in their respective affidavits have not established on a balance of probabilities rights of possession over the suit property for the orders sought to be granted.

Secondly, that it is now trite law that a certificate of title issued by the Registrar to any purchaser is taken by the courts as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof. Further that such a title is not subject to challenge except on the ground of fraud or misinterpretation to which the proprietor named therein is a party. It was submitted that the Objectors have not disclosed any rights of interest in the suit property and therefore cannot claim ownership thereof. Further, that they have no documents of ownership and are mere busybodies and trespassers.

The Plaintiff contended that the Objectors have failed to prove that they were legitimate allottees of the suit property as alleged. It was argued by the Plaintiff that at the time of the alleged allocation of the suit

property to the Objectors, the said property had already been leased out to the Plaintiff and which lease had not been determined. Further, that the Provincial Administration and/or the Government could not therefore have allocated land to the Objectors which had already been leased out to the Plaintiff.

Lastly, it was submitted by the Plaintiff that the Objectors do not possess the locus to institute the proceedings hereto since they are yet to be enjoined in this suit.

The Objectors' Submissions

The counsel for the second set of Objectors filed reply submissions dated 4th March 2015. The first and third set of Objectors did not file any submissions on the Plaintiff's Preliminary Objection. The second set of Objectors argued that the Objectors were never made parties to the suit by the Plaintiff at the time judgment was entered, yet they are in occupation of the suit property and the Plaintiff intends to evict them from the land without including them as parties. The counsel cited Order 10 rule 1(1) of the Civil Procedure Rules in this regard which provides that:

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”.

It was submitted that the Objectors should be substituted as parties to the suit in order for the court to determine the real matter in dispute. Reliance was placed on the decisions in **Andrew Muguan & 16 others Vs. Meru Central County Council & 2 others, (2005) eKLR** and **Teresia Waithira K. Njuguna Vs. John Otieno Nyandew & Another, (2015) eKLR** for the position that the Objectors have *locus standi* as a result of the sufficiency of interest in the matter having been relocated to, and carried out fundamental developments in the suit property.

It was further submitted that the Objectors have been in continuous, exclusive and undisturbed possession of the suit property until when they were served with the decree, and that effective interruption of their possession would have been by way of demand by the Plaintiff, and/or a suit for vacant possession thereof taken out against the Objectors within 12 years preceding entry to the land. Further, that it is therefore clear that the Objectors' occupation and possession of the suit land has been uninterrupted for the entire term pleaded herein above. Reliance was placed on the decision in **Githu Vs. Ndete (1984) KLR 776** in this regard.

It was in this regard contended by the Objectors that the Decree and/or eviction order dated 24th April 2012 seeking to have all persons residing the suit property vacate the same cannot in essence construe to interruption of their possession of the same for purposes of adverse possession. The Objectors submitted that in any event, the eviction notice was made when the registered proprietor's title to the suit land had already been extinguished by virtue of the the Objectors' possession of the same for purposes of adverse possession.

Lastly, it was argued that the Objectors have a *prima facie* case as they have demonstrated that they would suffer insurmountable financial losses if the decree were to be executed, owing to the huge developments they have undertaken on the suit land, and also due to the fact that they are the real owners of the suit property after having been settled there by the provincial administration and the City Council of Nairobi.

Further, that the balance of convenience is invariably in favour of the party in occupation and who would be greatly prejudiced and inconvenienced if the *status quo* were disturbed pending the hearing and determination of the suit, and that the Objectors are admittedly in possession of the suit land.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the Plaintiff's Preliminary Objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The Court in this regard notes that the Plaintiff's grounds of objection are based on the Objectors' lack of *locus standi* based on their possession of the suit property and lack of any proprietary interest in the same. In particular the Plaintiff argues that the Objectors' possession of the suit property is insufficient and/or inadequate to give rise to a claim of adverse possession, and that they have no documents of ownership to the suit property.

However, this Court notes that the very fact that such possession and ownership by the Objectors of the suit property is disputed makes the Plaintiff's objection untenable, as it is raising issues of contested facts. The arguments made by the respective parties are better canvassed at the hearing of the various Notices of Motion filed by the Objectors, and not at this stage. This Court accordingly finds for the above reason that the Plaintiff's Preliminary Objection dated 24th August 2012 does not raise a pure point of law, and therefore has no merit. The Plaintiff shall meet the costs of the said Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 23rd day of April, 2015.

P. NYAMWEYA

JUDGE