



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

ENVIRONMENT AND LAND COURT DECISION

CIVIL SUIT NO.560 OF 2014(O.S)

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CAP 22

BETWEEN

PATRICK KARIGE MUNGE.....PLAINTIFF

-VERSUS-

RAPHEAL ARC MICHAEL MUNGE.....DEFENDANT

RULING

The matter coming up for determination is the Plaintiff/Applicant's Notice of Motion dated **7th May 2014**, brought under **Sections 3 and 3A of the Civil Procedure Act ,Order 37 Rules 5, and 7 of the Civil Procedure Rules, Section 38 of the Limitation of Actions Act** and all other enabling provisions of the law. The applicant has sought for these orders.

- a. ***That pending the hearing and determination of this suit, the Court be pleased to grant an inhibition order against any dealings by the Defendant , his servant and/or agents over land reference No.8107/2 8107/3,8107/4,8107/5,8107/8 and 8107/9.***
- b. ***Costs of the application be borne by the Defendants.***

The application is supported by the grounds stated on the face of the application and also on the Supporting Affidavit of **Patrick Karige Munge**, the applicant herein. The grounds, in support of the application are:-

- i. ***That the Defendants are the registered owners of the above land referenced numbers L.R.NO.8107/2, L.R.NO.8107/3, L.R.NO.8107/4, L.R.NO.8107/5,L.R.NO.8107/8 and L.R.NO.8107/9.***
- ii. ***Further that the Plaintiff has been in quiet possession of the above stated land reference numbers for a period of over 15 years and has been paying all the rates over the said properties and he has invested over Kshs. 10,000,00/= in the properties.***
- iii. ***That the Defendant returned to the country for United States of America [USA] after 22 years and having seen the properties, he abandoned have been developed , he is attempting to dispose of or sell the same with no regards to the Plaintiff's acquired right and overriding interests.***

iv. That the Plaintiff having occupied the land for over 15 years without interruption has acquired the rights over the properties by adverse possession.

In his Supporting Affidavit, the applicant **Patrick Karige Munge**, averred that the Defendant **Raphael Arc Michael Munge**, is his father and the registered owner of the suit properties. Further that his father left the country and went to reside in the **United States of America [U.S.A]**, in the year **1992**. It was his contention that since **1999**, he has been occupying the properties and maintaining the same and has carried out structural and general repairs. Further that in **April 2008**, the City Council of Nairobi sent demands for payment of rates and interests for all the suit properties from **1992** failing of which the suits were to be sold as per annexure **PKM 2**.

Applicant averred that his father refused and/or failed to pay the said

rates and applicant took upon himself and paid all the outstanding rates as per annexures **PKM 3**. He also contended that he has been in quiet and peaceful occupation of the properties since **1999** and has invested heavily and has now occupied the properties for over **15 years**. He also averred that the Defendant came back to the country in the **year 2013** and he has indicated that he wants to sell off all the properties. Applicant therefore alleged that the Defendant has no right to sell these properties that the Plaintiff has developed and managed for over **15 years** and that he is entitled to the property by adverse possession and he therefore seeks for inhibitive orders.

The application is opposed by the Defendant who filed Grounds of Opposition, Replying Affidavit, and further Replying Affidavit. In the Grounds of Opposition, the Defendant/Respondent alleged that the Originating Summons and the said Notice of Motion are both **incurably defective, incompetent** and the same **do not lie**. Further that the Plaintiff is his son and he occupied the suit premises at one time or another, but with the Defendant's permission as his son. That the Plaintiff never lived in any part of the suit premises for a continuous period of 12 years as alleged and that the Plaintiff wants to rob his father of his property through cheating, falsehood, and trickery. Further that the plots claimed in the Originating Summons and the Notice of Motion application are non-existent. Respondent further averred in

his Replying Affidavit that he is the sole registered proprietor of the registered properties of the earlier suit premises known as **LR No.8107**, together with all sub-divisional portions thereof, save that he has sold some of these sub plots . He also deponed that he purchased the entire piece of land known as **LR No.8107**, comprising of **5 acres** in the **year 1973**,and it had an old house that was erected thereon. He further deposed that he lived in the said house with his family until **1992**, when he left for **United States of America [USA]**. While in the **United States of America [USA]**, he continued to educate his children, the Plaintiff included as he had divorced his wife in the year **1983**. The Respondent also averred that he had sold **two plots 6 & 7 to Mr Kimaru and Mr Njoroge** before he left for **United States of America [U.S.A]**. It was his contention that he has always been in control of the entire suit premises and at no time has the Plaintiff ever occupied any of the portions of the suit premises for a continuous and uninterrupted period of 12 years, as alleged by him. Further that he has never authorized or appointed the Plaintiff any one time to receive any documents on his behalf and therefore to pay rates for him. He also contended that the Plaintiff has not furnished the court with evidence of expenditure of **Kshs.10,000,000/=** over the suit premises and that the suit premises are residential properties and not commercial /or business properties. The Respondent further deposed that he came back from the

United States of America[U.S.A] in **January 2014** and sold **LR 8107/8** to one **Mr Wambu**, and he is in the process of developing the other plots. He contended that the Plaintiff is not entitled to possession of the suit properties by adverse possession and that the Respondent is the absolute owner of the suit properties.

The Plaintiff filed a further Affidavit on **26th November 2014**, and the Defendant also swore a further Replying Affidavit on **5th December 2014**.

The Notice of Motion was canvassed by way of written submissions. I have now carefully read and considered the written submissions, the cited authorities, and the relevant law. I make the following

findings:-

There is no doubt that the Plaintiff and the Defendant herein are father and son. There is no doubt that the Defendant was the registered owner of suit land, **LR NO. 8107**, which was later subdivided into various portions of land being **LR NO.8107/1–8107/9** . Though the copy of the title deed was not attached, both the Plaintiff and the Defendant did acknowledge that Defendant was the registered owner of the initial mother title **LR No 8107**, which he purchased in 1970's. It is also evident from the Demand for payment of rates, '**PMK2**' that the suit plots were registered in the names of the Defendant **Raphael Arc Michael Munge** .

There is also no doubt that the Defendant left for the USA in the year

1992, and left the Plaintiff and his other siblings behind. There is also no doubt that as per the Demand for payment of rates dated **25th April 2008**, the City Council had demanded for rate payment for the various suit premises which were registered in the name of the Defendant. During this time, the Defendant was based in the **United States of America [U. S. A]**. The Demands were for rates arrears from the year 1992 when the Defendant left the country for **United States of America [U.S.A]** to the **year 2008**. It is also not in doubt that in the **year 2008**, the Plaintiff was residing in the suit premises and he was later attacked by thugs. There is also payment of the rates for these suit properties as per **PMK3**.

The properties were also not sold by the Nairobi City Council and that is evident that the Land Rates were paid as demanded by the said Nairobi City Council. It is also evident that the Defendant came back from USA in **January 2014**, and thereafter a misunderstanding over the suit premises arose between himself and the Plaintiff. The Defendant has admitted that he sold **L.R. NO.8107/8** was sold to one **Mr Wambu**.

The Plaintiff has alleged that he is entitled to ownership of the suit property by virtue of adverse possession. He also alleged that he took care of the parcels of land and maintained them while the Defendant was away in USA for the last 22 years. He further alleged that he paid land rates for the suit

premises from **1992-2008** after the City Council of Nairobi sent a demand Notice and threatened to sell the suit premises for non-payment of the rates. He also alleged that now the Defendant has threatened to sell the suit premises which he had abandoned for the last 22 years and that the Defendant had purchased the same during the subsistence of the marriage between the Defendant and the mother to the Plaintiff, whom the Defendant divorced in the year 1983.

The Defendant on his part denied that the Plaintiff is entitled to ownership of the suit property through adverse possession. He also alleged that the Plaintiff's Originating Summons cannot stand because the Plaintiff did not attach certificates of title deeds for the suit properties. The Defendant submitted that the plaintiff's Originating Summons has offended the provisions of **Order 37 Rule 7** and should be struck out for being incompetent and defective. The said orders reads as follows;-

- i. **An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**
- ii. **The Summons shall be supported by an affidavit to which certified exhibit of the title to the land in question has been annexed.**

I have considered the submissions by the Defendant on that point and it is evident that the said Originating Summon is not supported by an affidavit to

which certified extracts of titles are attached. However the applicant has attached demand letters for payment of rates and the said demand letters shows that the suit properties are in the names of the Defendant though the Defendant alleged that the suit properties do not exist, he admitted in his Replying affidavit that he owned **LR No. 8107** and the subdivision, thereto. I do believe that the subdivisions that the Defendants referred to are now the suit properties herein.

The Defendant objection is based on the point of law and meets the description of what a preliminary objection is as was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, and which has found backing in other judicial pronouncements. In the case of **Avtar Singh Bhamora & another Vs Oriental Commercial Bank, Kisumu High Court Civil Case No.53 of 2004**, the Court held that:-

“ A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.

It is clear that the Defendant herein preliminary objection stems from the pleadings and no facts are to be ascertained. Indeed the Originating Summons is not supported by an affidavit with extracts of certified copies of the title deeds herein. If the Court is to uphold the preliminary objection, the end result would be strike out the Originating Summons and thus the instant Notice of Motions. However, striking out of a suit is a draconian action and courts trend with caution when called upon to strike out a suit. See the case of

The Court finds that since at this stage we are dealing with an interlocutory application, the omission by the Plaintiff can be lured by an amendment. For that reason, I will overrule the preliminary objection and consequently, dismiss the same.

I will now turn to the merit of the application .The Defendant has submitted that the applicant's application was brought under the wrong provisions of the law. That the instant applications ought to have been brought under **Order 40** and **Order 51** that deals with Notices of Motions but not **Sections 3 and 3A of the Civil Procedure Act**. However the Court finds that the applicant has sought for an Order of inhibition, which is not an injunction as such. The power of the court to order for inhibition is provided for on **Section 68(1)**, which provides that:-

“ the court may make an order (herein referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular events or generally until a further order, the registration of any dealing with any land lease or charge.”

The provision of **Section 68** of the **Land Registration Act** shows that Court has discretion to issue such an order. Since the Court herein is being called to exercise its discretion, then the applicant was right to bring the application

under **Section 3 and 3A of the Civil Procedure Act** which donates power to the Court to exercise its discretion and make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.

Further **Order 51 Rule 10(2)** provides that:-

“ No application shall be defeated on a technicality or for want of form that does not affect the substance of the application “.

The applicant herein is asking the Court to issue an inhibition order until the Originating Summons is heard and determined. The issue of whether the applicant is entitled to ownership of this land through adverse possession is a matter to be determined after evidence has been called in the main suit.

However, it is evident the suit land is in the name of the Defendant who had been away from the Country for over 20 years. It is evident that there was a demand for rate payment which was paid. The question of who paid for the demanded rate is a question to be determined after calling evidence. What is not in doubt is that the Defendant had intend of disposing off the suit land. He has admitted so. The Plaintiff has also been using this suit land and is the son of the Defendant. Though the Defendant is the registered owner of the suit land, the Court has to determine whether the Plaintiff is entitled to possession by virtue of adverse possession. Before the said question of adverse possession can be answered, the suit property has to be preserved and **status quo** maintained.

Having now considered the available evidence, and the Notice of Motion dated **7th May 2014**, the Court finds it merited and allows the same in terms of **prayer No.3** and costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this 16th day of November, 2015.

L.GACHERU

JUDGE

In the presence of

Mr Mureithi for the Plaintiff/Applicant

Mr Morara holding brief **Mr Moriasi** for the Defendants/Respondents

Court Clerk : Hilda

Court:

Ruling read in open Court in the presence of the above stated Counsels.

L .GACHERU

JUDGE

Mr Morara: I apply for certified copies of the Proceedings and the Ruling.

L. GACHERU

JUDGE

Court: Certified copies of the Proceedings and Ruling to be supplied to the parties upon payment of requisite fees.

L GACHERU

JUDGE