



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 791 OF 2013 (OS)

IN THE MATTER OF SECTIONS 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA, SECTION 3A THE CIVIL PROCEDURE ACT AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES AND ALL OTHER ENBANDING PROVISIONS OF THE LAW

SERAH MUTHONI KIMANI.....PLAINTIFF

VERSUS

JOHN WANYOIKE GERALD.....DEFENDANT

RULING

The Defendant filed a Preliminary Objection dated 16/10/2013 that the entire suit be struck out on the grounds that it offends the provisions of **Section 7 and Order 37 Rule 7 of the Civil Procedure Act and Rules**, respectively. Parties filed written submissions in support of and opposition to the Preliminary Objection. Mbichire & Co. Advocates for the Defendant filed submissions dated 10/11/2013 in support of the application. Counsel submitted that the present suit is similar to one filed by the Plaintiff in the Magistrate's Court at Githunguri Law Courts wherein the Plaintiff sought an order that the Defendant does transfer the suit property by virtue of an alleged purchase. Subsequently, the suit was determined where the Plaintiff's claim was dismissed for failing to prove the existence of a contract. It is counsel's submission that the Plaintiff has not appealed against the said Judgment but has opted to institute fresh proceedings claiming entitlement by way of adverse possession. It is submitted for the Defendant that the suit herein is an abuse of the court process, an afterthought and amounts to forum shopping.

Counsel submitted further that the issues raised in the present suit were not raised in the previous suit despite the suit being between the same parties and over the same subject matter. In support of this submission, counsel referred the Court to the provisions of Section 7 of the Civil Procedure Act and Explanation 4 thereof that the principle of **res judicata** as espoused under Section 7 bars the court from trying a suit in which the matter was directly and substantially in issue in a former suit between the same parties, and Explanation 4 provides that any matter which might and ought to have been made a good ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Counsel submitted that the objections raised herein are pure points of law. Counsel referred the court to the authority of **Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:** which elaborated on what qualifies as a preliminary objection. The Court held:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....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”.

In respect to Order 37 Rule 7 of the Civil Procedure Rules, it was counsel’s submission that the provision therein is mandatory in nature which states that the Originating Summons shall be supported by an affidavit to which a certified extract of the title to the land on question has been annexed.

Counsel submitted that the Plaintiff had annexed an official search which is not a substitute of an extract title. He cited the cases of **Robert Okumu Okanga HCCC Kakamega No. 178 of 1999** where the Court held that the originating summons was fatally defective devoid of an extract of title and **Githi Mwangi & 4 Others v Joseph Mwai Kabiru (2005) eKLR** where the court held that non-compliance with the mandatory requirement of Order XXXVI Rule 3D (2) rendered the originating summons, i.e the main suit, incompetent.

Musyoka & Muigai Advocates for the Plaintiff filed submissions dated 18/11/2013. In respect to the objection of res judicata, counsel submitted that the objection did not meet the test of a pure point of law as certain facts have to be ascertained before the plea can lie. Secondly that the objection does not meet the conditions set out at Section 7 of the Act in that the issue in the present suit is that of adverse possession that is a preserve of the High Court which could not be raised in the Magistrate’s Court owing to jurisdictional limitations. Consequently, counsel submitted, this issue alone dislodges the plea of res judicata. Further that the issue at the Magistrate’s Court was that of specific performance arising out of a contract and adverse possession was never an issue in the said proceedings.

As regards the objection of Order 37 Rule 7, counsel submitted that the certificate of official search under the Registered Land Act (now repealed) was an equivalent of an extract of a title. Further that under RLA the title deed held by the registered owner was only prima facie evidence of ownership under Section 32 (2) of the Act and an official search issued under Section 36 (3) was conclusive evidence of registration under Section 37 of the Act. Counsel submitted that this regime was different from the Registration of Titles Act (repealed) where the title document issued to the registered owner was a counter part of the Deed File held at the Lands office and where an actual copy of the title duly certified would constitute the official search. Counsel urged the court that if it was inclined to find that there was a defect, to find that the same was curable by filing a further affidavit by annexing the proper document.

The first objection is in respect to the concept of res judicata. The issue arising from the submissions by made by the Plaintiff’s counsel is that the objection on res judicata does not meet the test of a pure point of law thereby offending the principle laid down in **Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696**. This submission is opposed by the Defendant’s counsel who submits that the objections raised are pure points of law. Both parties referred me to the **Mukisa Biscuit** holding to appraise myself of what a pure point of law is. It is clearly stated that it is a point either pleaded or arises out of clear implication out of the pleadings which if argued as a preliminary point has the effect of disposing of the suit. Additionally, it is argued on the assumption that all the facts pleaded by the other side are correct. Further, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Section 7 of the Civil Procedure Act bars a court from trying a suit or issue that is res judicata. In essence, it has the effect of determining a suit. Secondly, fact pleaded that there has been a previous suit that between the same parties over the same subject matter has been heard and determined is not in dispute. There are no facts to be ascertained, neither is the Defendant seeking the discretion of this court. In that regard, I find that the objection of res judicata is a point of law which can be argued as a preliminary point.

Having found that the objection raised can be argued preliminary the issue is whether the present suit is

res judicata. Section 7 of the Civil Procedure Act provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

The requirements for *res judicata* to arise as stated in the said section are that:

- a. ***There must have been a previous suit between the same parties***
- b. ***The issue before the court must have been finally determined in that previous suit.***
- c. ***The issue must have been determined by a court having competent jurisdiction.***

I have perused the Judgment in **Sarah Muthoni Kimani v John Wanyoike Gerald PMCC (Githunguri) No. 103 of 2010** where the Plaintiff prayed for an order for specific performance that the Defendant does transfer the title to the suit property to the Plaintiff, general damages and the costs of the suit. The issue in the present suit is acquiring title by operation of law, that is, adverse possession. The Defendant referred the Court to Explanation 4 submitting that the Plaintiff ought to have pleaded this aspect in the previous suit. As correctly pointed out by the Plaintiff, the court that has jurisdiction to adjudicate over a claim of adverse possession is the High Court as expressly provided for under Section 38 of the Limitation of Actions Act. It follows therefore that the adverse possession claim could not be pleaded at the lower court, and even if it were, the Learned Magistrate would be jurisdictionally challenged to adjudicate over it. I therefore find that the present suit is not *res judicata*.

In respect of the provision of Order 37 Rule 7 of the Civil Procedure Rules, the Defendant submits that the provision is couched in mandatory terms and dictates that the affidavit in support of the Originating Summons must have an extract of the title as its annexure and that a Certificate of Official Search is not sufficient. Thus, the suit is fatally defective. The Plaintiff on other hand is of the view that this is a technicality which is curable by filing a further affidavit to avail the correct document. This issue has been subject of numerous judicial decisions all of which are categorical that annexing an extract of the title is a mandatory requirement in pursuing a claim of adverse possession. **Order 37 Rule 7 reads:**

1. ***An application under Section 38 of the Limitation of 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.***

The purpose of annexing an extract of the title is t so as to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land. See **Symon Gatutu & 587 others v E.A. Portland Cement (2011) eKLR**. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession.

There is annexed to the Plaintiff's affidavit in support of the Originating Summons a certificate of official search. Counsel submits that the property having been registered under the Registered Land Act, an official search is an equivalent of an extract if a title. The question whether a certificate of official search suffices in place of an extract of a title was answered by the Court of Appeal in the case of **Johnson Kinyua v Simon Gitura Rumuri Civil Appeal 265 Of 2005 (Nyeri) [2011] KLR**

“Concerning the effect of failure to annex an extract of title we are of the view that nothing turns

on this as the disputed land is registered under the Registered Land Act, and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36 (2) of the Registered Land Act provides:-

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:-

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law.”

I am guided by the decision of their lordships that an certificate of official search is sufficient. However, I must satisfy myself that the said search must be duly signed by the Registrar, give particulars as to the date of registration of the Defendant, or of the date of issue of a title deed to the Defendant. On perusal of the search annexed and marked “SMK1”, I note that it was conducted on 24/6/2013. The same has been signed by the Land Registrar and reveals that title in favour of the Defendant was issued on 23/5/1990. It follows therefore that the court is able to make a determination as to whether the threshold of 12 years has been met for adverse possession to attach.

In the foregoing, the Defendant’s preliminary objection is dismissed.

Before I pen off, the Plaintiff requested that she be allowed to file a further affidavit to avail the extract of the title. Whilst the same is not necessary, in the circumstances, I opine that it does not hurt to have the same in the court record.

Dated, Signed and delivered this 22nd day of July, 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

..... Court Clerk

L.N. GACHERU

JUDGE