



Birunda Farm v Sawenja & 35 others (Environment & Land Case 71 of 2019) [2024] KEELC 1384 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 71 OF 2019**

**FO NYAGAKA, J
MARCH 12, 2024**

BETWEEN

BIRUNDA FARM PLAINTIFF

AND

PROTUS SAWENJA & 35 OTHERS DEFENDANT

RULING

1. The 2nd Defendant brought the instant Notice of Motion dated 12/06/2023 supported by his Affidavit which he swore the same date. He brought the Application under Order 2 Rule 15 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 3, 3A and 63(e) of the *Civil Procedure Act*. I need not consider that he brought it too under “All enabling provisions of the law” because the phrase is at best nothing but a hollow smokescreen. He prayed for orders that:

The Applicant’s Originating Summons dated 12th November, 2019 be struck out in limine.

2. He based the Application on the grounds that the Originating Summons (OS) was scandalous, frivolous and vexatious since it was based on a claim whose right of action has not accrued since the limitation period had not lapsed to allow the suit commence by way of adverse possession; that the Originating Summons was otherwise and abuse of the process of the Court and the Applicant lacked locus standi to bring the claim while the claim was sub judice. Also, that the OS was evasive, inconsistent and did not disclose any triable issues.
3. The Applicant deponed in support of the Application that he had read and understood the contents of the OS. He repeated the contents of the grounds of the application to stated why the Application should be struck out. His deposition was that the OS was premature since 12 years had not elapsed since the claim arose yet the titles complained of were issued in 2017. He annexed and marked as PS 1(a)-(o) copies of the titles to show they were issued in 2017.



4. He swore further that the OS offended Order 37 Rule 7 of the Civil Procedure Rules to the effect that the Claimant did not annexed the extracts of the titles as required by the said provision.
5. He deponed further that the OS was tainted with dishonesty and misrepresentation and designed to mislead the court. Then he deponed that the OS failed to disclose that the originator of the OS was non-existent and not an entity recognized in law hence the suit was a non-starter; that the originator of the OS did not have locus standi to act on behalf of the Birunda Farm Limited and for failing to attach the company resolution by the directors authorizing the filing of the suit as should be evidenced by Form CR 12 from the Registrar of Companies; the right sought to be enforced is in personum yet the suit is for rights in rem; Birunda Farm Limited was incorporated to purchase land on behalf of its 25 shareholders who upon purchase sold some of their shares or portions to buyers who now stood at over 100 who in turn sold the land to more purchasers numbering hundreds.
6. He deponed also that each purchaser has an interest in the farm and can trace his/its title to the individual shareholder who sold it; the titles annexed were being litigated over in different courts wherein the purchasers are claiming their titles from the shareholders from whom the land was bought; any suit to be brought ought to be maintained by specific individuals claiming his portion against the persons who sold it them rather than an omnibus suit; that the application was brought in bad faith; that it was misleading that no searches were obtained yet the Claimant in the OS would claim that there were title deeds over the parcels of land; that alleged actions of fraud have not been pleaded to warrant the Court to intervene; and the Summons do not raise any triable issue and the same was a mere sham not capable of any success.
7. He deponed further that it was in the interest of justice and the overriding objective of the Court that the OS be struck out. Further, that the proposal of fresh titling of the whole parcel would cause difficulties since most original shareholders are deceased so much so that identifying bona fide owners or purchasers would cause confusion, chaos and uncertainty since it took decades for the land in question to be redistributed.
8. The Application was opposed strongly through the Replying Affidavit sworn by Samwel Maikuva on 10/12/2023. Strangely the said Affidavit was drawn by learned counsel, one V. A. Shibanda & Company Advocates of P. O. Box 2504-50100, Kakamega, who act for the Plaintiff and it was commissioned before one, Sheila I. Shibanda of P. O. Box 2993-50100 Kakamega. Granted that the two learned counsel are not one and the same or from the same law firm, this Court proceeds to summarize the content of the Affidavit and consider the merits thereof.
9. The Deponent stated on oath that he was the Chairman of Birunda Farm as shown by the resolution marked SM 1 annexed to the Affidavit in support of the OS as sworn on 30/10/2019. He repeated that he was duly elected to represent the company vide the resolution referred to above. Further, that the Application was not based on cogent evidence, the OS raised triable issues hence he referred the court to the content of the Affidavit in support of the OS. He deponed that he believed he had complied with Order 4 Rule 1(4) of the Civil Procedure Rules about a verifying affidavit to a suit or claim being sworn by an officer of the corporation duly authorized under the seal of the company. That the suit was not premature as the applicants had lived on the parcels for over 30 years. He referred the Court to annexure SM 4 to the Affidavit supporting the OS. He stated that the current registered owners had obtained their titles by way of fraud in 2017 while the Plaintiffs were residing on the parcels and in the process of obtaining deeds to their respective parcels.
10. He deponed that the deed of surrender was issued to the Chairman of Birunda Farm by the government in 1998. He referred the Court to annexure SM 5 of the affidavit in support of the OS. He deponed that the Applicants had not shown how they had acquired the parcels of land, particularly whether they



were buyers or who owned the land before 2017 when the registered owners obtained titles. Further, that the current registered persons were not owners of the land and they had never resided on it prior to 2017 or even after but rather were strangers. Moreover, the title deeds were issued to deceased people who could not have capacity to attend Land Control Boards or obtain consents to transfer land. He referred the Court to annexure SM 6 of the Affidavit to the OS.

11. He challenged the deponent of the Affidavit in support of the instant application, one Protus Sawenja to produce a certificate to show that he was a shareholder or member of Birunda Farm and he explains how he acquired the land in Birunda Farm. Further, that the said deponent should explain how dead people signed the list of properties allocated to them as shown in annexure SM 14 of the Affidavit to the OS.
12. He deponed that the area list that gave rise to the current titles obtained fraudulently in 2017 was presented by a stranger and fraudster who purported to be a secretary of Birunda Farm yet the secretary of the company had already been registered by the Registrar of Companies as evidenced by annexure SM 14 referred to by him. Further, that the list prepared by the fraudster was approved by the County Commissioner one Ann Kigure without the approval of the members of the Farm. The current registered owners never applied to the land control Board and further no survey was done, and the owners only learnt of the fraud in 2019 when the Defendants attempted to evict some members of the farm.
13. His further deposition was that the list with current title deeds was dated 24/05/2017, and the members did not approve it. That one Protus Sawenja did not have any parcel of land but one which was in his mother's name and on which he and siblings lived on but currently he had seven (7) parcels registered in his name and others in his brothers' and sisters' names and their children who are minors.
14. He deponed further that Rael Sawenja had a case which Protus Sawenja referred to but it was dismissed. He referred to annexure 3b in the Affidavit to the OS. Further, that Protus Sawenja did not submit a deed of surrender but prepared a fraudulent list of purported company directors and manipulated shares and allocated different shares from the originally held ones and caused the manipulated ones to be registered.
15. He deponed that the plaintiffs were challenging the titles under Section 26(1) of the [Land Registration Act](#). His further deposition was that the Birunda Farm obtained consent to subdivide the land on 07/12/1990 and the land subdivide accordingly. He referred to annexure SM 7 in the affidavit to the OS. That the persons currently residing on the land had been on it for more than 30 years yet the defendants went behind their backs and obtained the titles. That Protus Sawenja wanted the suit to be struck out so that he and his accomplices get away with the illegality relating the obtaining of the titles.
16. He deponed that he was not a stranger to the proceedings but a member of the Birunda Farm. He invited the Court to carry out a visit to the suit land to confirm that the defendants did not reside on the Farm. Further, that on 01/10/1990 the area chief took down the names of the members of the farm, and the Defendants' names were not among them. He relied on the Court of Appeal decision of Francis Gicahru Kariri v. Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi).
17. Then he deponed that one Ben Wanambisi who was a member of the Birunda Farm passed away but his whole parcel of land was given to Protus Sawenja while the children of the deceased remained on the parcel and are threatened with eviction.
18. In relation to the locus standi, the deponed stated that he was duly elected on 30/08/2018 vide a meeting held on that date. He referred to annexure SM 1 to the affidavit to the OS. That Birunda Farm was a limited liability company as admitted in paragraph 7 of the supporting affidavit to the



instant application. He discounted that the Birunda Farm (limited) was incorporated to buy land for 25 original shareholders.

19. In regard to suit No. 60 of 2017 and E03 of 2021 whose complaints were attached to the affidavit in support of the instant application, they were filed after the institution of the instant suit while 91/2015 was dismissed on 13/11/2017. He pleaded that proper survey was necessary and fresh titles issued and that the suit was meant to solve permanently the problem of grabbing of land and wrangles in the farm. He prayed for dismissal of the application.
20. The Application was determined by way of written submissions. Only the Applicant's submissions were on the record. I will consider the submissions as I analyze and determine the issues that I consider pertinent herein.

Issue, Analysis and Determination

21. I have carefully considered the Application, the law on it, the Replying Affidavit, the submissions herein and I am of the view that five issues arise for determination in this application. First is whether the Plaintiff lacks locus standi for reason that the Plaintiff does not exist and for want of filing a company resolution to evidence he was authorized to bring the suit, whether the application suit competent or not, whether the suit is premature, whether the application is merited and who to bear the costs of the instant application and suit if the application succeeds.
22. In my view that the determination of the first two issues identified above will go to the root of the suit hence this Court proceeds to determine them first. This is because, depending on the finding of the Court on them, there may be no need to consider any other subsequent ones except costs.
23. Starting with the first issue whether the Plaintiff lacks locus standi to bring this suit because the Plaintiff does not exist and for want of authority by way of a resolution of directors to bring it, the issue is does not require rocket science to discern its import. The first limb of the argument is whether the Plaintiff exists in law. The law regarding institution of a suit of claim on behalf of an artificial person is that the Claimant or Plaintiff should be described with clarity and particularity bringing out its legal status or existence. While a misdescription or non-description of it is not fatal to a claim or suit it becomes important, particularly, when the adverse party raises the challenge of the legal existence of the entity.
24. The Applicant argued that the Respondent does not exist in law. The Plaintiff contended that it existed in law. It relied on the annexures marked as SM 1 which were the resolution of directors and minutes thereof. Further, Mr. Samwel M. Mikisi deponed that the Defendants had admitted to in paragraph 7 of their Replying Affidavit as to the existence of the Plaintiff.
25. Section 107 of the *Evidence Act* which is to the effect that he who alleges the existence or otherwise of a fact must prove it always ought to be complied with. The only exception to the requirement is in an instance where the law places the burden on the adverse party to discharge it. It was incumbent on the Applicant to prove that the Plaintiff did not exist in law. He ought to have produced evidence either from the records of the Companies Registry or the Registrar of Business Names, whichever was proper for his argument, to confirm that indeed the entity known as the Plaintiff did not exist. He did not discharge the burden.
26. Nevertheless, the Plaintiff strongly argued that it existed in law. Having set upon that trajectory it proceeded to rely on the annexure SM1 to the Affidavit sworn on 30/10/2019. It deponed at paragraph 30 (b) of the Replying Affidavit that Birunda Farm is a Limited Liability Company incorporated in the Republic of Kenya and that the Defendants admitted as much in paragraph 7 of the Relying Affidavit to the OS.



27. This contention made the Court to carefully analyze the document. The document dated 30/08/2018 whose subject is “Special General Meeting (Birunda Farm)” called for a meeting on 05/09/2018. Following that a meeting was held and its minutes were made. Though it is not shown when they were approved or even signed, they are typed on a document which the Court takes as a letterhead appearing as “M/S Birunda Farm, P. O. Box 120 - 30200 Kitale. They are headed “Minutes of Birunda Farm A.G.M Held on 5/9/2018”
28. To authenticate the two documents on them are affixed two different stamps. On the Notice dated 30/08/2018 the stamp reads “Birunda Farm Co. Ltd”. The Minutes bear a stamp affixed to the document. It reads “Birunda Farm”. Its features, especially the shape, are quite diametrically different from the stamp that bore “Birunda Farm Co. Ltd.” These two stamps and the documents referred to as SM 1 when compared with the OS pleading make the court to arrive at one inevitable conclusion: that the Plaintiff herein is not the company which is said to be a duly incorporated limited liability company. In any event the hand-made stamps affixed to the document cannot be equated in law as a company seal as contemplated in Order 1 Rule 1(4) of the Civil Procedure Rules. Such a seal ought to be one that is legally issued by the incorporating authority of the Republic of Kenya.
29. In the circumstances I hold that the Plaintiff does not exist in law and therefore cannot sustain a suit.
30. The above view is further buttressed by the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which provides that:
- “(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
31. Clearly, the provision refers to the verification of the contents of a Plaint or Claim in cases of a corporation which is as important and indispensable as where a claimant plaintiff or defendant who counterclaims is a natural person. This can only be done by the duly authorized person signing the verifying affidavit and affixing next to the signature the official seal of the company. What I see in the Verifying Affidavit sworn on 15/11/2019 is a mere (and bare) signature of one Samwel Maikuva Mikisi which is then commissioned. This does not accord with the law hence the entire OS cannot be said to have been accompanied by a verifying Affidavit.
32. The other issue that follows, which I need to determine, is whether the suit is competent before the Court. The applicant argued that the OS was not supported with an annexures of extracts of title as the law requires under Order 37 Rule 7 of the Civil Procedure Rules. Close to that argument was one that the claim for adverse possession was premature given that the titles impugned were issued in 2017 hence the 12 year period that would firm such a claim had not lapsed. He relied on Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. I will deal with the latter issue first so as to lay the basis for whether there was or was no need to annex extracts of title to the supporting Affidavit to the OS.
33. Indeed Section 7 of the *Limitation of Actions Act* provides that:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
34. But my understanding of the provision is that is a bar to any person who is an owner of a parcel of land which he/she has not been in occupation but which has been in occupation of another for over twelve



(12) years who decides to move the Court to recover the same. It is not the other way round as the circumstances of this case show. What I mean is that this provision affords a defence to someone who is on possession of land which the owner seeks to recover. It is not to be used by an adverse possessor as the basis to claim land. Instead, the adverse possessor moves the Court under Section 38 of the Act.

35. That said, in the instant suit, the Plaintiff is not seeking to recover land which it is not possessing. Instead it is indicating that if the Defendants want to recover the land they allege to be registered in their names, then they cannot. It is stating that it is occupying the land adverse to the owners. The reason they allege that to be so is because, irrespective of the registration of the parcels of land in favour of the Defendants, the Plaintiff has been in occupation of the parcels of land for over 30 years. That is borne out in Paragraph 8 of the Replying Affidavit.
36. One thing that comes out in the deposition in paragraph 8 is that it is not the Plaintiff herein that is in occupation of the parcels for over 30 years but “the applicants”. Who they are, this Court has not been informed by way of pleadings. If that position is anything to go by, then the Plaintiff cannot competently claim the parcels of land, whether by way of adverse possession, even if the occupation could be proved to be existing, open and uninterrupted for over 30 years: it can only be the occupants.
37. Be that it may, the fact that titles were issued in 2017 does not of itself rule of the filing of a claim for adverse possession by the adverse possessor. The question the court would grapple with but answer through evidence when such an issue would come before it is, who has been the owner before the 2017 registrations? This is important because adverse possession runs with the physical possession of the land, meaning that even if the title changes hands to another person, it does not extinguish the right of an adverse possessor to lay claim over the land he/she has been in occupation, upon proof. For this, refer to the case of Registered Trustee Catholic Diocese of Murang’a V Micere Njau & 3 Others [2022] eKLR where the court held:

“The defendants’ suggestion that the limitation period should start to run afresh from the moment they acquired new titles is for outright rejection. It has been held again and again for purposes of limitation of Actions does not stop to run on account of change of ownership of the land. A claim for adverse possession runs with the land irrespective of the change of ownership. A mere change of ownership does not affect a claim for adverse possession. The taking out of succession proceedings by the defendants in H.C Succession Cause No, 282/2006 (Embu) and the subsequent issuance of new titles to the resultant parcels was tantamount to nothing but an exercise in futility. The purported new titles were tiger papers which did not stop time from running for purposes of adverse possession.”

38. Thus, this suit may or may not be premature depending on the evidence that would be given of the same were to be heard. But having found as above, the only remaining question on the twin issues that were for determination is whether the suit is competent as to warrant it proceeding for trial. The Applicant argued that the suit ought to be struck out because the Affidavit in support of the OS did not annex to it extracts of title as Order 37 Rule 7 of the Civil Procure Rules require. Order 37 Rule 7 if to the effect that:

“ 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.”



39. From the above provision it is clear that for a party to sustain an OS where he claims land by adverse possession, under Section 38 of the [Limitation of Actions Act](#), he/she/it has to support the OS with an Affidavit to which shall be annexed an extract of title. Without an extract of title one cannot tell who the registered owner of the land in question is. Adverse possession does not hang on empty rhetoric, imagination or conjecture. It must be against a person whom the law recognizes to the root of the title that he/she/it is the lawful owner of the land in question. Anything else, for instance, a certificate of official search cannot suffice. The ownership must be proven by the extract of title.
40. In the instant case, none of the extracts were annexed to the Affidavit sworn by Samwel Maikuva Mikisi on 30/10/2019. What he evidenced as ownership of the many parcels of land he referred to in paragraph 2 of the Affidavit is a list of owners and plot numbers. He referred to it as annexure SM 2. As I have stated above, no other documents can substitute “an extract of title” as contemplated in Order 37 Rule 7 of the Civil Procedure Rules, 2010. In the circumstances the suit herein is incompetent and the best the Court can do is to strike it out. I therefore need not go into the determination of the other issues.
41. The upshot is that the Application dated 12/06/2023 is allowed. Since there was no prayer in it for costs I award none. Since the Application has succeeded, the Originating Summons herein dated 12/11/2019 and filed on 13/12/2019 is struck out. Each party to bear own costs.
42. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED IN VIA ELECTRONIC MAIL THIS 12TH DAY OF MARCH 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE.

