



**Kakindu v Abdulla (Land Case E009 of 2022) [2024] KEELC 4094 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4094 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
LAND CASE E009 OF 2022**

**AE DENA, J**

**MAY 21, 2024**

**BETWEEN**

**HUSSEIN NJERU KAKINDU ..... APPLICANT**

**AND**

**FARIDA HARUN ABDULLA ..... RESPONDENT**

**RULING**

- 1 This suit was commenced by way of originating summons claiming adverse possession of Plot No. Kwale Township/13 (suit property) by dint of section 38 (2) of the *Limitations Act* Chapter 22 Laws of Kenya. The suit is defended by the said Farida Harun Abdulla via Replying affidavit sworn on 7/11/2022. The Respondent denies she is the registered owner of the suit property.
- 2 The subject of this ruling is the application dated 15/07/23. The application is brought by the Respondent seeking the following orders;
  1. THAT the Originating Summons dated 13<sup>th</sup> October 2022 be struck out and the Applicants application be dismissed with costs to the Respondent/Applicant as the same is an abuse of the court process.
  2. THAT the costs of this application be provided for.
- 3 The application is supported by the grounds on its face and the affidavit of Farida Harun Abdulla. It is contended that the Respondent is not the registered owner of the suit property but the County Government of Kwale. That the Respondent was allocated the same by the County's predecessor to develop. That no title has been issued to the Respondent which can be said to have been extinguished under the *Limitation of Actions Act*. Further that no abstract of title to the land they adversely claim has been attached contrary to the Mandatory provisions of Order 37 Rule 7(2) of the *Civil Procedure Rules* rendering the application fatally defective.



- 4 The application is opposed through the replying affidavit sworn by Hussein Njeru Kakindu sworn on 24/08/23. It is deponed that he has been diligently paying land rates for many years. That Farida Harun Abdulla has not denied she was allocated the suit property. That she has never developed or resided therein. That any land that the owner has been absent or failed to occupy for whatever reason whether it is registered under the County government or national government can be subject to adverse possession provided that the 12 years uninterrupted occupation is proved.
- 5 It further deponed that the county government has not digitised their records nor do they have a system of being able to provide a search to the said plots hence the deponent's reliance on the demand notice for rates clearance paid by Hussein Njeru Kakindu. That striking out the suit will be prejudicial to the Applicant in the main suit herein as he had developed the same over the years.
- 6 The application was dispensed by way of written submissions.
- 7 The Respondent/Defendant filed their submissions on 19/2/24. It is submitted that pursuant to section 38 of the Limitation of Actions Act the suit property is not amenable to a claim for adverse possession as it is unregistered land. That Order 37 rule 7 (1) of the Civil Procedure Rules makes it mandatory that the summons commencing a suit for adverse possession shall be supported by an affidavit to which is attached a certified extract of a title. Further that since the suit property belongs to the County Government of Kwale it protected under section 41 of the Act. The case of Onghwen & Another Vs. Keya & Another (2023) eKLR is cited.
- 8 The Applicant/Plaintiff filed their submissions on 11/3/24. Citing article 40 of the Constitution it is submitted that every person has a right to acquire land through leasehold or freehold. That the suit property is not un-alienated government land by private land. That a letter of allotment from the county government serves as title and it is enough proof of ownership. The court is referred to Wreck Motors Enterprises Vs. Commissioner of Land and 4 others C.A No. 71 of 1977 (1997) eKLR. It is further contended that Section 37 of the Limitation of Actions Act applies to leasehold land. That the suit property is a leasehold interest in which the Applicant is trying to get prescriptive rights of the unexpired term. That there would be no person that would proceed to make payment for land rate unless he or she is owner and is well recognised by the county.
- 9 It is further submitted on behalf of the Plaintiff that it was upto to the allottee being the Respondent to process title for the suit property she was allotted which she is yet to do. That the Plaintiff has met all the factors required for one to seek adverse possession as set out in Mbira vs. Gachihi 2002 1 EALR 137. That allowing the application will condemn the Applicant unheard. Further that the Respondent has no locus to represent the Department of Land Kwale County.

## Determination

- 10 The main issue for determination is whether the suit should be struck out.
- 11 The application has been brought under the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Order 2 Rule 15 (1) (d) of the Civil Procedure Rules 2010.
- Order 2 Rule 15 provides as follows; -
- Striking out pleadings [Order 2, rule 15.]
1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
    - (a) it discloses no reasonable cause of action or defence in law;



- (b) or it is scandalous, frivolous or vexatious;
  - (c) or it may prejudice, embarrass or delay the fair trial of the action;
  - (d) or it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.

12 The above provisions have been the subject of determination in various cases notably in *D.T. Dobie & Co. (K) Ltd Vs. Muchina* (1982) eKLR the court stated

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bid summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. On the other hand if there is a point of law which merits a serious discussion the court should be asked to proceed under order XIV rule 2.

13 In the case of *Crescent Construction Co Ltd Versus Delphis Bank Limited* [2007] eKLR the Court of Appeal emphasized that the power to strike out pleadings is discretionary and there is need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings. That this comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. The court however pointed that at the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter.

14 The application to strike out the suit herein is on the basis of Order 37 rule 7 (1) of the *Civil Procedure Rules* and read together with Section 38 of the *Limitation of Actions Act* which provide respectively as follows;-

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. (3) The court shall direct on whom and in what manner the summons shall be served



“38. (1) 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.”

15 Guided by the law and judicial decisions above I will proceed to review the application and the pleadings filed in this matter while at the same time avoid getting into the merits of the case. The first issue to interrogate is whether the suit offends the provision of Order 37 and specifically Rule 7 (2) as to the requirement to attach a certified extract of the title. The suit property is described at paragraph 2 of the Originating Summons thus

‘.....which said piece of land is comprised in an allotment letter registered in the County Government of Kwale and is delineated, demarcated and described on the allotment letter issued by the County Government.....’

16 The essence of the above provisions in my view is to prove that the property is registered and or leased in the name of a third party. Firstly, the said letter of allotment allegedly issued in the name of Farida Harun Abdulla the Respondent is not attached as the ‘title document’ Mr. Kakindu purports to be in adverse possession of. Further the deponent instead attaches at paragraph 3 of the supporting affidavit to the Originating summons a copy of the demand for clearance of rates and which demand notice is not addressed to the said Farida Harun Abdulla but to the deponent. Certainly a demand notice is not a title and cannot be justified as one.

17 Thirdly assuming the allotment was attached it is trite that an allotment letter is not a title until it is perfected by registration – see the case of *Torino Enterprises Ltd Vs. Attorney General* (Petition 5(E006) of 2022 (2023) KESC 79 (KLR) where the Supreme Court of Kenya elucidated on the legal implications of a letter of allotment on property rights.

18 Based on the foregoing therefore in the absence of a document of title in the name of the Respondent Farida Harun Abdulla the provisions of order 37 Rule 2 have not been satisfied making the application defective.

19 The question that arises is can the suit be salvaged to ensure the litigant is not chased away from the seat of justice. Based on guidance from the authorities cited one intervention would be by amending the suit to inject some life into it. But I’m afraid the only amendment that would inject life into the title would be to describe the suit property by its registration and annexing a title or lease in the name of Farida Harun Abdulla. It is clear from the pleadings that there is no title that has been issued in the name of the said Farida Harun Abdulla.

20 Based on the above clearly it would be unfair to drag Farida Harun Abdulla to the seat of justice when the case purportedly brought against her is obviously a non-starter and however much the court would have desired to invoke its discretion, its hands are tied.

21 The upshot of the foregoing is that I find the application dated 15<sup>th</sup> July 2023 has merit and the same is allowed. The suit herein is struck out for the reasons cited. There will be no orders as to costs.

**DELIVERED AND DATED AT KWALE THIS 21<sup>ST</sup> DAY OF MAY, 2024**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Kabiaro holding brief for Ms. for Applicant/Respondent



Mr. V. Omollo for the original Respondent

Mr. Disii – Court Assistant

