REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA APPEAL

AT NAIROBI

Civil Appeal 25 of 2002

MUCHANGA INVESTMENTS LTD ……. APPELLANT

AND

SAFARIS UNLIMITED (AFRICA) LTD ……..1ST RESPONDENT

REGISTRAR OF TITLES ……..…… 2ND RESPONDENT

ATTORNEY GENERAL ….……..……. 3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Khamoni, J) dated 2nd March, 1999

in

H.C.C.C. NO. 133 OF 1998(O.S)

****

JUDGMENT OF THE COURT

In this appeal, the appellant ***Messrs Muchanga Investments Limited*** is aggrieved by a half page ruling of the superior court ***(Khamoni, J)*** given against it ten years ago. On 2nd March, 1999, the court refused to strike out an Originating Summons dated 29th January 1998 which sought the extension of a caveat registered against the property LR 5386/3 owned by the appellant. The Lands Department Central registry in Nairobi had registered the caveat on 4th May 1994 on the application of Safari Unlimited (Africa) Ltd the respondent herein. In the application for registration the respondent company, claimed:

"***Purchaser's and adverse possessor's interest pursuant to section 75(6) of the Constitution of Kenya (8.c) heads of agreement signed by the registered owner and its directors being the party to be charged under and for the purpose of section 3(3) of the Law of Contract Act Cap 23 Caveators possession since 1969 part II Cap 22 in LR 3586/3."***

After the registration of the caveat on the above grounds the registrar of titles served the respondent company (caveator) with a notice to remove the caveat, within 45 days of the 9th December 1997."

Arising from the above, the 1st respondent ***Messrs Safaris Unlimited (Africa) Limited*** filed an Originating Summons dated 29th January 1998. The Originating Summons as subsequently amended

sought to have a caveat registered in favour of the respondent company over L.R. 3586/3 extended beyond the 31st January 1998 pending the full determination of the suit. The Originating Summons also prayed that an inquiry as to the rights of the 1st respondent relating to property L.R. No.5386/3 be determined as the 1st respondent was in adverse possession.

Upon service of the Originating Summons (OS) on the appellant company, ***Messrs Muchanga Investments Ltd,*** it filed a Chamber Summons pursuant to Order VI 13(1)(d) and rule 16 of the Civil Procedure Rules.

The Chamber Summons sought the following orders:

1. That the Originating Summons filed in this suit and or the entire suit or claim against the first defendant (the appellant) be struck out as being an abuse of the process of the court.

2. That the costs of the suit and of this application be paid by the plaintiff (respondent).

The grounds in support of the application were set out as under:-

a) the entire suit is based on false, misleading and perjured evidence.

b) on its own written admission the plaintiff occupies the suit premises as a tenant of the first defendant and cannot be in adverse possession in the circumstances.

c) the plaintiff does not have and there is no evidence adduced to show that the plaintiff has a purchaser's interest in the suit property to warrant extension of the caveat in issue.

It is common ground that property L.R.No.3586/3 is registered in the name of the appellant company.

In support of the Originating Summons ***Mr Antony Howard Victor Church***, a director of the 1st respondent company swore an affidavit on 21st January 1998 and deponed inter alia, that he has been in occupation of the suit property since 1969 and that in 1978 the whole property was bought by the appellant. ***Mr Church*** further deponed that on or about 1st September 1993, some 15 years since the appellant company bought the property and 19 years since the death of the original owner, he noticed an advertisement in the Standard Newspapers purporting to announce the sale of the land on which he believed he was an adverse possessor. Following the advertisement of the intended sale, the 1st respondent company had a caveat registered over L.R. 3586/3 to protect the 1st respondent and ***Mr Church's*** adverse possession. In support of the Originating Summons ***Mr Church*** a director of the 1st respondent company deponed that he had been in occupation of property L.R.3586/3 since 1969 and knew the owner of the property and was aware that the appellant company had bought the property in 1978 and that (he) ***Mr Church*** had no formal relationship with the appellant. He further avers that he registered a caveat against the property in May 1994. ***Mr Church*** subsequently filed an Originating Summons wanting to have the caveat extended as narrated above and following the application for extention of the caveat the appellant company decided to challenge the Originating Summons whereupon, ***Mr Horatius Da Gama Rose***, a director of the appellant company filed an application to strike out the Originating Summons. In an affidavit sworn on 9th April 1998 in support of the application to strike out Originating Summons, ***Mr Horatius Da Gama Rose*** deponed that the 1st respondent company is the registered owner of property L.R.No.3586/3 with effect from 11th February 1983 and the land measures appropriately 140 acres and that the correct value is approximately Kshs 400 million. From the affidavit of ***Mr Church*** in support of the Originating Summons the following facts have emerged.

a) ***Mr Church*** claims to have been in possession of the suit property since 1969.

b) ***Mr Church*** admits in para 5 of his affidavit that the property was bought by the 1st respondent and that he, ***Mr Church*** has no formal relationship with the 1st respondent.

c) In para 6 he alleges that he is an adverse possessor of the suit property.

d) In paragraph 7, ***Mr Church*** claims that the extension of the caveat has been sought to protect his interests and those of his company.

e) That if the property was alienated ***Mr Church*** would suffer irreparable loss as his home and business headquarters would be lost and if the caveat was removed his rights and interests and those of the 1st respondent company would be violated.

The appellant's case as set out in the affidavit of ***Horatius Da Gama Rose,*** a director of the appellant company is:-

(i) That it is clear from the pleadings that ***Mr Church*** is not a party to the suit.

(ii) That a caveat cannot be extended on behalf of a stranger to the suit.

(iii) There is no evidence to show that any caveat was ever registered on behalf of ***Mr Church***.

(iv) That in the Originating Summons itself the 1st respondent company did not adduce any evidence in support of the claim for adverse possession because the affidavit in support of the summons only refers to possession by ***Mr Church*.**

(v) No evidence was produced or adduced to establish the 1st respondent company had a purchaser's interest by way of a sale agreement.

(vi) The 1st respondent company and ***Mr Church*** failed to disclose to the court that ***Mr Church*** had through several letters, exhibit HDR 2, clearly admitted that he was in possession of the land as a tenant, as reflected in letters written by the 1st respondent between 1990 and 1996 as follows:

Letter dated 1/8/1990 - written to Kenya Power & Company Limited on the notepaper of Safaris Company Unlimited.

Letter dated 17/8/1992 - written to the appellant company on notepaper of the 1st respondent company

Letter dated 1/9/1993 - written to ***Horetius***

Da Gama Rose by the 1st respondentLetter dated 9/1/1996 - written to a third party in a neighbouring property.

That the letters admitting that ***Mr Church's*** possession was pursuant to a tenancy were addressed by the 1st respondent and a third party on the first respondent's notepaper long before the suit was commenced. The chamber application dated 18th August 1998 set out the above factual ground in the affidavit in support.

The Chamber Summons dated 18th August 1998, seeking the striking out of the originating Summons was dismissed by ***Khamoni, J*** on 2nd March 1999.

We consider it important to set out the ruling in full:-

"**From what has been brought to my attention during the hearing of the 1st defendants Chamber Summons dated 18th August, 1998, I am not persuaded to agree that the plaintiff's Originating Summons herein constitutes an abuse of the process of the court.**

All that has been brought to my attention is evidence on both sides which the contending parties intend to adduce at the hearing of the Originating Summons to establish their respective cases.

That evidence is yet to be tested canvassed and evaluated and I do not think this is a case which (sic) the plaintiff claim should be dismissed summarily.

In the circumstances therefore the Chamber Summons be and is hereby dismissed with costs to the plaintiff."

The appellant filed an appeal against that decision in this Court and relies on the following grounds:-

1. "The learned judge erred in dismissing the appellant's chamber summons application dated 18th August 1998 without considering the merits thereof as provided by law.

2. The learned judge erred in his evaluation of the evidence before him when he failed to find and hold that on the 1st respondent's own written admission, the 1st respondent occupies the suit premises as a tenant of the appellant and it could not in the circumstances claim that it is entitled to the suit premises by reason of adverse possession.

3. The learned judge erred in his evaluation of the evidence before him when he failed to find and hold that there were obvious and glaring contradictions in the 1st respondent's originating summons which rendered the whole suit or claim an abuse of the court process as follows:-

a) The claimant for the relief of specific performance in the said originating summons was the 1st respondent; and

b) The evidence adduced by the 1st respondent in support of the said relief clearly shows that the person or party who alleges to be entitled to the suit premises by reason of adverse possession is one ***Anthony Howard Victor Church***.

4. The learned judge erred when he failed to find or hold that there was no claim let alone evidence to show that the 1st respondent is a purchaser of the suit premises to entitle it to extend the caveat as registered against the property.

5. The learned judge erred when he failed to find or hold that the 1st respondent could not claim to be entitled to the suit property as a purchaser and adverse possessor at the same time.

6. The learned judge erred when he failed to find or hold that the whole suit was based on false, misleading and perjured evidence and was therefore an abuse of the court process.

7. The learned trial judge erred in not holding or finding that the amended application of the 1st respondent by way of Originating Summons for extension of the caveat was frivolous or vexatious as also otherwise an abuse of the process of court as it did not show a prima facie case with a probability of success.

8. The Learned trial judge erred in not finding or holding or evaluating from the evidence before him that the caveat was bad in law and invalid as it absolutely prohibited or restricted dealings with the whole piece of land comprising about 140 acres while the alleged interest if any of the 1st respondent was limited to only a portion of the said land not exceeding 3 acres or thereabouts.

9. The learned trial judge erred in not holding or finding or evaluating that the only issue before it for adjudication was the extension of a caveat and basing his ruling or decision only on such issue."

Section 3(3) of the Law of Contract Act Chapter 23 which came into force on 1st June, 2003 and was

relied on states in part, as follows:-

"**No suit shall be brought upon a contract for the disposition of an interest in land unless:**

a) the contract upon which the suit is founded:

i. is in writing

ii. is signed by all the parties thereto; and

b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

In his submissions, ***Mr Ngatia*** the learned counsel for the appellant stated that the superior court had before it the letters described above, admitting that ***Mr Church*** was a tenant and as he was the Managing Director of the 1st respondent company, it must be taken to have been a tenant as well. In particular he submitted that ***Mr Church*** in the letter of 1st August 1990 forwarded some cheques to the Kenya Power & Lighting Company. In the letter written on the notepaper of the 1st respondent company, the company stated:-

"**As you know, I am merely a** *tenant* **but am prepared to finance up-rating from the meter board to the main house as soon as you provide a guarantee and steady regulation voltage to the cut out at the meter board serving the main house."**

In the letter of 17th August 1992 the tenancy was acknowledged thus:-

"**Please inform us if this cheque arrives and it can be put against the rent due for the month of September 1992."**

The respondent company and ***Mr Church*** on 1st September, 1993 wrote to the appellant's director, ***Mr Horatius Da Gama Rose*** as under:-

"**Naturally I am now placing my request for you to preserve the three acres already promised which includes the old castle and my residence and out buildings as agreed at our earlier meetings. I would like an option on a few more acres around the designated three acres which will provide me with a little more space."**

Again on 9th January 1998 the respondent company and ***Mr Church*** wrote to a third party:

"***The borehole in question is situated on L.R. 3586/2 owned by*** *Ms Muchanga Investments Ltd.* ***We are the tenants and have operated the borehole since it was restored …"***

The learned counsel submitted that the request to purchase 3 acres contained in the letter of 1st September, 1993 in law, constituted an option to purchase. It was also contended by the learned counsel that at page 13 of the record, the caveat is registered pursuant to section 75(6) of the Constitution and also pursuant to a claim based on adverse possession. The learned counsel persuasively argued that the two claims upon which the caveat was registered namely adverse possession and a purchaser's interest cannot co-exist in law rendering the suit frivolous. He drew the Court's attention to the fact that the respondents never produced any sale agreement and therefore no suit could be instituted in the face of section 3(3) of the Law of Contract Act which came into operation on 3rd August 1993. He concluded by stating that the ruling of the superior court had a serious misdirection in that there was no further evidence to be brought at a later date as the court had everything before it and that the only issue for determination was whether or not the caveat could in the circumstances be extended, and this issue cried out for immediate determination. He argued that the court contravened the provisions of Order 20 rule 4 of the Civil procedure Rules. In short, he stated that failure to give an immediate determination was abdication of the

court's role as per this provision. He further submitted that the evidence tendered by the appellant especially the admission contained in the exhibited letters did not require to be canvassed, tested or evaluated at a later date and that the state of the court file was such that the parties had exhibited all the documentary evidence the court needed for a final determination concerning the legality of the caveat. He also made reference to section 121 of the Evidence Act which states:-

"**No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property, and no person who comes upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time the licence was given."**

Mr Mwenesi the learned counsel for the 1st respondent submitted that the learned judge exercised a judicial discretion to allow the parties to ventilate their respective positions at a later date and that he was perfectly entitled to do that. He referred the court to the record of appeal where the 1st respondent's director maintains that there is no evidence produced by the appellant of a valid tenancy, and that there was in fact no enforceable tenancy agreement under section 32 of the Registration of Titles Act. As regards the letters marked "HDR 2" admitting existence of a tenancy the learned counsel submitted that ***Mr Church*** wrote the letters as a layman. He urged us to find that this is not a proper case for this court's intervention in exercise of this Court's powers under section 3 of the Appellate Jurisdiction Act.

He added that the issue of adverse possession was indeed a matter of evidence and that the court was correct in dismissing the application to strike out so that the matter could be heard on merit. On the authorities cited by ***Mr Ngatia***, he suggested that they could only be relevant if the Originating Summons were to be heard on merit and that the right of access to court could not possibly constitute abuse of the court process.

Arising from the foregoing and in particular the ruling of the superior court, grounds of appeal as set out above, the authorities cited and the submissions of counsel the critical points for determination are:-

1) Does section 57 of RTA contemplate a summary procedure or a trial.

2) Were the respondents entitled to register a caveat in law and what is the role of the court when the application to extend a caveat is made.

3) Did the institution of the Originating Summons as framed constitute an abuse of the court process.

On the first point for determination section 57(1) and (8) respectively of the Registration of Titles Act provide:-

(1) "**Any person claiming the right, whether contractual or otherwise, to obtain some defined interest in any land capable of creation by an interest registrable under this Act, and any person in whose favour a debenture has been executed by a company within the meaning of the companies Act or by a company to which part X of that Act applies creating a floating charge over land (hereinafter called the caveator), may lodge a caveat with the registrar of the registration district with which the land is situated forbidding the registration of any dealing with the land either absolutely or unless the dealing is expressed to be subject to the claim of the caveator as may be required in the caveat or to any conditions conformable to law expressed therein."**

(8) "**The caveator may either before or after receiving the notice from the registrar, apply by summons to the court for an order to extend the time beyond the forty five days mentioned in the notice, and the summons may be served at the address given in the application of the caveator, and the court may upon proof that the caveatee has been** *summoned and upon such evidence as the court may require make such orders in the matter either ex-parte or otherwise as it deems fit."*

On the basis of the provisions of section 57 of the Registration of Titles Act, it is clear that a caveat may be registered only pursuant to a contractual relationship or otherwise. However, it is expressly provided that the interest being claimable must be such as is registrable under the Act. With respect, the documents presented to trial court by the parties did not disclose the existence of any contract. In addition there was no registrable interest in terms of the section in that neither the admitted tenancy nor adverse possession as at the date of the suit were registrable interests pursuant to section 57 of the Registration of titles Act. This is evident from the reading of the section. It should have been clear to the court that a caveator cannot just claim a purchaser's interest unsupported by a sale agreement. Similarly, a claim based on adverse possession is not capable of being registered under the Registration of Titles Act. A claim based on adverse possession is not a defined interest and its existence was a matter of proof of possession, adverse to the registered owner. The statutory basis for claims based on adverse possession is not the Registration of Titles Act under which the suit property is registered but sections 37 and 38 of the Limitation of Actions Act. We are of the view that evidence of adverse possession in the exhibited application for registration of the caveat contained two inconsistent interests namely an unproven purchaser's interest and a claim based on adverse possession. The conflict is clearly apparent on the face of the application for the registration of the caveat and this was placed before the trial court. We think this is all the learned judge needed in order to determine the matter in a summary manner as contemplated by the provision of section 57 (8) as reproduced above. There is even a provision for the making of an ex-parte order.

On the basis of the letters of admission we think that ***Mr Church*** and by extension his company were tenants and tenants in possession have no adverse possession. Time cannot run in their favour until the tenancy is terminated. The situation of a tenant as far as adverse possession is concerned is similar to that of a licencee and we therefore re echo the decision of this Court cited by the learned counsel for the appellant, namely, the case of ***WAMBO v NJUGUNA 1983 KLR 172*** at holding 4 where the Court held:-

"**Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."**

In ***BOYES v GATHURE 1969 EALR 385*** the predecessor of this Court held:-

"**the nature of the registrable interest claimed was not disclosed by the caveat, and it should have been rejected by the Registrar."**

By analogy and on the basis of the unchallenged documentary evidence, the court should have summarily done the same in the circumstances. Moreover, we are of the view that the registration of a caveat over the larger portion of 140 acres while the claim was not based on contract but on an option to purchase 3 acres, oppressive and the court ought to have dismissed the application as held in the ***BOYES*** case (ibid) see letter ***F to G at page 388.***

In the case of ***SAMUIEL MIKI WAWERU v JANE NJERI RICHU C.A. NO.122 OF 2001 (UR)***, this Court said:-

It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise. Further as the High Court correctly held in *JANDU v KILIPAL [1975]EA 225* **possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of** *SISTO WAMBUGU v KAMAU NJUGUNA (1982-88)* I KLR – 217 **relied on by** *Mr Gitonga*, **learned counsel for the appellant seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a licence or possession of such land only after the period of validity of the contract unless and until the contract of sale, has first been repudiated as required by the parties in which case adverse possession starts from the date of the termination**

of the contract."

As regards the application of the Law of contract Act we think that nothing turns on it, since it came into force on 1st June, 2003 long after registration of the caveat.

We hold the view that a mere claim of a contractual right in the land is not sufficient to give rise to a registrable interest unless the contractual right is capable of crystallizing into an interest in land – see ***WILLIAM v DOCKS … 2004 MBCD COM LII.***

Under section 57(8) once the Court is satisfied that the caveatee has been summoned, it is required to make an order whether to extend or to discharge the caveat. As at the point the matter went before the superior court, in the form of an application to strike out the Originating Summons seeking extension, the documentary evidence availed to the court did not with respect, disclose any interest capable of supporting registration or extension of a caveat.

In the ruling, the superior court states that both parties had presented evidence for hearing at a future date. We do not agree. It is clear from the exhibits in support of the application to strike out the Originating Summons namely in the bundle of letters admitting tenancy by ***Mr Church*** and the 1st respondent company, it was not proper for the superior court to have deferred the matter. Proof of tenancy as per those documents was inconsistent with adverse possession and the fact was apparent on the face of the application for registration of the caveat and consequently, and we say so with respect, this in turn, merited immediate determination by that court. Thus, it was made clear to the superior court that ***Mr Church*** was in occupation of 3 acres out of 140 acres and was further trying to negotiate an option to occupy additional acreage around the three acres, yet the court by failing to give a determination allowed the continued registration of the caveat over the entire land of 140 acres for a period over 10 years. We find that the registration of the caveat over the whole land was oppressive and not contemplated by section 57 of the Registration of Titles Act.

The Court's view that possession grounded on contract cannot be the basis of a claim for adverse possession is shared by the Court of Appeal in the UK. In the case of ***HYDE v PEARCE 1982 ALL ER 1029*** – see holding (2) that Court stated:

"***However since the plaintiff in bringing his action against the defendant had relied on the existence of a contract of sale to support his continued occupation of the property, and since he could have set up the contract as a valid defence to any proceedings brought against him for possession, he could not thereafter assert that he had obtained a title by adverse possession."***

Similarly the right of first refusal or first offer to purchase as claimed by the 1st respondent and ***Mr Church,*** is not caveatable. In the Canadian case of ***KADYSCHUK v SAWCHUK 2006 MBCA 18 (COM LII***) in the state of Manitoba the Court observed at page 5:

"***That a right of first refusal is a right in contract but does not create a present interest in land, a requirement for the filing of a caveat."***

Here at home in ***CIVIL APPEAL NO. 179 of 1997 J.P. MACHIRA t/a MACHIRA & CO. ADVOCATES v WANGECHI MWANGI & ANOTHER (unreported) Akiwumi JA*** in a majority decision said:-

"**I think that as is required by Order XX rule 4 of the Civil Procedure Rules in respect of judgments, a ruling in an application which is opposed such as the one made by the appellant and opposed by the respondents, must be self contained and should contain a concise statement of the case, the points for determination, the decision thereof and the reasons for such decision. This I fear he did not endeavour to do. He therefore exercised his discretion improperly."**

With respect, the terse ruling by the superior court as reproduced above in full does contravene this Order and we do frown upon it on this point as well. On the second point, the pleadings patently show that ***Mr***

Church was not party to the suit and the 1st respondent Company of which he was a director had neither possession nor a sale agreement to support the registration of any caveat. ***Mr Church*** in his letter had clearly admitted that he had no formal relationship with the appellant. From the foregoing, it is clear to us that the Originating summons was not properly grounded in law, taking into account documentary evidence before the Court. Again with respect, there was nothing for the superior court to defer for determination at a future date and we think in the circumstances, it did exercise its discretion wrongly. A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.

Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.

We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized. We are certain this is what is contemplated by section 57 of the Registration of Titles Act cap 281 and also Order 36 of the Civil Procedure Rules.

We approve and adopt the principles so ably expressed by both ***Lord Roskil*** and ***Lord Templeman*** in the case of ***ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486*** at page 488 where ***Lord Roskil*** states:

"**It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

At page 493 of the same case ***Lord Templeman*** delivered himself thus:

…"**an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

To underscore the point that the learned judge should not have dismissed the application to strike out, it is important to touch on the law relating to Originating Summons.

This Court, in the case of ***MUCHERU v MUCHERU [2002] 2 EA 455*** held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved ***Sir Ralph Windham CJ"s*** holding in ***SALEH MOHAMMED MOHAMED v PH SALDANHA 3 KENYA SUPREME COURT (MOMBASA) Civil Case Number 243 of 1953 (UR)*** where his Lordship said:-

"**Such procedure is primarily designed for the summary and "ad hoc" determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible** *and be heard in chambers unless adjourned by a judge into court."*

In the case of ***FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR*** at page 6 where the Court said:-

"**Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and**

determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

Finally, the ***third point is***, whether in the circumstances the respondents had abused the process of the court. We must therefore determine if, in the circumstances the Originating Summon as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after ***Mr Church*** had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and ***Mr Church*** did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in ***WIKIPEDIA***, the free encyclopedia:

"**The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."**

In ***BEINOSI v WIYLEY 1973 SA 721 [SCA]*** at page 734F-G a South African case heard by the Appeal Court of South Africa, ***Mohomad CJ***, set out the applicable legal principle as follows:-

"**What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."**

Again the Court of Appeal in Abuja, Nigeria in the case of ***ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656***, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of ***KARIBU-WHYTIE J Sc*** in ***SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)*** the concept of abuse of judicial process was defined:-

"***The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"***

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

It is therefore clear to us that the Originating Summons seeking an extension of the registration of a caveat and which is not supported by a sale agreement as in this case and which purports to be based on adverse possession must constitute an abuse of court process because section 57 does not support such a position and it clearly defines instances where registration of caveats and extensions are permitted. In addition, it is trite law, that claims based on adverse possession are regulated by the Limitation of Actions Act and not by section 57 of the Registration of Titles Act Chapter 281. Any claim based on adverse possession should have been instituted as provided in section 38 of the Limitation Actions Act.

The filing of the Originating Summons has resulted in a ten year delay in attaining justice. It has also, therefore offended the public interest, reinforced by the current emphasis on efficiency and economy in the conduct of litigation in the interests of the parties and the public as a whole.

Perhaps we should add that this case is also a serious indictment to the counsel handling the matter in that although in the last 10 years, they could have set the case down for hearing in the superior court, they failed to do so and as a result perhaps the free use of prime land measuring 140 acres has been hampered, obviously due to what appears to have been a lapse on the part of both counsel and poor case management.

For the above reasons we allow the appeal, set aside the order of the High Court and substitute an order dismissing the Originating Summons with costs to the appellant. Considering what we said earlier that there was delay in the superior court in taking steps to have the matter heard, we express our displeasure concerning that conduct by the advocates. In future this Court might be compelled to penalize the advocates found guilty of that behavior.

Dated and delivered at Nairobi this 5th day of June, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR