REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 142 OF 2013

(*Formerly* NAIROBI HCCC NO. 307 OF 1995 (O.S)

GEORGE KARIUKI KABUGU..... PLAINTIFF/RESPONDENT

-VERSUS-

CECILIA GATHONI ..... 1ST DEFENDANT/APPLICANT

HARUN J.M THAIRU ..... 2ND DEFENDANT/APPLICANT

REUBEN WAIRICHU THAIRU ..... DEFENDANT /APPLICANT

RULING

1. By Notice of motion dated **13th June, 2013** Cecilia Gathoni, Harun J.M Thairu and Reuben Wairichu Thairu (hereinafter referred to as the applicants) filed the above motion seeking the following orders against George Kariuki Kabugu (hereinafter referred to as the respondent):-

1. That the application be certified urgent and be heard on priority basis;

2. That pending the *inter partes* hearing and final determination of the application, the respondent by himself, his agents, servants, employees, assignees, members of his family and/or anyone else claiming under him, be barred by temporary injunction from entering, occupying, remaining on, utilizing, developing, erecting structures upon or in any other manner whatsoever from tampering with land parcel No.Konyu/Gachuku/576 (hereinafter referred to as the suit land);

3. That pending the *inter partes* hearing and final determination of the application, the applicants, their offspring and belongings be put back into possession and occupation of the suit land;

4. That this suit be struck out and/or dismissed with costs for being a sham, frivolous, vexatious and an abuse of the process of this honourable court;

5. That the applicants be declared to be entitled to ownership, occupation and possession of the suit property by adverse possession;

6. That the District Commissioner Mathira East District be ordered to implement Order 3 above;

7. That the respondent be condemned to pay the costs of this application and the entire suit.

2. The application is premised on the grounds that theCourt of Appeal has ruled that this court (read the High Court) lacked jurisdiction to make the ruling dated 7th June,1995 pursuant to which the applicants were forcibly evicted from the suit land; that the eviction of the applicants rendered them homeless, destitute and desperate. The applicants contend that the order pursuant to which they were evicted from the suit property was a nullity *ab initio*, the same having been made by a court which lacked jurisdiction to hear and determine the dispute preferred before it. The applicants further contend that the legal effect of the judgment of the Court of Appeal was to maintain the status quo which prevailed before the impugned order of eviction was issued against them.

3. The application is opposed through the replying affidavit of the respondent sworn on **20th June, 2013** in which the respondent has deposed that the Court of Appeal ordered that the suit be heard afresh, on its merits; that he is the registered proprietor of the suit land having bought it lawfully in a public auction and that he has been in continuous exclusive possession of the suit land since June 1995.

4. Concerning the contention that the judgment of the Court of Appeal reinstated status which obtained before the applicants were evicted, the respondent argues that since the applicants were legally evicted from the suit land, they cannot be allowed back. Concerning the order pursuant to which the applicants were evicted the respondent points out that the applicants neither applied for nor obtained orders of stay of execution of the impugned orders.

5. On the claim that the applicants have gained rights over the suit property by adverse possession, it is argued that no case for adverse possession has been made out.

With regard to the prayer for striking out of the suit, it is contended that that order cannot issue before determination of ownership of the suit property or before the suit is heard on its merits as ordered by the Court of Appeal.

6. In view of the foregoing, the respondent contends that none of the orders sought in the application can issue in favour of the applicants before the suit is heard and determined in its merits.

Background to the application

7. As pointed above, the instant application is premised on the judgment of the Court of Appeal delivered on 24th May, 2013. In that judgment the court made the following key findings:-

“(1). The trial judge did not look at the whole case, by balancing the strength of the case and the strength of the defence;

2). The trial judge did not address himself to the appellant’s request for court interpreter;

3). The appeal has merit and therefore succeeds.”

8. Consequently the court set a side the order of the High Court dated 7th June, 1995 at Nairobi in

HCCC No.307 of 1995(O.S) and ordered a re-hearing of the case on its merit.

9. Given the fact that the order pursuant to which the applicants' were evicted from the suit property was set aside by the Court of Appeal, the applicants contend that the effect of the judgment was to reinstate the status which obtained before the order set aside was issued.

10. Whereas it is true that the Court of Appeal set aside the orders pursuant to which the applicants were evicted and issued orders for re-hearing of the suit, it is also true that it did not make any orders concerning the changed circumstances of the parties to the suit.

Submissions on behalf of the applicants

11. On behalf of the applicants, it is submitted that the pleadings instituting the suit are defective. In this regard, it is contended that the suit was brought under the Civil Procedure Rules when it ought to have been brought under the Law of Succession Act (It is contended that the suit relates to the estate of a deceased person). It is further submitted that since the prayers therein sought were of a temporary nature they could not issue under **Order XXX IV Rule 3 (Currently order 37)** but under **Order XXXIX (currently order 40**). It is further submitted that the suit ought to have been brought through a plaint as opposed to an O.S.

12. It is also contended that the respondent ought to have filed a petition under the Law of Succession Act.

13. Terming the orders of 7th June, 1995 null and void, the applicants maintain that the effect of setting aside those orders was to restore the status which obtained before the orders were set aside.

14. With regard to the claim that the applicants have gained rights over the suit property by adverse possession, it is submitted that the instant suit was filed outside the time within which the suit for recovery of the land ought to have been brought. In that regard reference is made to the cases of-

i. Ithongo v. Thindiu (1981) KLR 197;
ii. Mwangi & Another v. Mwangi (1986) KLR 328;
iii. Nguyai v. Ngunayu (1985) KLR 607;
iv. Wambugu v. Njuguna (1983) KLR 172;
v. Murai v. Wainaina (1982) KLR 51

and submitted that by the time the suit was filed, the applicants had become entitled to the suit land by adverse possession.

Submissions for the respondent

15. On behalf of the respondent, it is submitted that the current suit was filed pursuant to orders issued by the Court of Appeal for re-hearing of the suit on its merit.

16. Concerning the contention that the suit was brought under the wrong provisions of the law or form, it is conceded that there is a defect in the pleadings and submitted that use of wrong procedure does not invalidate proceedings. In that regard, reference is made to the case of **Boyes vs. Gathure Civil Appeal No.44 E.A 369** and **Article 159** of the Constitution of Kenya, 2010 which requires that justice be administered without undue regard to technicalities. It is also pointed out that despite the Court of Appeal having held that the suit ought to have been instituted by a plaint, it did not find that the defect

rendered the suit fatally defective. In the interest of justice the court ordered that the suit be heard afresh.

17. Concerning the contention that this court has no power to overule the decision of the Court of Appeal to theeffect that this court lacked jurisdiction to make the impugned orders, pointing out that the Court ordered that the suit be heard afresh, counsel for the respondenthas submitted that this application seeks to circumvent the order for re-hearing of the case.

18. Pointing out that following the order of the judgment of the Court of Appeal, the respondent filed an application on 8th August 2013 seeking leave to amend his pleadings by withdrawing the O.S and substituting it with a plaint, It is submitted that if the application for amendment is allowed, the issue of jurisdiction will have been resolved.

19. The claim for adverse possession is said to beunsustainable because by the time the applicants were evicted from the suit property, they had been in adverse possession of the suit property for only one year. The claim is also said to be unsustainable because apart from the grounds of opposition dated 25th April, 1995 and an affidavit in support thereof, there are no proceedings in court by the defendants claiming adverse possession against the respondent.

20. With regard to the contention by the applicants that the suit ought to have been commenced under the Law of Succession Act, it is pointed out that after the suit by the applicants' father abated, the respondent instituted the suit for eviction of the applicants in his capacity as the registered proprietor of the suit property and not as a representative of the estate of the deceased.

21. Arguing that the applicants have never at any timeowned the suit premises, counsel for the respondent submits that prayer number 4 seeks to circumvent the order for re-hearing of the suit.

Analysis and determination

22. From the pleadings and submissions in respect thereof the issues for determination are;

1. Whether the judgment of the Court of Appeal restored the status which obtained before the orders appealed from were issued"

2. Whether the defect in the respondent's pleadings renders the suit fatally defective"

3. Whether the suit by the respondent is time barred"

4. Whether the applicants' have made up a case of being granted the orders sought or any of the orders"

5. What order(s) should the court make"

23. As the issues in numbers 2 and 3 are capable of determining this matter preliminarily, I will address them first.

Whether the suit by the respondent is time barred"

With regard to this issue, I refer to the history of the dispute hereto contained in page one and two of the judgment of the Court of Appeal hereto which shows that the respondent filed a suit asserting his rights

to the suit property seven years after the applicants' predecessor in entitlement to the suit property had gone to court to challenge the respondent's registration as the proprietor of the suit property. The suit by the respondent abated in 1993, a year after the applicants' predecessor passed on without being substituted. My view of this matter is that time, for purposes of the applicants' claim for adverse possession did not run during the time their entitlement thereto was under challenge.

24. The evidence on record, shows that barely two years after the suit the respondent had filed challenging the entitlement of the applicants' predecessor in title to the suit property abated, the respondent filed the current suit seeking to evict the applicants. In my view, the filing of the current suit, yet again made time stop running for the purpose of the applicants' claim for adverse possession.

25. The foregoing analysis of the historical background to this claim shows that, if at all the applicants' and/or their predecessor in claim were in adverse possession of the suit property, they only occupied it as such for a period of about 9 years. That is to say the seven years before the respondent filed a suit challenging the entitlement of the applicants' predecessor in claim (the applicants' and their father did not have separate claims to the suit property) and two years before the respondent filed the current suit, following abatement of the initial suit.

26. Although the foregoing determination suffices to determine this question, I wish to comment on the applicants' claim for adverse possession when the same is not supported by any pleading, other than the current application. That observation raises an issue as to whether the applicants' claim for adverse possession can be sustained in the absence of any pleading to that effect. My view of that matter is that, the claim must flow from the applicants' pleadings. In the absence of any pleading to that effect, I find that claim to be bad in law and to that extent unmaintainable.

Whether the defect in the respondent's pleadings renders the suit fatally defective"

27. Concerning this issue, I wish to point out that while considering the applicants' appeal, the Court of Appeal considered that issue and despite having found therespondent's suit to have been defective in form, ordered that the suit be heard a fresh. The only reasonable interpretation of the order of the Court of Appeal is that the defect in the respondent's suit did not render the suit fatally defective.

28. According to the decision of the court of Appeal in the case of **John Kamunya & another v. John Nginyi Muchiri & 3 others (2015)e KLR**, the court has jurisdiction to convert an originating summons into a suit and to allow parties to adduce viva voce evidence. See the decision in the said case where the court observed:-

"Bearing in mind the provisions of order 36 Civil Procedure Rules as it was then and Order 37 as it is now as well as principles of case law sampled above, we wish to reiterate that the correct position in law in so far as pleading of a claim for adverse possession is concerned is that, a claim for adverse possession can only be presented to court by way of an originating summons. Such a procedure is designed to deal with less complex and uncontentious matters. Where issues turn out to be complex and highly contentious the court has jurisdiction to covert an originating summons into a suit and allow parties to adduce "*viva voce*" evidence.

29. Being of the view that the defect in the respondent's pleading is curable, I find and hold that the defect in the pleadings does not render the pleadings fatally defective.

30. Did the judgment of the Court of Appeal hereto restore the status which obtained before the orders appealed from were issued"

In considering this question, l begin by pointing out that whereas the Court of Appeal was aware that the appellants had been evicted pursuant to the impugned orders, it did not declare the eviction of the applicants unlawful. All what it did was to fault the procedure used to find in favour of the applicants. Since the applicants' did not apply for stay of execution of the decree pursuant to which they were evicted, they cannot be heard to say that the eviction was illegal. Their eviction would only have been illegal if they had obtained orders stopping it.

Since the applicants' were evicted pursuant to valid orders of court, the respondent cannot be heard to say that the effect of success of their appeal was to render their eviction illegal when they had not sought such determination before the Court of Appeal. In my view, if the intention of the Court of Appeal in finding in favour of the applicants was to order their repossession of the suit property pending the re-hearing and determination of the suit, nothing would have been easier than to say so. For the foregoing reasons, I return a negative verdict to this issue.

31. On whether the applicants' have made up a case for issuance of a temporary injunction to restrain the respondent from entering, occupying, remaining,developing, erecting structures on the suit property or in any other manner tampering with the suit property and/or for being put back into possession and occupation of the suit property, having considered the peculiar circumstances of this case, in particular, the fact that the Court of Appeal did not declare the eviction of the applicants illegal, the fact that the respondent is the registered proprietor of the suit property and the principles that guide the court in granting the orders sought, I find and hold that the applicants' have not satisfied the conditions for being granted the orders sought. I say this because:-

a) As the registered proprietor of the suit property, the respondent is *prima facie* the owner of the suit property (see Section 26(1)of the Land Registration Act, 2012).

b) The respondent was put into the suit process through a legally sanctioned process (there are no orders of court declaring the process through which the respondent gained access to the suit property illegal);

c) Setting aside the orders pursuant to which the respondent gained entry into the suit property does not amount to a nullification or declaration that whatever happened pursuant to that order was illegal or unprocedural; and

d) That in the peculiar circumstances of this case, the balance of convenience tilts in favour of the respondent who is the registered proprietor of the suit property and who gained entry therein through valid court orders.

32. The upshot of the foregoing is that the application herein has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 23rd day of December, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Sane for the plaintiff/respondent

Mr. Miano for defendants/applicants

Court assistant - Lydia