



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KERICHO**

**ENVIRONMENT AND LAND CASE NO.14 OF 2015**

**ELIZABETH CHEPTOO TUIMISING.....PLAINTIFF**

**VERSUS**

**JANE CHERONO NGENO.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY CHERUIYOT.....2<sup>ND</sup> DEFENDANT**

***(Sued in their capacity as the Administratrix and Administrator respectively of the Estate of the late DAVID CHESIMET KOECH –DECEASED)***

**RULING**

***(Application to reinstate a dismissed suit; suit for adverse possession dismissed for failure to annex an extract of the register; time having been given to the applicant to annex the same but failing to do so; suit then struck out as being incompetent; applicant now beseeching the court to be allowed to file the extract of the register; there was inordinate delay in filing the register; however time extended by a further 14 days subject to payment of throwaway costs assessed at Kshs. 25,000/=; order of status quo issued)***

This case was commenced by way of an Originating Summons filed on 27 March 2015. The Originating Summons have been taken out pursuant to the provisions of Order 37 Rules 3, 14 and 15 of the Civil Procedure Act. The applicant seeks orders that she has acquired title by way of adverse possession to the whole of the land parcel Kericho/Kipchimchim/2787. The Originating Summons was accompanied by a Verifying and Supporting Affidavit vide which the applicant explained why she is entitled to the suit land through the doctrine of adverse possession. Inter alia, she averred that she purchased the suit land on 12 October 2001 vide an agreement that she had with one Jane Cheronu Ngeno, the 1st respondent, with the blessings of Geoffrey Cheruiyot, the 2nd respondent. The purchase price was of Kshs. 600,000/=. She claims to have made a down payment of Kshs. 260,000/= and that the balance of Kshs.340,000= was to be paid once the respondents carried out succession proceedings and effected transfer. She claims to have made subsequent payments and is only left with a balance of Kshs. 80,000/=. She has averred that since the year 2001 she has been in quiet, peaceful, exclusive and continuous possession of the suit land hence entitled to the same by way of adverse possession.

The suit was resisted through the replying affidavit of the 1st respondent. It was claimed inter alia that the sale agreement was revoked and that the applicant has not been in occupation of the suit land.

The supporting affidavit to the Originating Summons was not accompanied by a certified extract of the register as required by the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules. On 30 October 2015 when the matter came before me for directions, I pointed out to Mr. Kirui, counsel for the applicant, that there was no extract of the register annexed and I directed that a further supporting affidavit, annexing the extract of the register be filed within 15 days. I gave 25 January 2016 as the next mention date. On 25 January 2016, Mr. Ngetich for the respondents, complained that the applicant has not filed the further affidavit as directed on 30 October 2015. In my discretion, I allowed Mr. Kirui a further 30 days to file the document and gave 4 April 2014 as the next mention date.

On 4 April 2016, only Mr. Ngetich for the respondents appeared in court. There was no appearance on the part of Mr. Kirui for the applicant. I observed that the further affidavit is yet to be filed and considering the accommodation that I had given the applicant, I found the suit to be incompetent and struck it out with costs.

On 6 April 2016, the applicant filed an application dated 5 April 2015 asking that I review my orders of 4 April 2016 dismissing the Originating Summons. She also asked for orders of injunction seeking to restrain the respondents from evicting her and orders that she be allowed to file a copy of the green card out of time. The application is founded on the grounds inter alia that failure to comply with the orders of 25 January 2016, cannot be attributed to the applicant. The supporting affidavit is sworn by Mr. Kirui himself. He has deposed inter alia that he is aware of the orders of 25 January 2016. He has stated that on 25 January 2016, he applied for a certified copy of the Green Card which was supplied on the same date. He then drew a further affidavit but he failed to inform the applicant to come to his chambers to swear the affidavit. He has averred that failure to comply cannot be attributed to the applicant and that this was an oversight by his office.

The application is opposed by the replying affidavit of Jane Cherono Ngeno, the 1st respondent. She has deposed inter alia that there was an order in Succession Cause No. 191 of 2004 vide which the applicant was advised to file an affidavit of protest but instead of doing so, she filed this suit. She has further deposed that on 30 August 2004, the deposit that the applicant was made was refunded. It is said that the applicant started an illegal construction to hoodwink the court that she has been living on the land. She has deposed that she is the one who has been using the suit land. She has averred that the applicant did not file any further affidavit after 30 October 2015 despite being given time to do so. She has also pointed out that the applicant and her counsel did not attend court on 4 April 2016 yet the date was taken by consent. It is her view that this was a tactic to delay the matter. She has stated that the applicant should not hide her undoings on mistakes of counsel.

I invited counsels to file written submissions and they did so.

In his submissions, Mr. Kirui inter alia submitted that the applicant has been in exclusive possession since the sale agreement of 12 October 2001. He admitted that no further affidavit was filed despite time being given but submitted that this is excusable under Article 159 of the Constitution and Sections 1A and 2A of the Civil Procedure Act. He submitted that if the order of dismissal is not reviewed, the applicant stands to suffer irreparably. He relied on the case of **Mwangi S. Kimenyi vs Attorney General & Another (2014) eKLR**.

Mr. Ngetich on the other hand submitted inter alia that this application is an abuse of the process of court. He pointed to various orders given to the applicant to file affidavits in succession cause No. 191 of 2004 which she failed to do. He disputed that the applicant is entitled to the land by way of adverse possession. He submitted that the applicant has been indolent and that her failure to attend court on 4 April 2016 was deliberate. He submitted that courts should not assist the indolent and relied on the case

of **Joshua Otieno Buyu v Petro Ochieng Wasambwa Kisumu, Civil Appeal No. 347 of 2000.**

I have considered the application. There are two main prayers. The first is for the applicant to be allowed to file the further affidavit annexing an extract of the register of the suit land (Green Card) and the second principal order sought is one for injunction to restrain the respondents from the suit land.

On the first prayer, it is not in issue that no extract of the register was ever annexed by the applicant when she filed suit. This as I have mentioned is contrary to the provisions of Order 37 Rule 7 (2). The whole of Order 37 Rule 7 is drawn as follows :-

**7. 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.*

It follows that the Originating Summons as filed was therefore incompetent. I have already mentioned that I observed this anomaly on 30 October 2015 and instead of striking out the suit, I allowed the applicant 15 days to put her house in order. She did not do so. As at 25 January 2016, she had not done so and on a second occasion, I did grant her 30 days. Nothing was filed within 30 days or at all, and I have already mentioned that the applicant and her counsel did not appear on 4 April 2016 when I struck off the suit.

The applicant is now pleading with me to allow her more time. I have seen from the supporting affidavit of Mr. Kirui that Mr. Kirui has averred that he paid for the Green Card on 25 January 2016. I do note from the record that on the same day when Mr. Kirui appeared before me, he stated that he had applied for the Green Card "last year" and that when he went to the Land Registry "the week before this date", he did not find the Land Registrar. It seems to me as if the submissions of Mr. Kirui on 25 January 2016 were false since as I have mentioned, payment for the Green Card was only made on 25 January 2016. I have not been shown any proof of payment for the Green Card in the year 2015. Neither Mr. Kirui nor his client have offered any explanation as to why they were absent on 4 April 2016 when the case was due for mention despite the date having been taken by consent. There is a loud silence on this.

I am aware that courts should be slow not to allow a party to plead their case fully or deny a party a hearing. I have indeed looked at the case of **Mwangi S. Kaimenyi vs Attorney General & Another (supra)** cited by Mr. Kirui wherein Gikonyo J, expounded on the principles.

On my part, I hold the view that in the circumstances of this case, the delay by the applicant to file the further supporting affidavit was inordinate. It was inordinate for the reason that the extract of the register ought to have been filed with the suit in the first place, and a fortiori, no extract of the register was filed despite extensive accommodation being given to the applicant by the court. That said, I do not think that any injustice will be caused to the respondent, which cannot be compensated by an award of costs if I allow the application and extend time to the respondent to file the further affidavit annexing the extract of the register. I will therefore allow the applicant to file the further supporting affidavit with the extract of the register annexed within 14 days from today but since there was inordinate delay the applicant will pay throwaway costs which I assess at Kshs. 25,000/=. These must be paid within the 14 days. If the said

affidavit is not filed within the 14 days, and the costs ordered above are not paid within the time given above, the suit will remain struck out.

On the second prayer, that of injunction, the principles for the grant of the same were laid out in the case of ***Giella vs Cassman Brown (1973) EA 358***. One needs to establish a prima facie case with a probability of success; demonstrate that she stands to suffer irreparable loss if the injunction is not granted; and if in doubt, the court will decide the case on a balance of convenience. On the circumstances of this case, I would not wish to dwell on the respective strengths of the cases of the parties at this stage of the proceedings. I think it is best that I determine this application on a balance of convenience. In my view, the balance of convenience tilts towards maintaining the status quo before the Originating Summons was filed. I have seen that the applicant seems to have been in some sort of possession and had commenced constructing a house. That status should be maintained but there should be no further construction of the house and no further construction of any additional developments. The land may however continue to be used as it was prior to the filing of this suit. My order therefore is that the said status quo be maintained, subject of course to the prior order of payment of thrown away costs so that the suit may be reinstated.

As to costs of this application I award the same to the respondents.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 28<sup>TH</sup> DAY OF OCTOBER, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**In the presence of:-**

Mr. Caleb Koech holding brief for Mr. Kirui for the Applicant

Mr. Weldon Ngetich present for the respondent

G. Wambany Court assistant



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