



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.862 OF 2015

[Formerly High Court Civil Suit No.130 of 2011]

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF
EXTINCTION OF THE INTERESTS AND RIGHTS OF REGISTERED
PROPRIETOR AND OWNER ZAKARIA ODHIAMBO JUMA IN ALL
THAT PARCEL OF LAND KNOWN AS KISUMU/KARATENG/497
AND REGISTRATION OF THE SAME IN THE NAME OF THE
PLAINTIFF/APPLICANT**

TOM MBOYA ARWA.....PLAINTIFF

VERSUS

AUGSTINE ONYANGO OWALADEFENDANT

RULING

1. Augustine Onyango Owala, the Defendant, vide notice of motion under **Order 2 Rule 15 (1)** of the Civil Procedure Rules and **Section 3A and 63 (e)** of the Civil Procedure Act seeks for the following orders;

- That the suit be struck out for being an abuse of the court process.
- Costs of the application be provided for.
- Any further order the court may deem fit.

The application is based on the six grounds marked (a) to (e) on the notice of motion and is supported by the affidavit of the Defendant sworn on the 30th June 2016.

2. The application is opposed by **Tom Mboya Arwa**, the Plaintiff, through the grounds of opposition dated 23rd July 2016 and replying affidavit sworn on the 30th November 2016.

3. The application came up for hearing on the 21st February 2017 when Mrs Opondo and Mr. Onsongo, the learned counsel for the

Defendant and Plaintiff respectively, made their rival oral submission summarized as follows;

A. SUBMISSION BY DEFENDANT'S COUNSEL:

- That after the Plaintiff filed this suit through the originating summons dated 8th August 2011 and filed in court on 18th August 2011, he subsequently filed Kisumu H.C. **Succession Cause No.214 of 2015** in which he cited the Defendant herein and another in respect of the estate of **Zakariah Odhiambo Juma** (deceased).
- That the person against whom a claim based on adverse possession is brought must be the one on whom the title rests. That in this suit the subject matter is land parcel **Kisumu/Karateng/497** which is registered in the name of **Tom Mboya Arwa**, the Plaintiff herein having been so registered on the 12th January 2010.
- That this suit is therefore an abuse of the courts process and a non – starter.
- That the Plaintiff seeks for consolidation of this suit with **ELC 187 of 2016** through the replying affidavit which is not the way to commence and prosecute such an application.
- That the cause of action in **ELC 187 of 2016**, in which the Defendant has sued the Plaintiff and three others, is based on fraud over the same land and cannot be consolidated with this suit.
- That this suit should be dismissed.

B. PLAINTIFF'S COUNSEL SUBMISSION:

- That the registered owner of the suit land, **Zacharia Odhiambo Juma**, is the father to the defendant. That as the Defendant is the heir apparent **Order 37** of Civil Procedure Rules allows originating summons to be taken against him the way the Plaintiff did.
- That the matters touching on that land including **ELC 187 of 2016** should be consolidated and determined ones and for all.
- That the application should not be allowed.

4. The following are the issues for the determination by the court;

- a) Whether the Defendant is the registered proprietor of the suit land.
- b) Whether a claim based on adverse possession can lie against a person who is not the registered proprietor.
- c) Whether the suit is an abuse of the process of the court.
- d) What orders to issue.
- e) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence and come to the following conclusions.

- a) That this suit was commenced through the originating summons dated and filed in court on the 18th August 2011. That the heading of the originating summons shows that it was brought pursuant to "**Section 38 of the Limitation of Actions Act (cap 22), Section 1A and 1B of the Civil Procedure Act and Order 37 Rule 7 of the Civil Procedure Rules 2010**". That **Order 37 Rule 7 of the Civil Procedure Rules** that deals with the procedure of commencing a claim under **Section 38 of Limitation of Actions Act** provides as follow:

“ 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)

b) That the originating summons herein has a supporting affidavit sworn by the Plaintiff on the 17th August 2011 and is clear the title in question or subject matter is land parcel **Kisumu/Karateng/497**. The court has perused the documents annexed to the said supporting affidavit which are marked **TMA 1, TMA2, TMA3 (a) and (b)** and described in paragraph 2 and 18 of the said affidavit. That as submitted by counsel for the Defendant, the certified copy of the extract of the suit land has not been annexed to the said supporting affidavit contrary to the provision of **Order 37 Rule 7 (2) of the Civil Procedure Rules**. That the failure to annex an extract of the title of the land claimed by the Plaintiff makes the originating summons defective.

c) That the Originating summons and the supporting affidavit clearly states that the suit land claimed by the Plaintiff is registered in the names of one **Zakaria Odhiambo Juma** who is deceased. That the said deceased is not a party in these proceedings nor has the Defendant been sued as a legal representative of the estate of the said deceased. That in view of the foregoing the defendant herein is wrongly sued and as submitted by counsel for the Defendant, the suit is a non-starter.

d) That a copy of the green card certified on 26th January 2016 and annexed to the Defendant's further list of document dated 1st March 2016 indicates that the suit land was initially registered in the names of **Zakaria Owala** on the 20th April 1977. That on 26th September 1977, there was a correction of name to read **Zakaria Odhiambo Juma** and title deed was issued. That on the 10th January 2010 the land was transmitted to the name of **Tom Mboya Arwa**, the Plaintiff. That there are two subsequent entries of cautions filed by the Defendant and Plaintiff. That the contents of the said green card has not been disputed by the Plaintiff and they are at variance with the Plaintiff's pleadings and deposition that by the time he filed this suit, the land was in the names of **Zakaria Odhiambo Juma**.

e) That in view of the fact that the suit land was registered in the name of the Plaintiff on 10th January 2010, it is an abuse of the court's process for the Plaintiff to file a claim over the same land based on adverse possession, as he did through the originating summons dated 18th August 2011. The Plaintiff cannot be an adverse possessor of the land that is already in his name.

f) That the defects in the suit as set out above clearly shows there is no case capable of being salvaged even through amendments. That to allow the suit to continue pending before the court will run contrary to the objectives and duty of the court as set out in **Section 1A and 1B of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That there is also no suit before this court capable of being consolidated with any other.

6. That flowing from the foregoing, the Defendant's notice of motion dated 30th June 2016 is allowed and this suit commence through the originating summons dated and filed on the 18th August 2011 is hereby struck out with costs to the defendant.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Onsongo for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2016

S.M. Kibunja Judge

Parties absent

Mr. Onsongo for the Plaintiff

Court: The Ruling dated and delivered in open court in presence of Mr. Onsongo for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017



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