



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KAPSABET

ENVIRONMENT & LAND CIVIL SUIT NO. 37 OF 2021

GEOFFREY KIPSEREM KOSGEL.....PLAINTIFF

-VERSUS-

SIMION KIMARU MUGUN.....DEFENDANT

RULING

1. This ruling is in respect to preliminary objection raised orally by plaintiff counsel on 22nd February 2022 on grounds that:

a) The counter claim filed by the defendant on 27th January 2016 seeks orders of adverse possession contrary to order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act.

2. The Preliminary Objection was canvassed orally in court on 22nd February 2022 where both counsels submitted their assertions. The plaintiff's counsel also filed list of authorities on 23rd February 2022 in support of the Preliminary objection.

3. Learned counsel for the plaintiff, in support of the objection, submitted that the counter claim filed by the defendant on 27th January 2016, which upon perusal of the pleadings was filed on 11th January 2016, is an abuse of the court process as it contravenes order 37 Rule 7 of the Civil Procedure Rules and section 38 of the Limitation of Actions Act. As a result counsel submitted that the counter claim be struck out under order 2 Rule 15(d) of the Civil Procedure Rules.

4. The preliminary objection was opposed by the defendant counsel who submitted that the counter claim was filed to avoid multiplicity of Suits Analysis and Determination.

5. I have considered the oral submissions by parties and authorities filed to buttress their assertions. One issue that arises from this preliminary objection is whether a claim for adverse possession can be raised and sustained by way of counter claim.

6. On this issue I will rely on the court of Appeal case of Gulam Mariam Noordin -vs- Julias Charo Karisa(2015) eKLR where the court in upholding the procedure adopted by the respondent of raising a claim for adverse possession in their defence ,stated that;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or defence and counter- claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the questions whether it was erroneous to sanction on claim of adverse possession only pleaded in the defence, we refer to the case of wabala -vs- Okumu (1997)LLR 609(CAK), which like this appeal the claim for

adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co.Ltd -vs- Kosgey(1998)LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.

The court has in Teresa Wachika Gachira -vs- Joseph Mwangi,CA 325 OF 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi,nec clam,nec precario*”

7. Equally, the Court of Appeal in the case of Chepkwony -vs- Malenya (Civil Appeal 90 of 2018)(2021)KECA 47 (KLR) noted that,

“As we have already alluded to above, it is evident from the record that the respondent’s assertion of entitlement to the suit property was not founded on an originating summons but a defence and rebuttal in appellant’s reply to defence.

It is also evident from the record that the respondent sought leave to amend the defence to include a counter claim, a position not objected to by the appellant. Leave was indeed granted to her the trial court to regularize that position but for reasons not borne out by record.....

In light of the above exposition, it is our view that the current jurisprudential position on this issue as gathered from the above case law is that a party claiming adverse possession founded on a defence is entitled to relief where such claim is well founded on evidence. It is in this same vein that we hold that on the record as laid before us, the respondent’s claim for adverse possession was well founded in law. The learned Judge therefore fell in no error when he sustained that claim as presented in a defence and rebutted through a reply to defence as opposed to presentation by the way of originating summons.”

8. I take cue from these decisions cited here in above and respectfully disagree with the plaintiff’s counsel that a claim for adverse possession ought to be brought by way of Originating Summons only.

9. In the circumstances, this Preliminary Objection is dismissed.

DATED AT KAPSABET THIS 17TH DAY OF MARCH, 2022

M. N. MWANYALE.

JUDGE

In the presence of;

Mrs.Chumba holding brief for Mr. K. Arap Segoo.



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