



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: AKIWUMI, TUNOI & O'KUBASU, J.J.A.

CIVIL APPEAL NO. 151 OF 1999
BETWEEN

MAINA NJUGUNA APPELLANT
AND
PAUL NJUGUNA MWANGI RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court (Githinji J) dated 24th November, 1998 in the High Court Civil Suit No. 3506 of 1991. There are four grounds of appeal:

- "1. The Judge erred in holding that Thika Civil Suit No. 431 of 1989 between the Appellant and the Respondent was not decided on merit.
2. The Judge erred in holding that Thika Resident Magistrate's Court was not competent to determine the issue of trust.
3. The Judge erred in holding that the fact that the Respondent's claim based on adverse possession was brought by way of plaint was not fatal to the suit.
4. The Judge erred in holding that the fact that the Respondent's claim based on trust was no res judicata yet the same had been heard and dismissed on 17.6.91 by the Senior Resident Magistrate's Court in Thika RMCC NO. 431 of 1989."

The appellant herein was the defendant sued in the superior court. The respondent as the plaintiff was seeking a declaration that as he had been in adverse possession of the land in dispute he was entitled to be registered as proprietor of that portion by virtue of the provisions of the Limitation of Actions Act. The respondent had an alternative prayer based on trust.

When the suit came up for hearing before Githinji J. on 10th November, 1998, Mr Kinuthia for the appellant raised a preliminary objection on the ground that the suit was res judicata as there was a similar suit between the same parties before Thika Resident Magistrate's Court which suit had been determined in favour of the appellant. Mr Kinuthia also submitted that as the suit was based on adverse possession it could not be brought by way of a plaint but by originating summons under ***Order XXXVI of the Civil Procedure Rules*** .

In his ruling Githinji J dismissed the appellant's preliminary objection and directed that the suit be heard on merit in the High Court. It is against that order of dismissal of the preliminary objection that the appellant appeals to this Court.

As regards the issue of res judicata we observe that by virtue of ***Section 159 of the Registered Land Act (Cap 300 Laws of Kenya)*** the Thika Resident Magistrate's Court had no jurisdiction as it was not

indicated that the value of land in dispute was less than Shs.500,000/=. We agree with Githinji J that the Thika Resident Magistrate's Court was not competent to try the suit before it. But on the issue of adverse possession, we do not agree that the suit could proceed in the High Court by way of a plaint.

Order IV Rule 1 of the Civil Procedure Rules provides that:

"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

That means that the usual way of instituting a suit is by way of a plaint but there are also other ways which can be prescribed for instituting suits. **Order XXXVI Rule 3D of the Civil Procedure Rules** prescribes the manner for starting a suit for adverse possession under **Section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya)** . Such a suit is to be started by way of an originating summons supported by an affidavit and a copy of the title to the land adversely claimed has to be annexed to the affidavit.

In a recent decision delivered in Kisumu on 24th March, 2000 in **PATRICK A. ODAKO & ANOTHER V WILLIAM N. KIREW - Civil Appeal No. 262 of 1998 (unreported)** this Court observed:

"Various decisions of this Court, among them BWANA V SAID (1991) 2 KAR 262 to which we have been referred, specifically lays it down that a claim for adverse possession must be started by an originating summons."

In view of the above it cannot be correct to say that Mr Kinuthia's preliminary objection on adverse possession was merely technical. We say so because in dismissing the preliminary objection, Githinji J stated inter alia:

"As plaintiff's claim has not been determined on merit or by court of competent jurisdiction plaintiff's suit is not res judicata and the technical objection to the plaintiff's claim on ground of form is misconceived. I dismiss the preliminary objection with costs and order that the suit be heard on merit."

While we agree with the learned Judge that the Thika Resident Magistrate's Court was not competent to try the suit before it, we do not agree with him that a suit on adverse possession could be brought by way of a plaint. Mr Kinuthia's preliminary objection in the High Court ought to have been upheld.

In view of the foregoing, the claim based on trust may proceed to hearing but the claim based on adverse possession can only be brought by way of originating summons in a separate suit. The appeal, therefore, succeeds to that extent only. As regards costs, we order that these be awarded to the appellant.

Dated and delivered at Nairobi this 30th day of June, 2000.

A. M. AKIWUMI

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR