



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.102 OF 2019(OS)

IN THE MATTER OF CHAPTER FIVE OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT

AND

IN THE MATTER OF A CLAIM ON ADVERSE POSSESSION OF A PORTION

OF THE PROPERTY KNOWN AS KABETE/KIBICHIKU/208

AND

IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTIONS 7, 9, 10, 17 OF LIMITATION OF ACTIONS ACT

BETWEEN

GEORGE MBUGUA NJUGUNA.....1ST PLAINTIFF/APPLICANT

BERNARD WANGIGE NJUGUNA.....2ND PLAINTIFF/APPLICANT

GRACE NJUHI NGUGI.....3RD PLAINTIFF/APPLICANT

ROSE WANJIKU NGUGI.....4TH PLAINTIFF/APPLICANT

AND

JOSEPH GACHUHI MUTHANJI.....1ST DEFENDANT/RESPONDENT

JAMES MBUGUA MUTHANJI (Sued as Administrators of the Estate of

GEORGE MUTHANJI WANGIGE).....2ND DEFENDANT/RESPONDENT

RULING

By an **Originating Summons** dated **4th June 2019**, the Plaintiffs herein sought for various orders against the Defendants. The orders sought are:-

a) A declaration that the Plaintiffs have become entitled under Section 38 of the Limitation of Actions Act, Cap 22 to be registered as proprietor by adverse possession of the portion measuring approximately 2 acres severed from LR.No.Kabete/

Kibichiku/208, in place of its present registered owners, the Defendants herein.

- b) An order directed to the Land Registrar Kiambu ordering him to rectify the register to give effect to the declaration contained in paragraph (a) above.
- c) An order directing that a survey be carried out and a title do issue for the portion occupied by the Plaintiff measuring approximately 2 acres.
- d) Costs of this application be provided for.

The Plaintiffs sought for determination of the following questions:-

- i. Whether the Plaintiffs have been in continuous, open, exclusive and undisputed possession of the portion measuring approximately 2 acres derived from Kabete/ Kibichiku/208.
- ii. Whether the period of possession commenced has been over 12 years since the Plaintiffs began to occupy and or utilize the portion measuring 2 acres derived from the suit property.
- iii. Whether the Plaintiffs in occupying the portion measuring approximately 2 acres derived from the suit property have continued to utilize and or live on it to date.
- iv. Whether the Defendants are subject to the overriding interests under Section 28 of the Land Registration Act.
- v. Whether the Plaintiffs are entitled to be registered as the owners of the portion measuring approximately 2 acres that they occupy on the suit property.

Simultaneously, the Plaintiffs also filed a **Notice of Motion** application even dated and sought for various interlocutory orders among them;-

1) That the Defendants/Respondents jointly and severally either by themselves, agents, servants, employees, assigns or any persons acting or claiming under their authority, consent or permission be barred from initiating any developments, subdivision, transfer, disposition, erecting any developments whatsoever, offering for sale either by private treaty, auction or advertisement, alienating, charging, mortgaging or in any way dealing with the property known as LR.No.Kabete/

Kibichiku/208, situate within Kiambu County pending the hearing and determination of this suit.

2) That the Land Registrar be directed to register an inhibition in respect of the title for LR.No.Kabete/Kibichiku/208, situate within Kiambu County barring any disposition, alienation, subdivision, or undertaking any intended dealings whatsoever during the pendency of this suit or pending any further orders of the Honourable Court.

The above application was supported by various grounds among them that the occupation of all the three families, the Applicants included has been since 1951 to date and there has been clear mapped out boundaries markings indicating where each family resides and the three families that is the Nyoro's, Muthanji's and Mbugua's have clear and distinct occupational areas. The families have each developed, improved on and cultivated their respective portions of land on the suit property.

It was further supported by the **Supporting Affidavit** of **George Mbugua Njuguna**, the 1st Plaintiff herein who averred that he had authority to swear the said affidavit from his Co-Plaintiffs. He further averred that the Co-Plaintiffs are the grand children of the late **Mbugua Wangige** and their fathers were **Njunguna** and **Ngugi Mbugua**. That both families live on portions of land situate on the parcel of land known as **Kabete/Kibichiku/ 208**, situate within Kabete Sub-County, Wangige town. Further that the Defendants as administrators of the estate of **George Muthanji Wangige** have threatened to evict the Plaintiffs, their families and family members from the suit property.

Further that the occupation of the Plaintiffs and their families on the suit property dates back to the Colonial period and that the suit property was originally owed by **Wangige Kimotho (deceased)**, who had three sons namely; **Muthanji, Nyoro** and **Mbugua**. That the Plaintiffs are cousins as their parents **Njuguna** and **Ngugi** were sons of **Mbugua Wangige**.

When the Defendants were served with the **instant Originating Summons**, and the **Notice of Motion** application, they filed a **Notice of Preliminary Objection** and sought for striking out of the main suit and application on the ground that:-

“Both the application and the main suit herein are Res-Judicata”.

The Court directed that the **Preliminary Objection** be heard first and was canvassed by way of written submissions.

The Defendants/Objectors through **W. Wanjiku Advocate** filed their written submissions on **8th July 2019**, and gave background of this case and chronology of various other cases that had been filed and determined over the suit property. The initial suit property was initiated in **1974** as **HCCC No.150 of 1974** by **Mbugua Wangige** and **Nyoro Wangige**, against their brother **George Muthanji Wangige**, and their claim was for **customary trust** in respect of the suit property.

The Plaintiffs too through **Wokabi Mathenge & Co. Advocates** filed their written submissions on **23rd October 2019**, and urged the Court to dismiss the instant Notice of Preliminary Objection. The parties herein relied on various decided cases and the provisions of **Section 7** of the **Civil Procedure Act** which provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

The Court has carefully read and considered the pleadings herein and the written submissions together with the relevant provisions of law.

The guiding law herein is the one stipulated by **Section 7** of the **Civil Procedure Act** and which has been referred to by both parties.

A ‘**Preliminary**’ Objection was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd..Vs...West End Distributors Limited (1969) EA. 696**, to mean:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an

objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir **Charles Newbold P** added:-

“A preliminary Objection is in the nature of what used to be a demurer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

From the above description of a **Preliminary Objection**, it is clear that it raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained from elsewhere or when the court is called upon to exercise its judicial discretion.

Further, a **Preliminary Objection** must stem from the pleadings and should raise pure points of law. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

The Defendants/Objectors have averred that the main suit and the application herein are **Res judicata** as the issues raised herein by the Plaintiffs have been determined in various other cases. The referred cases were **HCCC No.150 of 1974** which later became **Nyeri ELC No.614 of 2014**, proceedings at the Court of Appeal being **Appeal Case No.34 of 2015** and **Succession Cause No.281 of 2010**.

Both parties quoted the expressions given by Kuloba J in ‘**Judicial Hints to Civil Procedure**’ that **Res judicata means a thing or a matter adjudged; a thing Judicially acted upon or decided; a thing or matter settled by Judgment. Res judicata is essentially a bar to subsequent proceedings involving same issued that had finally been conclusively decided by a court of competent jurisdiction between the parties or their representatives.**

The Defendants/Objectors have averred that the issues raised herein were conclusively delt by in the various cases already decided by different courts of competent jurisdiction.

However the Plaintiffs have averred that the issues raised in the former suits were on **trusteeship** that is in the case **HCCC No.150 of 1974 (ELC NO.614 of 2014)** and administration of the Estate in **Succession Cause No.281 of 2010**.

It was their contention that the present **Originating Summons** raises a new cause of action on **Adverse possession** and **ownership** of a portion of the suit property which cause of action had not been raised before.

For this Court to determine whether the issues raised in this **Originating Summons** were directly and substantially in issue in the former suits, the court has to ascertain facts by calling for pleadings and proceedings of the former suits, scrutinize them and then make a finding. The court will then be ascertaining facts from elsewhere and that would not amount to dealing with pure points of law. For this Court to determine whether the issues raised herein are the same issues which have already been delt with in other suits, it will have call for pleadings and proceedings of the other suits to ascertain facts and that will be contrary to the description of a **Preliminary Objection** in the **Mukisa Biscuits Case(supra)**. In the case of **George Kamau Kimani & 4 Others...Vs...**

County Governments of Trans-Nzoia(2014)eKLR, the Court held that the best way to raise the issue of **Res judicata** is by way of **Notice of Motion** wherein pleadings would be annexed to allow the court to consider whether the issues in the previous suit are similar to the issues in the suit being in issue.

Further, it is evident that the Plaintiffs herein have brought their cause of action seeking to be declared owners of the suit property by virtue of adverse possession. The other suits dealt with the issue of **customary trust** and **distribution** of the estate. The causes of action are totally different. Further it is evident that striking out a suit is a draconian act and courts ordinarily strive to determine matters on merit and guard

against removing any party from the seat of justice through a **Preliminary Objection**. See the case of **DT Dobie & Co. (Kenya) Ltd ... Vs... Muchina (1982) K.L.R 1** where the Court held that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and curable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected to real life by amendment, it ought to be allowed to go forward.”

Having considered the **Notice of Preliminary Objection** and the rival written submissions by the parties herein and the limited scope of the jurisdiction on **Preliminary Objection** and the facts to be applied, the Court finds the issue of **Res judicata** involves ascertaining of facts and therefore this Court cannot determine at this juncture. It may be a future defence.

For the above reasons, the Court finds that it cannot determine the issue of Res judicata through a **Preliminary Objection** because by doing so, the court will be probing the exhibits and annexures thus ascertain facts. Consequently, the court finds the instant **Notice of Preliminary Objection** is not merited and the same is dismissed entirely with costs to

the Plaintiffs. Let the application dated **4th June 2019**, be determined on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of January 2020.

L. GACHERU

JUDGE

23/01/2020

In the presence of

Mr. Omas for the Plaintiffs/Respondents

M/S Muthanji for the Defendant/Objectors

Lucy - Court Assistant.

L. GACHERU

JUDGE

23/01/2020