



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC CASE NO. E006 OF 2021

ANDREW KIPKOSKEI TOO.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS ARAP TERER.....1st DEFENDANT/APPLICANT

JOHN KIMUTAI TERER.....2nd DEFENDANT/APPLICANT

SAMSON KIPRONO TERER.....3rd DEFENDANT/APPLICANT

GRACE CHELANGAT TERER.....4th DEFENDANT/APPLICANT

GILBERT KEMBOI.....5th DEFENDANT/APPLICANT

LAND REGISTRAR, KERICHO.....6th DEFENDANT/APPLICANT

RULING

1. The Plaintiff filed an application dated the 16th February 2021 wherein he sought for injunctive orders against the 1st to 5th Defendants. The matter was placed before me on the 17th February 2021 wherein the court directed that the same to be served upon the Defendants for further directions. Interim orders of status quo were also issued.
2. Service was effected upon the Defendants wherein the court further directed that the application be disposed of by way of written submissions. Counsel for the 1st -5th Defendants then informed the court that they had filed a Preliminary Objection on the 26th February 2021 and sought that the Plaintiff be given leave to file his response so that the Preliminary Objection could take priority over the application. They sought to have the same disposed of by way of written submissions. The court obliged. We shall refer to the parties in the original status for ease of reference since there are two applications where there is an interchange of their status.
3. The Notice of Preliminary Objection dated the 26th February 2021 was to the effect that the suit offended the provisions of Section 6 of the Civil Procedure Act in that there was an ongoing matter in ELC No. 001 of 2020(OS) between the same parties and the same subject property wherein the issues were substantially similar to the issues in the current suit.
4. That in ELC No.001 of 2020(OS), the Plaintiff herein had filed an application dated 16th September 2020 seeking similar orders as sought in the current application and Plaintiff dated 16th February 2021 wherein a ruling was delivered on 11th March 2021.
5. That the entire suit offended Section 7 of the Limitation of Actions Act, the Plaintiff's claim and interest on the suit property having been based on an alleged agreement entered into some time in 1992.
6. That the substance of the subject matter herein namely LR No. Kericho/Kebeneti/2198 no longer existed because the 1st -4th Defendants being the beneficiaries of the deceased's estate, undertook succession wherein each beneficiary had been awarded a portion thereby closing LR No. Kericho/Kebeneti/2198.
7. That the 5th Defendant was a stranger to the estate and his joinder as a party to the suit was misled. Finally, that the Plaintiff was on a forum shopping expedition which was a misuse of the court system.
8. There was no response from the Plaintiff to the Preliminary Objection and neither did he comply with the court's directions to file his written submissions, despite that court having extended leave for him to comply

Defendants' submissions.

9. The Defendants framed their issues for determination as follows

- i. Whether the suit herein is sub Judge
- ii. Whether the suit is barred by Limitation of Actions Act

10. On the first issue for determination, the Defendants relied on the provisions of Sections 6 of the Civil Procedure Act as well as the decided case in **Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral and Boundaries Commission and 16 Others (interested parties) [202](sic) eKLR** to submit that the present suit was sub Judge because there was a pending case being kericho ELC No. 001 of 2020(OS)

11. That in the present matter before the honorable court, the Plaintiff sought for orders that;

- i. A declaration that the Plaintiff is the legal and/or beneficial owner of land registration No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.
- ii. An order of permanent injunction be and is hereby issued restraining the 5th Defendant by himself, agents, assigns, and any other person whom so ever from in any way taking possession of occupying, alienating, transferring to himself land registration numbers LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.
- iii. An order of mandatory injunction be and is hereby issued directing the 1st Defendant to transfer the titles over land registration numbers LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204 to the Plaintiff.
- iv. And order of permanent injunction be issued restraining the 6th Defendant from canceling the Plaintiff's title over LR No. Kericho/Kebeneti/2202.
- v. An order of general damages
- vi. Costs of this suit.

12. That similarly, the questions sought to be answered by the court in the previous matter No. ELC No. 001 of 2020(OS) were as follows;

- i. Whether the Applicant herein is entitled under Section 38 of the Limitation of Actions Act to be registered as the absolute proprietor of the properties of land comprised in LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.
- ii. Whether the parcels LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204 where derived from the original LR No. Kericho/Kebeneti/945 owned by the deceased.
- iii. Whether the Respondent was registered owner in transmission for himself and in trust for the Applicant.
- iv. Whether the Respondent has acted equitably and with equity in allocating benefit from the deceased's land as trustee.
- v. Whether the Applicant is entitled to equitable share and benefit of the suit portions of land.
- vi. Whether the trust created herein should be determined and the properties stated shared equitably taking into account past benefits derived by the Applicant.
- vii. Whether the Respondents should transfer the same portions of parcels of land to the Applicant.
- viii. Whether in default of the Respondent to transfer the said land above, the Deputy Registrar of the court should execute all such documents as may be necessary for the registration of the Applicant as proprietor of the above parcels of land.
- ix. Whether the Respondent should pay the costs of this Originating Summons.

13. The Defendants' submissions was that as depicted from above issues and/or questions sought by the Plaintiff, it could be discerned that the subject matter was similar in both suits being the ownership and rights over properties in parcels LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.

14. That the parties herein were the same although in No. ELC No. 001 of 2020(OS) the person sued was the administrator of the estate of Sarah Kebor Kigeny (deceased) and the beneficiaries who were appearing as the 2nd, 3rd and 4th Defendants.

15. The Defendants submitted that the reliefs were substantially the same and over the same subject properties wherein both suits are pending before this court. That since the court risked falling into a trap of sub Judice and further that the Defendants had been subjected to an unending litigious process which was a waste of court precious time, the subsequent suit should be dismissed with the contempt it deserves.

16. On the second issue for determination as to whether the suit was time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act, the Defendant submitted that the said act prescribes the limitation period for instituting suits in regard to actions founded on contract, tort and actions to recover land. That the cause of action according to the pleadings herein took place in 1992, 1997, 2000, 2001, and 2003 which was over 18 years ago. That an action to recover land under the provisions of Section 7 of the Limitation of Actions Act would not be brought after the expiry of 12 years. The Plaintiff had instituted the present case in February 2022 which was over 18 years after the alleged sale agreement had been executed and had not offered any explanation as to why it had taken him all that time to institute the recovery action. The Defendant thus relied on the decided case in **Gathoni vs. Kenya Co-operative Creamery Limited [1982] KLR 104** to buttress their submissions.

17. On the third ground as to whether the joinder of the 5th Defendant was appropriate, the Defendant submitted that the 5th Defendant was an Advocate of the High Court of Kenya authorized to draft legal instruments as per the provisions of Section 4 of the Contract Act and Section 24 of the Land Registration Act. That his involvement in this matter was to draft the sale agreements while discharging his duty and therefore he should be excluded from the proceedings herein as the joinder was improper and highly prejudicial to both his profession and personal life.

18. The Defendants concluded their submissions by stating that the preliminary objection satisfied the test as set out in the case of **Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696** the same should be upheld and the suit herein dismissed and/or struck out with costs to them.

Determination.

19. Having considered the submissions herein submitted, the and authorities cited thereof, I find the matter for determination as being:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the present suit is sub-judice Kericho ELC No. E001 of 2020(OS).

20. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd (supra)** was stated to be thus:-

“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.”

21. In **Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, 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.”

22. From the above holding, it is clear that Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of Court process.

23. I have called for Kericho ELC No. E001 of 2020(OS) pending before this court and I find that the Originating Summons dated the 16th September 2020 was filed on the 22nd September 2020 between, the Plaintiff herein and one Francis Arap Terer (legal administrator to the estate of Sarah Kebor Kigen alias Kigeny Chebor Deceased) where the subject matter was parcel LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.

24. A look at the parties in the present suit, the same are depicted as Andrew Kipkoskei Too versus Francis Arap Terer, John Kimutai Terer, Samson Kiprono Terer, Grace Chelangat Terer, Gilbert Kemboi, and the Land Registrar, Kericho wherein the subject suit is LR No. Kericho/Kebeneti/2198, LR No. Kericho/Kebeneti/2201, LR No. Kericho/Kebeneti/2202, and LR No. Kericho/Kebeneti/2204.

25. In both suits, the Plaintiff herein is claiming title to the suit lands, in the previous suit as an adverse possessor while in this current suit, he seeks ownership after an alleged sale agreement.

26. The provisions of Section 6 of the Civil Procedure Act which provides as follows:

‘No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in

Kenya to grant the relief claimed.'

27. I find that *the matter in issue in the present suit is directly and substantially in issue with the previously instituted suit pending before this court being Kericho ELC E001 of 2020(OS) and between the same parties and therefore is sub-judice*. I find that where the test of res sub-judice is established or met, the marginal notes in Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined. There can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which require under Section 1B that there be an "*efficient use of the available judicial and administrative resources*".

28. Having considered all the above, I am satisfied that the present matter, being sub-judice the pending Kericho ELC No. E001 of 2020(OS). The current suit, I find is an abuse of the court process and need not be stayed as the claim herein can perfectly be litigated in Kericho ELC No. E001 of 2020(OS). In the circumstance therefore the Preliminary Objection herein succeeds with the result that this latter suit is herein dismissed with costs the Defendants.

It is herein ordered

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 24TH DAY OF FEBRUARY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE