



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 148 of 2015**

**CYPRIAN NJERI NDEGWA**

**Suing in his capacity as the Administrator of the Estate of**

**SEBASTIAN MBUI NDEGWA.....PLAINTIFF**

**VERSUS**

**MICHAEL IRERI NGANGA.....DEFENDANT**

**RULING**

1. What is for determination before the court is a preliminary objection dated 20.09.19 and filed on 23.09.19. The objection is filed by the Defendant and it targets the suit as filed. It is premised on three (3) grounds as follows:-

*i) That the suit (O.S) does not disclose a reasonable cause of action against the defendant.*

*ii) That the cause of action as pleaded in the suit does not survive the death of the deceased Sebastian Mbui Ndegwa (on behalf of who) the plaintiff filed this suit.*

*iii) The suit is therefore misconceived, frivolous and/or otherwise an abuse of the court process.*

2. The contestation between the parties relates to ownership of land parcel No. Evurore/Evurore/2169.

3. The suit before the court is based on adverse possession of land parcel Evuvore/Evuvore/2169. The plaintiff seeks for a declaration that the defendant, who is the registered owner of land parcel Evuvore/Evuvore/2169, is holding it in trust for Sebastian Mbui Ndegwa (deceased). It is claimed that, the deceased entered into an agreement with Teresia Wambui Nganga (deceased) for purchase of 0.05Ha which was to be excised out of land parcel Evuvore/Evuvore/93 at a consideration of Kshs. 20,000/=.

4. At the time of purchase, the land is said to have been registered in the name of Nganga Mutema, husband to the vendor Teresia Wambui Nganga. According to the plaintiff, the land was subdivided into several portions and the land the deceased was purchasing Evuvore/Evuvore/2169 was registered in the name of the Defendant who is a son to the vendor.

5. The deceased is said to have been granted vacant possession of the land upon purchase and that he resided on the land with his family from the year 1991. It is averred that he died in 2005 before he could pursue his title and left his family on the land. According to plaintiff, the deceased and his family have been living on the land openly and without disturbance and the family should be declared the rightful owners of the land and the defendant's name should be cancelled from the register.

**SUBMISSIONS**

6. The preliminary objection was canvassed by way of written submissions. The defendant filed his submissions on 6.10.2021. He reiterated the grounds in the preliminary objection and submitted that the issues for determination before the court are whether a deceased person has legal capacity to acquire the right of adverse possession and whether the administrator to an estate can apply for right of adverse possession after death of the person on behalf of the estate.

7. It was submitted that the right of adverse possession is a right that can only be acquired by the claimant's individual and actual possession and not in a representative capacity. The right was said not to be one that can be inherited or transferred to a personal representative of the estate of a deceased person in a suit filed against the estate. It was further submitted that the deceased having not filed a suit seeking adverse possession then nothing survived his death to justify substitution and representation under Order 24 of the Civil Procedure Act.

8. It was argued that the right of adverse possession cannot be acquired by a person who is already dead at the time of filing a suit and that the day the deceased died was the day the right of possession ceased. According to the defendant, any cause of action that the deceased acquired terminated upon his death and could not be invoked in a representative suit. The defendant relied on the cardinal principles of adverse possession to wit; be in actual possession, which is continuous and interrupted and also adverse to the registered owner's rights. It was submitted that the principles were negated by the death of the deceased and the court was urged to dismiss the suit.

9. The plaintiff filed his submissions on 25.1.2022. He submitted that he had filed an application for injunction which was responded to by the defendant who filed a replying affidavit and submissions to it. According to the plaintiff, the grounds raised in the preliminary objection were similar to those raised in the replying affidavit and the court is said to have delivered its ruling on those issues.

10. The honourable court in finding in favour of the plaintiff is said to have found that the defendant was sued by virtue of being the registered owner of land parcel Evuvore/Evuvore/2169. The court was invited to look at the title of the plaintiff in the pleadings, who averred that as administrator, he was clothed with power to sue and be sued on behalf of the estate of the deceased.

11. It was submitted that the defendant, by bringing a similar ground through a preliminary objection, was caught up by the issue of res judicata. The court was urged to dismiss the preliminary objection, which was said to be an abuse of the court process.

### **ANALYSIS AND DETERMINATION**

12. I have considered the objection as raised, the submissions by the parties, and the suit as filed. In the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, the court in describing what constitutes a preliminary objection held as follows:

*“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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”*

13. I have looked at the three grounds as raised to wit; the suit (O.S) does not disclose a reasonable cause of action against the defendant, the cause of action as pleaded in the suit does not survive the death of the deceased Sebastian Mbui Ndegwa (on behalf of who) the plaintiff filed this suit, and finally, that the suit is misconceived, frivolous and/or otherwise an abuse of the court process.

14. From the three grounds of objection raised grounds one and three seek to have the court find that the suit does not raise a reasonable cause of action against the defendant and that the suit is misconceived and frivolous. In making a determination of the two grounds of objection as raised, the court has to determine the facts of the case and call upon the parties to tender evidence in the suit. According to the Mukisa case (Supra), a ground of preliminary objection should be one that raises a pure point of law and not one that requires a fact to be ascertained or evidence to be tendered. It is my finding that the two grounds therefore do not raise pure points of law and therefore fall short of the requirement for them to be considered under a preliminary objection.

15. The only ground for determination therefore is ground two on whether the cause of action as pleaded in the suit survived the death of the deceased Sebastian Mbui Ndegwa (on behalf of who) the plaintiff filed this suit. Before I proceed to determine that ground, I wish to consider first whether the ground as raised is res judicata. The plaintiff has argued that the grounds raised in the preliminary objection had already been determined by the court in the ruling of an injunction application filed by him and by virtue of the fact that a court of proper jurisdiction had determined the issue it amounted to res judicata.

16. It is trite law that the doctrine of res judicata ousts the jurisdiction of a court to determine a suit or issue which had been determined with finality by a court of competent jurisdiction in a suit involving the same parties or parties litigating under the same title. I have perused the ruling delivered by the court on 18.7.2014. The ruling centered on the injunction sought by the plaintiff pending determination of the suit. From my reading of the ruling, the court only considered the elements for grant of an injunction application. Nowhere in the ruling did the court make a determination on whether the cause of action had survived the deceased. As such the issue had not been brought to the court's attention for determination nor did the court of its own motion consider it. I therefore find that the grounds raised in preliminary objection are not res judicata.

17. From the pleadings filed, the cause of action herein is a claim on adverse possession by the plaintiff on behalf of the estate of Sebastian Mbui Ndegwa, who is said to have purchased the land from one Teresia Wambui Nganga. The deceased is said to have been granted vacant possession from the time of purchase of the land in the year 1991 and that he has had continuous and uninterrupted occupation with the knowledge of the plaintiff. According to the plaintiff, the deceased died in the year 2005 but his family is said to have continued being in occupation and have been dependent on the rentals from the developments on the land.

18. The defendant on the other hand contests the action brought by the legal representative of the estate of the deceased. According to the defendant, rights of adverse possession cannot be brought after death of the person on behalf of the estate. Such rights are said to only be acquired by an individual in actual possession and not in a representative capacity. The defendant is of the view that such rights cannot be inherited or transferred to a personal representative.

19. It is trite law that for a claim of adverse possession to be sustainable, possession of the land must be actual, visible, continuous and exclusive for the applicable statutory period of 12 years with the knowledge of the owner. The claim by the plaintiff is by virtue of purchase of land by his father but transfer was not effected in favour of that father. It is my view that such issues on whether the purchase existed and when time can be considered to have started running together with other elements for consideration in a claim of adverse possession can only

be determined at the main suit. In making a determination of the objection I will only limit myself to the issues raised on whether a claim on adverse possession survives the death of an adverse possessor. However in doing so I am of the view that I must consider whether the elements of adverse possession have been met to warrant the claim before the court.

20. The plaintiff's claim is that the deceased person had been in occupation of the land from the year 1991 until his demise in the year 2005. I note that the period of time the plaintiff is alleged to have been in occupation of the land is a total of 14 years, which period surpasses the 12 year statutory limit required for a claim of adverse possession to be founded. The family of the deceased is said to still be in occupation of the land even after his demise. Assuming that the plaintiff was indeed in occupation of the land for such period of 12 years as claimed in the suit, did any cause of action arise by virtue of adverse possession at the time of his death? A cause of action under the Black's law dictionary ninth edition is defined as

*“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person....”*

21. From the definition above it is evident that a cause of action accrues when there is a factual situation that entitles a person to obtain a remedy against another. From the circumstances of the case and the assumption made that the deceased had been in occupation for a period of 12 years, then in my view, the assumed occupation for a period of more than 12 years can be considered as the factual basis upon which the deceased was entitled to bring a claim against the defendant. Simply put, a cause of action on adverse possession arise after lapse of 12 years. It therefore follows that at the time of death of the deceased then there was a subsisting cause of action capable of being brought against the defendant on adverse possession.

22. The defendant has in his submissions argued that at the time of the adverse possessor's death, he had not instituted a suit and any cause of action that the deceased acquired terminated upon his death and could not be invoked in a representative suit. The plaintiff in the case has brought the claim in his capacity as a legal representative to the estate of the deceased. It is trite law that a personal representative once duly appointed comes in the place of a deceased person and assumes the rights, obligations and liabilities of a deceased person, these rights extend to instituting suits on behalf of a deceased person.

**Section 82(a) of the Law of Successions Act** stipulates that

*“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

**Section 79 of the Law of Succession Act** provides that

*“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”.*

23. I have already pointed out that from the facts of the case, the plaintiff is said to have been in occupation of the land for a period of 12 years. With that assumption, the cause of action arose the moment the 12 years lapsed from the date of his occupation of the land and at the time of his death the cause of action was therefore subsisting. The property of the deceased by virtue of Section 79 of the law of Succession Act vested in his legal representative who is empowered under Section 82 of the Law of Succession Act to institute suits on behalf of the estate of the deceased to pursue such interest on the property of the deceased.

24. **Section 2(1) of the Law Reform Act**, provides that;

*“Subject to the provisions of this section, on the death of any person after the commencement of this act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate”.*

25. From the provisions of Section 2(1) of the Law Reform act it is clear that any cause of action that subsists during the death of a person survives such death for the benefit of the estate. It therefore follows that the cause of action being subsisting at the time of death of the deceased, then the same survived the death of the deceased.

26. The upshot of the foregoing is that the preliminary objection lacks merit and the same is dismissed. I order that costs be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2022.**

In the presence of Rose Njeru for Eddie Njiru for defendant and in the absence of Munene Muriuki for plaintiff.

Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

22/2/2022