



**REPUBLIC OF KENYA**

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

**ORIGINATING SUMMONS NO. 8 OF 2021**

**IN THE MATTER OF IRRIGATION (NATIONAL IRRIGATION SCHEME) REGULATIONS 1977 VIDE (TENANCY)  
LICENCE NO. 3694 UNIT W6 WAMUMU SECTION**

**AND**

**IN THE MATTER OF THE LIMITATION OF ACTION ACT (CAP 22)**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE ACT (CAP 21) 210**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (ARTICLE 40) 2010**

**LEAH WAMBUI KIMOTHO .....PLAINTIFF**

**VERSUS**

**MAINA MUNGURI .....1<sup>ST</sup> DEFENDANT**

**MUGO KARANI .....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion brought under **Order 40 Rule 2 and Order 51 C.P.R** dated and filed on 2<sup>nd</sup> March, 2021, the Applicant is seeking the following Orders :-

a. SPENT

b. That a temporary injunction be issued against the Defendants by themselves, their agents, servants jointly and severally from entering, cultivation, surveying, transferring, disposing, selling, alienating and otherwise interfering with the plaintiff and five (5) others namely: Joram Munguri Maina, Rachael Gacheru Maina, Salome Wangari Maina, Naomi Wanjugu Maina on suit land being tenancy licence No. 3694 unit W6 Wamumu Section or any part thereof until the hearing of this application and or otherwise status quo be maintained.

c. That the officer in charge Kiamiciri Police Station and area administration to ensure compliance with the order accordingly.

d. That the cost of this application be provided for in any event.

2. The application was based on the following Grounds :-

a. That the Applicant lodged an application for a declaration for orders of adverse possession subject to actual rights over the rice holding no. licence 3694 unit W6 Wamumu Section which and consequently by such unwarranted and illegal act of the defendants as to interference without occupational rights thereto which issue and conduct of the defendant is very detrimental to them as a

family.

- b. That we deprive our livelihood from cultivation of rice in the said holding.
- c. That the defendant/respondent have threatened them and have even caused the arrest of some of them by police maliciously to intimidate and defeat their right.
- d. That it's accordingly justified that their application be granted.

#### **APPLICANT'S CASE**

3. The application is supported by the affidavit of the applicant sworn on 2<sup>nd</sup> March, 2021 whereby she adopted and relied on her supporting affidavit sworn on 26<sup>th</sup> February, 2021 whereby she stated that:

- a. They have at all time resided on the suit land rice holding no. 3694 unit W6 Wamumu Section for a period of over forty (40) years enjoying uninterrupted possession and maintaining themselves as rice farmers but lately the 1<sup>st</sup> defendant has conducted himself in such unwarranted manner as extinguish our right and interest over the land wherein they by his consent resided.
- b. She was apprehensive that his involvement with other parties bent on defrauding to cause them irreparable loss and damage
- c. The 1<sup>st</sup> defendant has used all means to intimidate them hence they sought protection of the Court.
- d. She sought for maintenance of status quo in view of merit of the claim over land.

4. She added that the respondent had interfered with their occupational rights to the rice holding which they have resided on for over forty (40) years and caused irregular and malicious means, threats against them and otherwise evict them from the suit land and hence its only the orders sought wherein they can be protected by maintenance of status quo pending further orders from the court and their suit may be rendered nugatory in event of continuance of their acts.

#### **DEFENDANT'S CASE**

5. The Defendant/Respondent opposed the application by filing a Preliminary Objection dated 27<sup>th</sup> April, 2021 and filed on 29<sup>th</sup> April, 2021. He also filed a Replying Affidavit sworn by the 1<sup>st</sup> Defendant/Respondent on 20<sup>th</sup> April, 2021.

6. The Defendant/Respondent in the said Preliminary Objection prayed that the Notice of Motion dated 2.3.2021 as well as the Originating Summons dated 1<sup>st</sup> March, 2021 be dismissed/struck out on grounds that: -

- a. The entire suit filed together with the Notice of Motion dated 2.3.2021 is misconceived, fatally defective and raises no cause of action as the plaintiff and her 4 siblings are children of the 1<sup>st</sup> Defendant/Respondent MAINA MUNGURI and their entry to and cultivation of the suit land is by virtue of being authorized dependants within the meaning of Irrigation (National Irrigation Scheme) Regulation 1977 and the entire suit is an abuse of court process disclosing no reasonable cause of action.
- b. The suit land Rice Holding No. 3694 Unit W 6 Wamumu Section of the Mwea Irrigation Settlement Scheme constitute land under National Irrigation Scheme Pursuant to the relevant provisions of the National Irrigation Act CAP 347 Laws of Kenya owned and managed by the State through the National Irrigation Board- now National Irrigation Authority and 1<sup>st</sup> Defendant is a mere licensee and or Tenant of State and land is incapable of being vested by way of Adverse possession same being Public/Government Land.
- c. The Honourable Court lacks the requisite jurisdiction to grant orders sought in the Originating summons dated 1.3.2021 and the Application dated 2.3.2021 as powers to issue licenses, revocation of licenses and determination of the number of settlers within a National Irrigation Scheme is solely vested with the National Irrigation Board currently National Irrigation Authority under the Irrigation Act Cap 347 Laws of Kenya being the law applicable and NOT courts of law.
- d. The Application dated 2.3.2021 is bad in law as it is Resjudicata in view of the orders/Ruling dated 13.1.2021 vide Baricho S.P.M ELC NO. E10 of 2021- Maina Munguri Vs Salome Wangari Maina & 4 Others and which orders of injunction against the Applicant and her 4 siblings are still valid and the substantive suit still pending.
- e. The entire suit is an abuse of court process and breaches the provisions of *Sections 6 & 7 of the Civil Procedure Act Cap 21* prohibiting multiple litigations.

7. In his replying Affidavit, the Defendant stated that he is the registered tenant of Rice Holding No. 3694 Unit W6 Wamumu Section Measuring 4 Acres and was accordingly issued with a license.

8. He further stated that the application was totally misplaced and was not entitled to the prayers sought under the laws cited and had not stated which fundamental right had been infringed.

9. He went ahead to state that the plaintiff who is his daughter was married and together with her siblings, had denied him the right to occupy and enjoy his tenancy.
10. He also stated that the provisions which the plaintiff has cited are not applicable under the land which is purely owned by the National Irrigation Authority whereby the 1<sup>st</sup> Defendant is just a tenant.
11. He further stated that the plaintiff has not come to court with clean hands since there was another suit pending which is Baricho S.P.M ELC NO. E10 of 2021- Maina Munguri -vs- Salome Wangari Maina & 4 Others.
12. He stated that the Plaintiff's application was sick and lacked legs to stand on and urged that this Honourable Court dismisses the same with costs to the Defendants.

### ANALYSIS

13. When the instant application came for hearing on 13<sup>th</sup> May, 2021, the Plaintiff was absent and the counsel for the Defendant urged that this Honourable Court to dismiss it with costs.
14. I have considered the application herein, the grounds set out therein, the facts deponed in the applicants supporting affidavit, the Preliminary
15. Objection and Replying Affidavit sworn in opposition thereto. Besides filing a replying Affidavit in response to the application, the respondent also filed a Notice of Preliminary Objection dated 27/04/2021. It is trite law that where a party raises an objection of a serious preliminary nature such as challenging the jurisdiction of the court, the Judge must of necessity put down its tools and make inquiries pending further proceeding in the matter.
16. Preliminary Objection is often a procedural raised by a litigants as the first business of the especially where the jurisdiction of the court or Tribunal called to determine the matter in question is being challenged. The issue is a topic of by scholars, Students of Law and even Authors.
17. *The most referred decision on what constitutes a preliminary Objection was set out in the locus classicus case case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:*

*“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.”*

18. In this case, the Respondent has raised the following grounds in their Notice of Preliminary Objection:
- a. *The entire suit filed together with the Notice of Motion dated 2.3.2021 is misconceived, fatally defective as it raises no cause of action.*
  - b. *The suit land Rice Holding No. 3694 Unit W 6 Wamumu Section of the Mwea Irrigation Settlement Scheme constitute land under National Irrigation Scheme and thus was incapable of being vested by way of Adverse possession.*
  - c. *The Application dated 2.3.2021 is bad in law as its Resjudicata in view of the orders/Ruling dated 13.1.2021 vide Baricho S.P.M ELC NO. E10 of 2021- Maina Munguri -vs- Salome Wangari Maina & 4 Others.*
  - d. *This Honourable Court lacks the requisite jurisdiction to grant orders sought in the Originating summons dated 1.3.2021 and the Application dated 2.3.2021.*
  - e. *The entire suit is an abuse of court process and breaches the provisions of Sections 6 & 7 of the Civil Procedure Act Cap 21.*
19. I will first consider the issue of jurisdiction as jurisdiction is everything and without it, this Court has no power to make one more step. This position was held in another most referred case of **The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.** where Nyarangi J.A. held as follows:

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

20. In determining the issue of jurisdiction, the Supreme Court in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others** held as follows:

“... a court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

21. This Court’s jurisdiction is outlined under **Section 13 of the Environment and Land Court Act No.19 of 2011** which provides that:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes? (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

22. The applicant in the instant application under review is seeking a temporary injunction to restrain the respondents from entering, cultivation, surveying, transferring, disposing, selling, alienating and otherwise interfering with the plaintiff and five (5) others namely: Joram Munguri Maina, Rachael Gacheru Maina, Salome Wangari Maina, Naomi Wanjugu Maina on suit land being tenancy licence No. 3694 unit W6 Wamumu Section or any part thereof until the hearing of the application and or otherwise status quo be maintained.

23. Further in the originating summons, the plaintiff/Applicant prays that she be declared to have acquired a portion of 4 acres out of the suit land by way of adverse possession. She also prays for a declaration that the registration and dealings of the suit land between the defendants constitute fraud and/or is irregular, intended to defeat her rights and interests of adverse possession.

24. The respondents in their preliminary objection stated that this Honourable court does not have jurisdiction to determine the application and/or the Originating Summons as powers to issue licenses, revocation of licenses and determination of the number of settlers within a National Irrigation Scheme is solely vested with the National Irrigation Board, currently National Irrigation Authority under the **Irrigation Act Cap 347 Laws of Kenya** being the law applicable and NOT courts of law.

25. The jurisdiction of this Honourable Court to determine claims of adverse possession is outlined in **Section 38 (1) of the Limitation of Actions Act Chapter 22** which provides that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

26. From these provisions, it is clear that this Court is only clothed with jurisdiction to determine a claim of adverse possession in relation to land which is registered under the Acts cited in **Section 37 of the Limitation of Actions Act Chapter 22**. The said **Section 37 of the Limitation of Actions Act Chapter 22** provides as follows:

“This Act applies to land registered under the Government Lands Act, the Registration of Titles Acts, the Land Titles Acts or the Registered Land Act...”

27. From the claim in the Originating Summons and the Replying Affidavit in response as well as the pleadings herein, the subject matter of this suit and the current application is Rice Holding tenancy license No. 3694 unit W6 Wamumu Section. The same is a tenancy under a Settlement Scheme which is not registered in any of the Acts cited in **Section 37 of the Limitation of Actions Act Chapter 22**.

28. The subject matter is the property of the National Irrigation Board. It is the National Irrigation Board that has the absolute power to issue licences and to terminate the same. This was the holding in the case of **Republic Vs National Irrigation Board, Mwea Irrigation Settlement Scheme & another Ex parte John Murimi Gichobi [2021] e KLR** where this Honourable Court held thus:

“First, it is important to note that the 1st respondent is a creature of statute whose sole statutory mandate is to manage, control, regulate and allocate land established within National Irrigation and Settlement Schemes. Being a property belonging to the National Irrigation Board, they have the absolute power to issue licences and to terminate the same toward proper regulation and management of such land.”

29. It is therefore my view that this Honourable Court does not have the requisite jurisdiction to determine the claim sought by the applicant both in the instant application and the Originating Summons.

30. In the case of **The Owners of the Motor Vessel “Lillian S”** (supra) once a court finds that it has no jurisdiction it is supposed to down its tools immediately. Since I have found that this Honourable Court does not have the jurisdiction to determine the instant application and even the originating summons for want of jurisdiction, it is finding my view that that point issue alone is sufficient to determine the matter without going into the rest of the issues.

## **CONCLUSION**

31. In the circumstances, I find that this court lacks the jurisdiction to determine/handle the Notice of Motion dated 2.3.2021 as well as the Originating Summons dated 1<sup>st</sup> March, 2021. Consequently, this suit commenced by Originating Summons dated 1<sup>st</sup> march, 2021 as well as

the Notice of Motion dated 2/3/2021 are struck out with costs to the defendants/Respondents. It is so ordered.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**IN THE PRESENCE OF:**

- 1. MR. MAINA HOLDING BRIEF FOR MR. KAHIGAH FOR 1ST AND 2ND DEFENDANT**
- 2. PLAINTIFF – ABSENT**
- 3. KABUTA, COURT CLERK – PRESENT.**