



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC ORIGINATING SUMMONS E023 OF 2021

MUKOKINYA M'ARITHI.....PLAINTIFF

VERSUS

PATRICK MUNKIRI KABUNDU.....DEFENDANT

IN THE MATTER OF ADVERSE POSSESSION OVER L.T. THAU/MUMUI 1/5

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF LAND ACT NO. 6 OF 2012 AND LAND REGISTRATION ACT NO. 3 OF 2012

RULING

1. By an application dated 30.9.2021, the plaintiff seeks temporary order of injunction barring and restraining the defendant from interfering with the plaintiff's quiet possession, occupation and use of **L.R No. Thau/Mumui 1/5** pending hearing and determination of this suit. The second prayer is for an order of inhibition over the referenced land pending the hearing and determination of the suit. The application is supported by an affidavit of Mukokinya M'Arithi sworn on 30.9.2021.
2. The grounds of the application are that the applicant being elderly has been in occupation of the suit land since 1983 with his family where she has established her homestead and should she be evicted as currently threatened by the defendant, she would be rendered homeless and her suit shall be rendered nugatory.
3. In support of her prayers, the plaintiff has attached a copy of a death certificate of her late husband who passed on in 2007, photographic images depicting her extensive developments on the suit land and official search as annexures marked **MM1 – MM3** respectively.
4. The basis of the plaintiff's claim is the originating summons dated 30.9.2021, where she is seeking this court to find that she is entitled to orders of adverse possession as against the defendant who is the registered owner of the suit land. In the said originating summons, she averred that she has been on the suit land for 38 years but in July 2020, the defendant allegedly threatened her with eviction.
5. Looking at the copy of records attached to the originating summons, the suit land appears to have been in the name of M'Muguongo Thanyoke Baibere prior to the registration in favour of the defendant on 13.3.2006. The aforesaid M'Muguongo Thanyoke was the husband of the plaintiff going by the witness statements filed by the plaintiff.
6. The respondent has opposed both the originating summons and the application through a notice of preliminary objection dated 12.11.2021 stating the originating summons and the notice of motion are misconceived frivolous and vexatious. The second ground was that the plaintiff lacks capacity to institute the suit on behalf of the estate of M'Mugonogo Thanyoke Baibere.
7. The third ground was that the court could not determine similar issue through a n originating summons where a similar application was dwelt with in **Meru ELC No. 26 of 2020 (O.S)** which was struck out hence this suit was *res-judicata*.
8. On 15.11.2021, the court directed that the respondent files a reply to the application within 7 days and that the application be canvassed through written submission which were to be filed within 14 days.

9. The plaintiff filed his written submissions dated 23/11/2-21 whereas the defendant did not comply.
10. The plaintiff submitted that the notice of preliminary objection dated 12.11.2021 was unmerited since the suit had raised genuine and legitimate issues/cause of action requiring court's determination.
11. As regards capacity, the plaintiff submitted she had instituted the suit for herself and not for and on behalf of the estate of her deceased husband hence required no letters of administration to institute it.
12. On the issue of *res judicata*, the plaintiff submitted the previous suit had been struck out on a technicality and was not determined on merits hence the instant suit could not fall under *res judicata* and in any event, the defendant was yet to reply to the originating summons, especially the factual issues raised.
13. The plaintiff urged the court to be guided by **Article 159 of the Constitution** and hear the suit on merits by sustaining, it given the disclosed cause of action.
14. Coming to the application, the plaintiff submitted she had met the threshold under the ***Giella –vs- Cassman Brown & Co Ltd [1973] EA 358*** and her being elderly, the court has an obligation to protect her rights under **Article 57 of the Constitution** including, if need be, visit the **locus in quo** and establish the facts and status of her long occupation if there is any doubt as to her pleadings.
15. Other than the referral of a preliminary objection in the written submissions by the applicant, the court record does not contain any duly paid for and filed response to the application by the respondent. This court cannot therefore make a finding based on an alleged preliminary objection which was not properly filed in court as ordered on 15.11.2021.
16. Be that as it may, a preliminary objection is a pure point of law filed on the assumption that what has been pleaded by one side is admitted by the other side and which if argued may dispose of the suit. See ***Mukhisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd (1969) E.A. 696.***
17. In this suit, the defendant has not filed a response to the originating summons to content both the factual and legal issues raised therein. The court has not been furnished with a determination on merits made on the subject matter on the issues now before this court between the same parties.
18. In addition, there has been no demonstration on how the suit is misconceived, frivolous and or vexatious.
19. Further, the plaintiff has sued the defendant in her own capacity to safeguard her alleged accrued rights under **Order 37** as read together with the **Limitation of Action Act**.
20. Again, the applicant has attached evidence indicating she has been in occupation of the suit land initially registered in favour of her deceased husband.
21. For these reasons, the applicant has demonstrated a right which is threatened with breach by the defendant and hence requiring protection as held in ***Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others [2003] eKLR and Nguruman Limited –vs- Jan Bonde Nielsen & 2 others [2014] eKLR.***
22. Consequently, I find the appellant has established a prima facie case with a probability of success.
23. Secondly, having been in occupation with developments, I find she is likely to suffer irreparable loss and damage which may not be compensated by way of damages. The balance of convenience also tilts in favour of preserving the property against eviction or demolition and disposal to third parties.
24. Under **Section 68 of Land Registration Act**, the court has powers to issue inhibition orders to preserve the property from disposal, pending the happening of a certain event for a specific period.
25. I find this a proper case given the circumstances to issue such an order for a period of one year only. Consequently, I allow the application dated 30.9.2021 by issuing: -
 - a) **Temporary injunction barring and restraining the defendant, his agents, servants or employees from entering, evicting, demolishing or in any way interfering with the plaintiff's quiet enjoyment and occupation of L.R No. Thau Mumui 1/5 for a period of one year.**
 - b) **An order of inhibition stopping any dealings over L.R No. Thau/Mumui 1/5 for a period of one year.**
 - c) **The defendant is granted leave to file a response within 45 days.**
 - d) **Parties to appear for pretrial on 16.5.2022**

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 30TH DAY OF MARCH, 2022

In presence of:

Thangicia for plaintiff/applicant

HON. C.K. NZILI

ELC JUDGE