



REPUBLIC OF KENYA



**Eshitera v Murutu (Environment & Land Case E001 of 2021)
[2022] KEELC 70 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 70 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E001 OF 2021**

DO OHUNGO, J

MAY 30, 2022

BETWEEN

JAMES AMUKHOYE ESHITERA APPLICANT

AND

MARITINA MURUTU RESPONDENT

RULING

1. The applicant commenced proceedings in this matter through Originating Summons (OS) dated September 8, 2021, claiming that he had acquired title to the parcel of land known as N/Wanga/Namamali/889 (hereinafter “the suit property”) through adverse possession. Together with the OS, he filed Notice of Motion dated September 8, 2021, seeking the following orders:
 1. [Spent]
 2. THAT pending the hearing and determination of this application there be an order restraining the Respondent from evicting the Applicant from land parcel no N/Wanga/Namamali/889.
 3. THAT the interims orders in prayer 2 be confirmed to remain in force until this originating summons are heard and determined.
 4. THAT the Honourable court be pleased to maintain the status quo pertaining land parcel No N/Wanga/Namamali/889 subsisting as at the time of filing this summons.
 5. THAT there be no orders as to costs.
2. The application is supported by an affidavit sworn by the applicant. He deposed that he was born in 1956 on land which was later registered as the suit property in the names of Murutu Were who is since deceased and that he (the applicant) lives on the suit property to date, has buried a child on it and that three of his sons have built houses in which they reside on the suit property. That at the time of land registration, his (the applicant’s) father Benjamin Eshitera was living in Uganda but returned home in



- 1973 and settled on the suit property. He added that his father filed Kakamega Succession Cause No. 142/1992 concerning the estate of Murutu Were and for adverse possession in Kakamega Civil Case No. 134 of 2001 (OS). That he obtained letters of administration in respect of his father's estate.
3. The respondent reacted to the application through a replying affidavit in which she deposed that she is the registered proprietor of the suit property having acquired it from her late husband Murutu Were through transmission in Kakamega High Court P & A No. 142 of 1992. That the applicant filed Kakamega High Court P & A No. 150 of 1992 in which he included the suit property but the court ordered that the suit property be deleted from the cause. That the applicant forcefully moved into the suit property in 2007, built a house and started using a portion of the suit property. That she reported the matter to the local administration and elders who asked the applicant to desist from using the suit property but he did not comply.
 4. The respondent further deposed that she filed Kakamega ELC No. 19 of 2015 wherein judgement was delivered on March 23, 2021 and the defendant was ordered to vacate the suit property. She added that instructed her advocates to commence the process of evicting the applicant and that in the circumstances this suit is res judicata. The respondent also filed Notice of Preliminary Objection dated November 25, 2021 in which she contended that the suit is res judicata.
 5. Both the application and the preliminary objection were canvassed together through written submissions. The respondent in her submissions referred to the judgment in Kakamega ELC No. 19 of 2015 and argued that the suit is res judicata. Regarding the application, the respondent argued that the applicant has not demonstrated a prima facie case and that the balance of convenience tilts in favour of the respondent. She urged the court to strike out the suit.
 6. On his part, the applicant argued that he is not challenging the judgment in Kakamega ELC No. 19 of 2015 but wishes to be heard on the element of adverse possession. Regarding the application, the applicant argued that he had satisfied the requirement for grant of an interlocutory injunction.
 7. I have considered the application, the affidavits and the preliminary objection. I will deal with the preliminary objection first.
 8. The parameters for consideration of a preliminary objection are well settled. A preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Any objection whose determination rests on disputed facts is not a valid preliminary objection. See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. There is no dispute that Kakamega ELC No. 19 of 2015 was filed and that judgment in it was delivered on March 23, 2021. The judgment is reported as *Maritina Murutu v James Amukhoye Eshite* [2021] eKLR. As such, the objection is a valid preliminary objection since its determination does not rest on disputed facts.
 9. The objection is that this suit is res judicata. Res judicata has found statutory expression in Section 7 of the *Civil Procedure Act* as follows:

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.
 10. For an objection based on res judicata to be upheld, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the



previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR.

11. A perusal of the judgment in Kakamega ELC No. 19 of 2015 shows that the applicant herein was the defendant therein while the respondent herein was the plaintiff therein. The suit property in both matters is the same: N/Wanga/Namamali/889. The plaintiff in Kakamega ELC No. 19 of 2015 sought judgment against the defendant therein for eviction of the defendant, his family, servants or any other person claiming through him from N/Wanga/Namamali/889. Upon hearing the case, the court granted the following orders in its judgment:
 1. The defendant, his relatives, servants and/or agents to vacate the suit land parcel No. N/Wanga/Namamali/889 within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.
 2. Each party to bear its own costs.
12. It is thus manifest that the court ordered that the applicant herein vacates the suit property within 6 (six) months from the date of the judgement and in default he be evicted. The respondent herein is on record stating that the applicant failed to vacate within the stated period and that she has consequently commenced the process of execution. The applicant herein is on record stating that he is not challenging the judgment in Kakamega ELC No. 19 of 2015.
13. In his OS dated September 8, 2021, the applicant is claiming that he has acquired title to the suit property through adverse possession. To succeed, he must prove that has occupied and used the suit property without force, without secrecy and without evasion. It is impossible for him to satisfy those ingredients since his stay on the suit property has been contested by the respondent since 2015 when she filed Kakamega ELC No. 19 of 2015 and certainly since March 23, 2021 when the court ordered his eviction. His continued stay on the suit property cannot be said to be without force and without evasion.
14. In view of the foregoing discourse, I find that Notice of Preliminary Objection dated November 25, 2021 has merit. I uphold it. This suit is struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Applicant present

Counsel for the applicant absent

No appearance for the respondent

Court Assistant: E. Juma

