



Nyambichu alias Nyairo v Onsongo (Sued as the Legal Administrator of the Estate of the Late Isaac Onsongo Manono) (Environment & Land Case E001 of 2022) [2022] KEELC 3132 (KLR) (30 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E001 OF 2022**

**JM KAMAU, J
MAY 30, 2022**

BETWEEN

THOMAS NYAMORA NYAMBICHU ALIAS NYAIRO PLAINTIFF

AND

JERUSA KWAMBOKA ONSONGO DEFENDANT

**SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE
ISAAC ONSONGO MANONO**

RULING

1. The Applicant moved this court by way of an Originating Summons seeking a Declaration that he has acquired Title to that portion of land measuring 0.041 Hectares or thereabout forming part of the parcel of land known as L.R. No. West Mugirango/nyamaiya/2036 by way of prescription and/or adverse possession for determination of the following issues: -
 1. Whether a Declaration ought to issue that the right(s) of Respondent or any other person claiming under his Title or entitled to so claim is (are) barred under the *Limitation of Actions Act* – Chapter 22 of the Laws of Kenya and Title thereto extinguished upon the ground that the Applicant has been in occupation of a portion of that parcel of land known as L.R. No. West Kitutu/bomatara/3166 measuring 0.041 Hectares or thereabouts (hereinafter referred to as “the suit premises”) for a period spanning well over 50 years.
 2. Whether an Order ought to be made that the Applicant be registered as proprietor of the suit premises.
 3. Whether an Order ought to issue restraining the Respondent, either by himself, his agents, assigns or any other person(s) claiming under his Title from interfering with the Applicant’s quiet use, possession and enjoyment of the suit premises in any manner howsoever.



4. Who ought to bear the costs of the Summons.
 5. Whether other or further Orders ought to be made as are expedient in the circumstances.
2. On 14/03/22 and before the Hearing of or directions given for the Hearing of the suit, the Respondent issued a Notice of Preliminary Objection on the following grounds: -
1. The subject suit was filed and/or commenced on the basis of existing suit and/or proceedings namely, Nyamira CMCC ELC Case No. 86 of 2019 (Formerly Kisii ELC Case No. 337 of 2013) consequently, the subject suit is barred and/or prohibited by the Doctrine of *Sub-judice*. In the premises, the suit herein offends the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya.
 2. On the other hand, the instant suit is *Res-Judicata* as issues raised in the instant suit and particularly pertaining LR. No. West Mugirango/ Nyamaiya / 2036, measuring approximately 0.08 Ha, (hereinafter referred to as the suit property) had been dealt with *vide* Kisii HCC no. 297 of 1993 which suit was dismissed for want of prosecution.
 3. In any event, the instant matter, does not disclose and/or raise a reasonable cause of action, whatsoever and howsoever.
 4. The suit herein is Pre-mature, misconceived and bad in law.
 5. Consequently, the instant suit and/or proceedings are not only scandalous, but frivolous and vexatious. Consequently, the suit herein constitutes an abuse of the due process of the court.
 6. In a nutshell, the suit herein is legally untenable.
3. I have looked at the said Preliminary Objection, the Affidavit in response to the aforesaid Preliminary Objection, the Replying Affidavit in respect thereto and the Submissions in support of and in opposition to the objection as well as on the oral submissions in Court. The objection is based on the ground that in Nyamira CMCC ELC Case No. 86 of 2019 the late Isaac Onsongo Manono whose Estate the Respondent sued the Applicant herein for: -
- i. A Declaration that the Applicant herein is the registered and/or lawful owner of L.R. No. West Mugirango/nyamaiya/2036.
 - ii. An order of eviction directed against the said Thomas Nyamira Nyambichu from L.R. No. West Mugirango/ Nyamaiya/2036.
 - iii. Permanent injunction against trespass entry, re-entry, construction and/or interference from Thomas Nyauma Nyambichu.
 - iv. General Damages for trespass.
 - v. Intent on (i) alive.
 - vi. Costs of the suit.
4. The Defendant in the lower court consequently filed a response by way of Defence and a counterclaim where he prayed for: -
- a. A Declaration that Isaac Onsongo Manono held 0.034 Hectares out of L.R. No. West Nyamaiya/2036 in trust for the Defendant.



- b. The Plaintiff do transfer a portion of L.R. No. West Mugirango/ Nyamaiya/2036 measuring 0.041 Hectares to the Defendant.
5. The withdrawal of the counterclaim was sought vide Notice of withdrawal of counterclaim dated 04/02/2022. What is not clear is whether the same was withdrawn or not.
6. In a nutshell the counterclaim in the lower court is the ownership of Plot No. L.R. West Mugirango/nyamaiya/2036. The said case is said to be part heard and has substantially proceeded and what is pending is the Defence Hearing. This, in the opinion of the Respondent herein makes this case *sub-judice*. Secondly, there was a matter dealing with the suit property herein in Kisii HCC No. 297 of 1993 which was dismissed for want of jurisdiction. A Decree from this determination has been attached to the pleadings in the lower court.
7. On the issue of *Res-judicata*, Section 7 provides that: -

Res judicata

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.”

the key words here are: -

.....and has been heard and finally decided by such court...”

8. The Respondent herein has already indicated to the court that Kisii H.C.C. No. 297 of 1993 was dismissed for want of prosecution. Consequently, the same was never heard nor finally decided. Being dismissed for want of prosecution means that it was not heard and decided. It in effect was struck out.
9. As to this case not raising or disclosing a reasonable cause of action I do not agree with the Respondent that the suit is devoid of cause of action. The Applicant has raised the issue of adverse possession and indicated for how long he has lived on the suit land to warrant this Declaration.
10. On the issue of being sub-judice I fail to understand why the Applicant herein never filed his counter claim in Kisii HCC No. 33 of 2013 (in the Environment and Land Court Division.) Secondly, why did the Applicant have to wait until the Plaintiff in the lower case had closed her case to file the current suit and canvass the ownership of the suit property in both suits. I do not buy the Applicant’s argument that the subject matter in the Originating Summons before this Court is different from the one in the lower Court. The issue for determination is the same, that of ownership of the property known as L.R. West Mugirango/nyamaiya/2036. All the matters raised in the Originating Summons herein were perfectly within the jurisdiction of Kisii High Court (Environment and Land Division) in 2013 and had they been raised there then the suit may not have been transferred to the Chief Magistrate’s Court. Asking this Court as not within the jurisdiction of the Chief Magistrate’s Court. Asking this court to proceed with this summons and close its eyes to the fact that the issue of ownership is contested in the lower court is to overlook the many hours put in Nyamira CMCC Case No. ELC No. 86 of 2019. One of the 2 cases must be stayed. I have been informed that an Application to stay Nyamira CMCC ELC land case No. 86 of 2019 was made on the ground that this summons has been lodged the same bearing the date 06/02/2022. What none of the parties has disclosed to me is the outcome of the said Application. I would have expected the Application to be heard and if dismissed, then an Appeal be preferred to this court. What would happen if I stay this suit and the lower court stays the suit before



it? Both suits would have been stayed. In whose benefit could this be. In the absence of any evidence that the lower court case has been stayed, I believe the same has not and I do order that this suit be stayed awaiting the outcome of Nyamira CMCC No. 86 of 2019. Costs in the cause.

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

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: N/A

Defendants: Mr. Omotto holding brief for Mr. Ochwal

