



**Lekishon v Land Registrar, Kajiado District & 2 others; Naumo (Interested Party)
(Environment & Land Case E040 of 2021) [2022] KEELC 2978 (KLR) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E040 OF 2021**

MN GICHERU, J

MAY 23, 2022

BETWEEN

MOLOI OLE LEKISHON PLAINTIFF

AND

LAND REGISTRAR, KAJIADO DISTRICT 1ST DEFENDANT

LAND SURVEYOR, KAJIADO DISTRICT 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

AND

MASAGU OLE KOITALEL NAUMO INTERESTED PARTY

RULING

1. This ruling is on the notice of motion dated 16th September, 2021. The said motion is brought by the Interested Party/applicant under sections 1A, 1B and 7 of the *Civil Procedure Act* read together with order 2 rule 15 *Civil Procedure Rules*, article 48 of *the Constitution* of Kenya 2010 and all other enabling provisions of the law.

It seeks one main prayer namely;

- (a) That an order be granted by the court striking out the entire suit herein as it is scandalous, frivolous and vexatious. it is an abuse of the court process.
2. There are twenty six grounds, a supporting affidavit by the interested party with eleven (11) annexures in support of the application. The gist of all this material is that the entire suit is Res Judicata because the same parties litigated in ELC 864/2017 Kajiado over the same subject matter before a court of competent jurisdiction which issued an order of eviction against the plaintiff who should have appealed against that decree instead of filing a fresh suit.



3. The plaintiff/respondent filed six grounds of opposition dated 24/2/2022 opposing the interested party's application. They include;
- (i) That the court should administer substantive justice and not dwell on technicalities.
 - (ii) That the parties in ELC Kajiado 864 of 2017 are different from the parties herein.
 - (iii) That the reliefs sought against the defendants in these proceedings have never been sought in the previous proceedings.
 - (iv) That the defendants herein have filed substantive defences.
 - (v) That there has been material disclosure of the entire extent of the previous litigation and departure well set out in paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the plaint.
 - (vi) That the plaintiff is entitled to pursue his claim in this Court however implausible and improbable his case may be.

Counsel for the interested party filed written submissions on 12/4/2022.

4. I have carefully considered the application in its entirety including the pleadings, the affidavit, the grounds in support, the annexures, the grounds of opposition, the submissions and the case law cited.
5. I agree with the first ground by the plaintiff that the court should administer substantive justice without regard to technicalities.
6. Regarding the plaintiff's second ground, I find that two of the parties in ELC 864/2017 namely the plaintiff and the interested party are the same parties in this case.
7. As for the plaintiff's third ground of opposition, I find that the same issues that arose in Kajiado ELC 864/2017 are the same issues herein, namely, the boundary between Kajiado/olchoro/onyore/111 and Kajiado/olchore/onyore/112.
8. On the fourth ground, the fact that the defendants have filed a written statement of defence in which they have averred vide paragraph 6 that this court has jurisdiction does not necessarily mean that an application of this nature cannot be made by the applicant.
9. On the fifth ground, though I agree that there is disclosure of the earlier suit, ELC 864/2017, the difference between it and the current one is not clear.
10. Finally on the sixth ground, I do not agree that a suit should be filed even if it is implausible and improbable. A suit must disclose a cause of action to be sustained in a court of law otherwise, it will be struck out under order 2 rule 15(1) of the Civil Procedure Rules which provides;

“(1) At any stage of proceedings the court may order to be struck out or amended any pleading on the ground that-

- (i) It discloses no reasonable cause of action or defence in law; or,
- (ii) It is scandalous, frivolous or vexatious; or
- (iii) It may prejudice, embarrass or delay the fair trial of the action; or
- (iv) It is otherwise an abuse of the Court process”

11. I find that the following issues arise in the current application dated September 16, 2021.



- (1) Whether there is a common issue at the core of the dispute between the Plaintiff and the Interested Party in the two suits?
 - (2) Whether Kajiado ELC No. 864/2017 determined the dispute identified in number 1 above?
 - (3) Whether the party who has been declared a trespasser by a court of Law and ordered to be evicted can file a fresh suit over the same land on a claim of adverse possession?
12. On the first issue, I find that there is a common issue at the core of the dispute, namely, boundary between the two parcels Kajiado/olchoro/onyore/111 and 112.
 13. This can be discerned from paragraph 17D of the plaint which states; “Alternatively, an order to the first and second defendants to resurvey the two parcels of land, re-allocation of the respective parcels of land to the plaintiff and the interested party”.
 14. The plaint dated December 17, 2014 in ELC No. 864/2017 at paragraph 14 (1) prays for,
 15. An order of eviction against the defendant, his servants or agents from the plaintiffs piece of land Kajiado/Olchoro-Onyore/111 as determined by the Kajiado District Land Surveyor”.
 16. It is evident from the two plaints in the two suits that the issue at the heart of the dispute is the boundary between the two parcels.
 17. Regarding the second issue, I find that Ochieng, Judge, in her judgement dated October 29, 2019 determined the dispute and ordered that the Plaintiff be evicted from LR Olchore/ Onyore/111 belonging to the Interested Party.
 18. Finally, on the third issue, I find that a trespasser who has been evicted from a land parcel cannot file a fresh suit over the same property claiming adverse possession.
 19. Trespass is wrongful, unauthorized invasion of land ownership by a person having no lawful right or title to enter on the property. Adverse possession on the other hand is the acquiring of title to real property owned by someone else by means of open, notorious, hostile and continuous possession for a statutory period.
 20. While trespass is unlawful, adverse possession is lawful. Since the plaintiff was found to be in unlawful possession of the land of the interested party’s land, he cannot again be found to be in lawful possession in a fresh suit. The only avenue available to him was by way of appeal.
 21. From the above finding, I find that the current suit is Res Judicata because the boundary dispute between the plaintiffs land was resolved by a court of competent jurisdiction and resolved against the plaintiff.
 22. The plaintiff cannot lawfully file a similar suit between him and the Interested Party.
 23. I find merit in the notice of motion dated September 16, 2021. I strike out the plaintiffs suit with costs to the defendants and the interested party.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 23RD DAY OF MAY, 2022.

M.N. GICHERU

JUDGE

HON. JUSTICE M.N. GICHERU

