



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**E.L.C NO. 199 OF 2012**

**IN THE MATTER OF: AN APPLICATION BROUGHT UNDER SECTION 30  
(1) OF THE LIMITATION OF ACTIONS ACT (CAP 22) FOR AN ORDER  
THAT THE PLAINTIFFS BE REGISTERED AS PROPRIETORS IN  
COMMON OF LAND REFERENCE L.R 20271/7 ON ACCOUNT OF  
ADVERSE POSSESSION**

**IN THE MATTER OF: AN APPLICATION BROUGHT UNDER SECTION 38  
(3) OF THE LIMINATION OF ACTIONS ACT (CAP 22) FOR AN ORDER  
VESTING ON THE PLAINTIFFS/ APPLICANTS THE EASEMENTS  
ENJOYED AND ACQUIRED ON L.R NO. 1191/2 AND REGISTERED AS  
20271/7**

**BETWEEN**

**DANIEL LEMASHISHA KISAI**

**MURE PARSITUA SAYO**

**MOSES JONGA KIPISHANI (Suing on their own behalf and**

**on behalf of the members of Olongonot Community.....PLAINTIFFS**

**-VERSUS-**

**KIAMBU NYAKINYUA FARMERS CO. LTD.....DEFENDANT**

**RULING**

1. By the Motion dated 13th July, 2012 and filed in this court on 17th July, 2012 the Defendant/ Applicant seeks the following orders:-
  - (a) That this suit be struck out with costs to the Applicant
  - (b) In the alternative, the suit be stayed pending the hearing and determination of Nairobi H.C.C.C NO. 663 OF 2001 Kiambu Nyakinyua Farmers Company Limited Vs. Samuel Ole Kibelekenya
  - (c) Costs of the application
2. The Application is supported by the affidavit of Orari Geoffrey, Counsel for the Applicant sworn

on 13<sup>th</sup> July, 2012. It is premised on the ground that there is in existence a similar suit between the parties pending at the High court, **Nairobi H.C.C.C NO. 663 OF 2001 Kiambu Nyakinyua Farmers Company Limited Vs. Samuel Ole Kibelekenya.**

3. The Application is opposed by the Plaintiffs/Respondents vide the Replying Affidavit of Daniel Lemashisha Kisai sworn on 13th November 2012.
4. The parties have filed written submissions in further support of their arguments. The Applicant's were filed on 4th December 2012 while the Respondents' were filed on 24th July, 2013. I have considered the same and I find the issues for determination to be as follows:

**(a) whether the suit herein is sub judice**

5. It is not disputed that there is a suit pending in the High Court at Nairobi HCCC NO. 663 of 2001 involving land parcels numbers L.R 378/2 and 11191/2 now registered as I.R No. 20271/7 ("the suit property"). In that suit the Applicant herein seeks, *inter alia*, injunctive and eviction orders against 1,000 persons who it alleges are occupying the said land illegally. By an order made on 1st July, 2011, the Respondents were enjoined as interested parties in that suit. The Applicant therefore avers that the present suit is an abuse of the court process and there is no basis for filing the same.
6. It is the Applicant's submission that the Respondents being parties affected by the suit pending at the High Court, in Nairobi should not file another suit but ventilate their issues in that court.
7. The Respondents on their part submit that their interest is only limited to one parcel of land NO. IR 20271/7 to which they claim ownership by way of adverse possession. It is their contention that as interested parties, they cannot seek substantive prayers in that suit particularly orders that they be registered as proprietors in common of the suit land. In addition, a claim for adverse possession can only be filed by way of an Originating Summons under Order 37 Rule 7 of the Civil Procedure Rules, 2010.
8. Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya prohibits a court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed.
9. The first test to be applied in the above doctrine of sub judice is that the matter in issue is also directly and substantially in issue in a previously instituted suit. The suit herein relates to the parcel of land known as land No. IR 20271/7. The Respondents allege that they have enjoyed exclusive, peaceful, open, continuous and uninterrupted possession for over 30 years and therefore seek a declaration that the Applicant's title has extinguished by virtue of the provisions of Section 38 (1) of the Limitation of Actions Act Cap 22 Laws of Kenya and that they have acquired ownership rights over the same by way of adverse possession.
10. This parcel of land is among other parcels, the subject matter in H.C.C.C NO. 663 of 2001 which is still pending before the High Court at Nairobi. In that case, as per the plaint filed on 25th April, 2005 the Applicant herein is asserting its title over the suit premises and seeking eviction of the persons it alleges to be illegally on the suit land. Thus the questions of title to the land, the rights of the parties over the same and the legality of the occupation and possession of the land are issues that arise in that suit and which will be determined by the court therein.
11. The 2nd test is that the matter must be between the same parties or parties under whom any of them claim. It is not disputed that the Respondents herein are parties to the earlier suit pending before the High Court at Nairobi having been enjoined therein as interested parties pursuant to the order made on 1st July, 2011. They have however averred that as interested parties in the Nairobi suit it is not possible for them to bring an action for adverse possession. It was their submission that an interested party has been defined in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as **"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in litigation."** Not being substantive parties to the suit, their prayers seeking to be registered as the registered proprietors cannot be granted.
12. **The Black's Law Dictionary 8th Edition** also defines an interested party as **"one who has a recognizable stake (and therefore standing) in a matter."** Standing is further defined as **"a**

**party's right to make a legal claim or seek judicial enforcement of a duty or right.”** Thus an interested party is a person whose rights or interests are likely to be affected by the determination of the court in a matter. Consequently he has a right to seek protection or enforcement of his right in that suit and the court is vested with jurisdiction to make a determination over his entitlement. The allegation therefore that an interested party's rights are limited and that there are orders which he cannot seek not being a main party to a suit is not sound.

13. Indeed, the phrase “between the same parties” is defined in Mulla, **The Code of Civil Procedure**, 16th Edition at page 151, as follows-

**“it is sufficient if there is a sufficient identity of parties..... The expression 'the same parties' means the parties as between whom the matter substantially in issue has arisen and has to be decided. It has accordingly been held that the section does not become inapplicable by reason of there being in addition a party against whom no separate and substantial issue is raised.” (underline mine)**

14. Consequently the issue of the rights of Applicant and the Respondents herein (Plaintiff and Interested Parties in HCCC No. 663 of 2001 respectively) is a matter that is substantially in issue in the said case and one that is yet to be determined.

15. It is however contended by the Respondents herein that the nature of orders they seek in this suit, that is, a declaration that they have acquired rights over the suit property by way of adverse possession, cannot be granted in the earlier suit because the law provides that such orders can only be sought by way of originating summons. Thus it was necessary to file the present suit in order to enforce their rights. They have relied on the holding of the Court of Appeal in **Nairobi Civil Application Number 286 of 1999 Githurai Ting'ang'a Co. Ltd vs. Moki Savings Co-operative Society Limited & Another**

16. In my view, the question of the power of the court to hear and determine a matter vests in the court before which the matter is filed. It is that court that should make a determination of whether or not its jurisdiction to determine the question of ownership by way of adverse possession has been improperly invoked because the orders have not been sought by way of an originating summons pursuant to Order 37 Rule 7(1) of the Civil Procedure Rules 2010 and thereafter make appropriate orders bearing. Thus this court has no jurisdiction to determine this question of the validity of the Respondents' claim for want of form which does not go to the root of the claim or touch on the substantial matter.

17. From the foregoing, I find that the matters raised in this suit are also the issues for determination in H.C.C.C 663 of 2001 in which the parties herein are party to. Thus the suit herein should be stayed under Section 7 of the Civil Procedure Act which prohibits this court from proceeding while the other suit is still pending.

18. In the circumstances, I allow the Application dated 13th July, 2012 in terms of prayer 2 and stay this suit pending the hearing and determination of Nairobi H.C.C.C 663 of 2001, Kiambu Nyakinyua Farmers Company Limited Vs. Samuel Ole Kibelekenya. The Applicant shall have the costs of this application.

**Dated, signed and delivered at Nakuru this 3rd day of December 2013.**

**L N. WAITHAKA**

**JUDGE**