



**Kanji & another v Gathigi & another (Environment & Land Case E007 of 2022) [2022] KEELC 2918 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E007 OF 2022**

**LN GACHERU, J**

**JUNE 23, 2022**

**BETWEEN**

**EVANS KIMONJO KANJI ..... 1<sup>ST</sup> APPLICANT**

**TRUPHENA WANJIKU MAINA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SUSAN NYAMBURA GATHIGI ..... 1<sup>ST</sup> RESPONDENT**

**VIOLET WAMBUI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

- 1 The Plaintiffs/Applicants filed a suit against the Respondents herein for a claim of adverse possession over LLC.15/GAKUYU/789 measuring 0.7 acres. It is the Applicants' case that while the 1<sup>st</sup> Applicant took possession in 1966, the 2<sup>nd</sup> Applicant took possession as a result of marriage in 1969. That they have been in open, exclusive and continuous occupation of the suit land for 54 years, and have made developments thereon including putting up a residential house. Additionally, that they have enjoyed peaceful occupation of the suit land until February 2022, when the Defendants/Respondents moved the Court vide CMCC ELC No. E012 of 2022, for eviction and exhumation orders.
- 2 It is their case that they are apprehensive that they might be rendered vagabonds with no source of livelihood should this Court not intervene.
- 3 The Respondents filed Preliminary Objection opposing the Originating Summons on the GROUNDS: -
  1. THAT the suit as filed is Res Judicata and it offends the principles set under Section 7 of the Civil Procedure Act. The subject matter having been heard and determined vide Succession Cause Number 1183 of 2013, at the High Court at Murang'a and the subsequent appeal namely Civil Appeal No. 179 of 2018, at the Court of Appeal Nyeri.



2. THAT the Originating Summons is therefore an abuse of the Court process as it is a clear example of forum shopping in the enforcement of a conceived right.
3. THAT the Originating Summons as filed purports to seek to overturn a decision rendered by the Court of Appeal that denied the Applicants any claim to the land in question.
- 4 The Preliminary Objection was canvassed through written submissions. The Respondents filed their submissions dated 5<sup>th</sup> May, 2022, and they submitted on both the Preliminary Objection and the Originating Summons.
- 5 It is the Respondents' submissions that the suit herein is Res Judicata Succession Cause Number 1183 of 2013 at the High Court at Murang'a and Civil Appeal No. 179 of 2018 at the Court of Appeal Nyeri and offends the provisions of Section 7 of the *Civil Procedure Act*. That the Court in Succession Cause Number 1183 of 2013, found that the Applicants had not met out a case for adverse possession and therefore this Court ought to dismiss the instant suit. Further that the Applicants are forum shopping and the instant suit is meant to overturn the decision of the Superior Courts and should be dismissed.
- 6 The Applicants filed their submissions dated 9<sup>th</sup> May 2022, and raised two issues for determination. On whether the matter is res judicata, the Applicants pointed out the elements of res judicata enunciated in John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & 3 others [2021] eKLR. That the Court in Succession Cause Number 1183 of 2013, lacked the requisite jurisdiction to determine the issue of adverse possession and this Court is thus the proper Court to address the claim.
- 7 On whether to grant an injunction, the Applicants submitted that they have met the threshold in *Giella v Cassman Brown & Company Limited* [1973]EA 358. That they have demonstrated to this Court through the annexures that they are in occupation of the suit property. Further that the Respondents have threatened their occupation and use of the suit property and should they not be restrained, the Applicants will suffer irreparable harm. In the end they submitted that the matter is properly before this Court and is ripe for determination.
- 8 This Court has looked at the pleadings and attachments thereof and notes that the Applicants and the Respondents are family members. That the suit property was registered in the names of the Respondents by dint of a Succession Cause being Succession Cause Number 1183 of 2013, over the Estate of the Respondents' mother. That the 1<sup>st</sup> Applicant was a protestor in the aforementioned Succession Cause, but his claim was dismissed on 31<sup>st</sup> July, 2018, and he preferred an Appeal in Civil Appeal No. 179 of 2018, which the Appellate Court upheld the decision of the High Court on 23<sup>rd</sup> September, 2021. Subsequently and as if to act on the pronouncement of the trial judge in Succession Cause Number 1183 of 2013, the Applicants filed the instant suit.
- 9 The Respondents contend that the suit is Res judicata for reasons that the subject matter of the suit was heard and determined by the aforementioned Courts and which Courts made the pronouncement on adverse possession in paragraphs 20 & 21 of the judgment.
- 10 The Applicants in their Originating Summons sought orders for interim injunction which this Court directed that the same would be heard alongside the Preliminary Objection.
- 11 The issues for determination by this Court are;
  - i. Whether the Preliminary Objection dated 5<sup>th</sup> May, 2022, is merited
  - ii. Whether an Injunction can issue.



## Whether the Preliminary Objection dated 5<sup>th</sup> May, 2022 is merited.

- 12 It is trite that a Preliminary Objection must raise pure points of law as settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696/, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

- 13 Therefore, a Preliminary Objection can only suffice on pure points of law and does not require of the Court to carry out any investigation of facts for it to stand. As it was rightly stated by the Supreme Court in *Application No 50 of 2014:- Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR;

“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

- 14 This position was reiterated by the Court in *Oraro v Mbajja* [2005] eKLR, where Justice J.B Ojwang held that;

“I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

- 15 The Preliminary Objection herein is based on allegations that the suit is res judicata.

- 16 To determine whether the suit is res judicata or not, a Court will have to establish the elements of Res Judicata, as laid out in Section 7 of the *Civil Procedure Act*.

- 17 These elements were enlisted in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR, where the Court held that;-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;



- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

18 Guided by the foregoing elements, it is in no doubt that this Court will be invited to look at the facts in order to establish whether the instant suit is res judicata or not. Thus, the Preliminary Objection fails to meet the standard set out in the *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*, (supra).

19 To adequately and sufficiently set out a case for res judicata, the most probable way is to move Court by way of Notice of Motion Application. This will give the desiring party an opportunity to lead facts to guide a Court. This Court concurs with the holding of the Court in *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] eKLR, where the Court opined:

“One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata”.

20 The upshot of the foregoing is that this Court finds and hold that the Preliminary Objection herein dated 5<sup>th</sup> May, 2022, and filed on 6<sup>th</sup> May, 2022, is not merited and is dismissed accordingly.

## **ii. Whether an Injunction can issue**

21 The Plaintiffs/Applicants sought an order for injunction pending the hearing and determination of the suit. The application is premised on grounds stated on the face of summons and the Supporting Affidavit therein.

22 It is the Applicants’ averments that the Respondents filed a suit being CMCC ELC No E012 of 2022, for exhumation orders and have threatened to evict the Applicants. Further that the Respondents obtained a favorable judgment giving them rights over the suit premises, which the Applicants are currently in occupation.

23 Order 40 of the Civil Procedure Rules makes provisions on the grant of temporary injunctions and interlocutory orders. Rule 1 of the said Order provides instances in which temporary injunctions can be granted that;

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—



- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant of a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

24 The principles for grant of injunctions are well settled in the case of *Giella v Cassman Brown Co. Ltd* [1973] EA 358 to wit;

- i. The Applicant has to make out the existence of a prima facie case with a probability of success
- ii. The applicant must demonstrate that he/she will suffer substantial loss which may not be remedied with an award of damages
- iii. Balance of convenience

25 In the *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504, the three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

26 There should be proof that the property in dispute is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property.

27 Therefore, in granting an application for an interlocutory injunction, the Court has to satisfy itself that the Applicant has a prima facie case with a probability of success and that the Applicant if not granted the orders sought will suffer irreparable damage which cannot be compensated by way of damages.

28 A prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya & 2 others*, [2003] KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, where the Court of Appeal defined a prima facie case as:

A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been



infringed by the opposite party as to call for an explanation or rebuttal from the later”

- 29 The Applicants are claiming beneficial interest over the suit property, despite having being unsuccessful in the succession cause. The Respondents aver that the Applicants are forum shopping and are using the instant suit to circumvent the judgment of the Succession Court. The title deed annexed shows the suit land is registered in the name of the Respondents.
- 30 The Applicants have attached photographs showing that they live on the suit land and are likely to be evicted by the Respondents. It is uncontroverted that the Applicants live on the suit property and that the Respondents despite being the registered owners are not living thereon.
- 31 Attached to the Originating Summons is a copy of Plaintiff filed by the Respondents seeking permanent injunction, exhumation orders and orders for trespass against the 1<sup>st</sup> Applicant.
- 32 It is trite that he who alleges must proof and which burden in the instant application lies squarely with the Applicants. The Applicants are apprehensive that the Respondents will evict them and they will be rendered homeless. The Court of Appeal in Nairobi Civil Appeal No. 77 of 2012:- Nguruman Limited/Jan Bonde Nielsen & 2 others [2014] eKLR held;

Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages”.

- 33 The fact that the Respondents were successful litigants in the succession cause and have now filed another suit for the orders mentioned above, it is right to conclude that the Respondents are enforcing the judgment of the Court.
- 34 Further it is anticipated that once judgment is issued, the successful party may execute the said judgment. The effect of it might result in eviction of the Applicants herein who are claiming rights on the suit property and which right though not ascertained will be lost arbitrary.
- 35 To this end, this Court finds and holds that the Applicants have on a balance of convenience established primacely that they may be evicted from the suit property on enforcement of a Court Judgement and that they have lived on and they still live on the suit land. This Court has to first determine whether the Plaintiffs/Applicants are entitled to orders of Adverse Possession. The Applicants may win or loose the claim, but that right has to be ascertained first through a fair hearing. Thus the Applicants have established a prima facie case with probability of success at the trial.
- 36 On the issue of irreparable harm and/ or substantial loss, the Court in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, defined irreparable injury as;

irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

- 37 Irreparable damage was also defined in Banis Africa Ventures Limited v National Land Commission [2021] eKLR ,where the Court quoted with approval Halsbury’s Laws of



England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] as follows :-

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," [ Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

- 38 The Applicants have submitted that they will suffer irreparable injury if the Respondents are not restrained. They have alleged that they will be rendered homeless, an allegation that has not been well placed before this Court in the form of evidence. These allegation has to be ascertained by calling of evidence in a full hearing.
- 39 From the attached copy of Plaintiff filed by the Respondents against the 1<sup>st</sup> Applicant, it appears that the Applicants have put up some structures on the suit land.
- 40 This Court has been shown in the form of attachment some photographs which the Applicants have averred is the home they reside on and also one showing banana plantations and cows. The Respondents did not rebut this, and the photographs shows a permanent structure erected and whether it is on the suit property or not, that is an issue that has not been established or controverted.
- 41 This Court lends some credence to the Applicants and finds that they live on the suit property and are therefore in use and occupation of it. There is no evidence that the Applicants have an alternative land or live elsewhere other than the suit land. Therefore, should they be evicted, this Court finds that they will suffer substantive loss. Therefore, the balance of convenience tilts in favor of granting an injunction.
- 42 Having carefully considered the instant Originating Summons Application dated 28<sup>th</sup> March 2022, the Court finds it merited in terms of prayer No. 2 in the meantime.
- 43 The parties are directed to prepare the Originating Summons for the expeditious hearing of the same so that the contested issues can be determined at once.

It is so directed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23<sup>RD</sup> DAY OF JUNE 2022.**

**L GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

Joel Njonjo - Court Assistant

1<sup>st</sup> and 2<sup>nd</sup> Applicants – Absent

1<sup>st</sup> and 2<sup>nd</sup> Defendants/Objectors – Absent

**L GACHERU**

**JUDGE**

