



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 6 of 2008 (OS)

GEOFFREY MBAABU 1ST APPLICANT

SOLOMON M'ETAYA 2ND APPLICANT

VERSUS

M'MAINGI M'LAARU 1ST RESPONDENT

JACOB MIORO M'LAARU 2ND RESPONDENT

RULING

The applicants herein are seeking in this originating summons a declaration that they are entitled to be registered proprietors of parcels of land Nos. NJIA/CIA-MWENDWA/3088 measuring 1.32Ha and 3089 measuring 1.12Ha by adverse possession.

Simultaneously with the plaint they have also brought Chamber Summons for an order of inhibition against the above two parcels and a third one NJIA/CIA-MWENDWA/1545. They also seek in that application an order of injunction to restrain the respondents from entering, disposing of or interfering with the three parcels of land. There is a further prayer for stay of proceedings in Meru CMCC No. 227 of 2005 pending the hearing and determination of the suit.

The above relief were granted on a temporary basis pending the hearing and determination of the application. The respondents meanwhile have filed a notice of preliminary objection to which this ruling relates. The objection lists six points but counsel only argued two of them probably after realizing that they are, strictly speaking, not grounds that can be argued as preliminary points of objection. The two points argued are:-

- (i) that the suit is *res judicata*, and
- (ii) that the court lacks jurisdiction to grant the relief sought

Arguing these grounds learned counsel for the respondents submitted that the present suit was *res judicata* Meru HCCC No. 77 of 2005 which is still pending. That suit relates to the same subject matter as the subject matter in this suit. The 1st and 2nd respondents herein are 1st and 3rd defendants in HCCC No. 77 of 2005. Plaintiff's suit in HCCC No. 77 of 2005 was struck out as against the 1st and 3rd defendants (the respondents herein). The present applicants have not appealed against the order striking out their suit against the respondents.

On this court's jurisdiction, counsel submitted that cancellation of the title of the respondents as sought in the originating summons is unattainable since the titles relate to first registration. That the respondents' titles were issued in 2004 following an adjudication process and for that reason the applicants cannot claim proprietary right by adverse possession as twelve (12) years have not elapsed since 2004.

Replying, learned counsel for the applicants argued that the applicants were not barred from instituting these proceedings against the 1st and 3rd respondents as the suit against them was only struck out and not dismissed. That HCCC No. 77 of 2005 was not determined on merit.

On jurisdiction he submitted that the court has powers to grant the orders sought in the originating summons.

It is now settled on the authority of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd** (1969) EA 696 that a preliminary objection must consist of a pure point of law, which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Applying these strictures to the notice of preliminary objection, I am persuaded that the issues of *res judicata* and jurisdiction are truly pure points of law within the contemplation of the **Mukisa** case and Order 14 rule 2 of the Civil Procedure Rule. Is this suit *res judicata* Meru HCCC No. 77 of 2005? There is no dispute that the plaintiff in that suit, Geoffrey Mbaabu, who sued as a legal representative of M'Etaya M'Ibeere (the deceased) is also the plaintiff in the present suit. In this suit, however, he is suing with his younger brother, Solomon M'Etaya, as the 2nd plaintiff.

There is also no dispute that both the 1st and 2nd defendants in the instant suit were 1st and 3rd defendants in Meru HCCC No. 77 of 2005. The only persons who were parties in Meru HCCC No. 77 of 2005 and are not sued in this suit are M'Imunya M'Ibeere (2nd defendant), the Land Adjudication Officer, Meru (4th defendant) and the Attorney General (5th defendant).

It is also a matter of fact that on 15th February 2007 in a ruling by this court (Sitati, J) the suit against the present defendants was struck out. The doctrine of *res judicata*, whose main purpose is to bar multiplicity of suits and guarantee finality to litigation, is legislated under section 7 of the Civil Procedure Act. Five conditions must be met for a matter to be *res judicata*, namely:-

- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
- (ii) the former suit must have been between the same parties or parties claiming under them or having a common interest in the subject matter of the suit;
- (iii) the parties must have litigated under the same title in the former suit;
- (iv) the court which decided the former suit must have been competent to try the subsequent suit; and
- (v) the matter in issue must have been heard and finally decided in the former suit.

I have already observed that the parties in the present suit are the same as those in the former suit, except for the present 2nd plaintiff, who is in fact the 1st plaintiff's younger brother. It is to be noted that in the former suit the 1st plaintiff sued as a legal representative of his deceased father who was also the father of the 2nd plaintiff in this suit.

Both plaintiffs therefore have a common interest in the subject matter. But what is the subject matter? In Meru HCCC No. 77 of 2005 the plaintiff prayed for an

“(a)

(b) order of permanent injunction restraining the 1st, 2nd and 3rd defendants from entering or in any way interfering with the peaceful occupation and enjoyment of the deceased estate comprised in land parcels Nos. NJIA CIA MWENDWA/700 and NJIA CIA MWENDA/2588 in its original position

(c)

(d)”

In the present originating summons the plaintiffs are seeking a declaration that they are entitled by adverse possession to be registered as proprietors of NJIA/CIA-MWENDWA/3088, NJIA CIA-MWENDWA/3089 and NJIA/CIA-MWENDWA/1545. Plainly, the subject matters in Meru HCCC No. 77 of 2005 are completely different from those in this suit. This is a matter which will require evidence to establish the nexus between the subject matters in the two suits. As a matter of fact the ruling of Sitati, J in Meru HCCC No. 77/2005 was in relation to NJIA CIA MWENDWA/700 and 2588.

That takes this preliminary objection outside the ambit of section 7 of the Civil Procedure Act.

The second point taken in this objection is that the court has no jurisdiction to order, as prayed in the originating summons, the registration of the applicants as proprietors of the suit lands on the grounds that the titles of the respondents being first registration are indefeasible and secondly that twelve (12) years have not elapsed since 2004 when the titles were issued to the respondents.

The issue is hotly contested with the applicants maintaining that they have been in occupation of the suit land for over 12 years.

The respondents on the other hand do not challenge this averment but insist that the property was registered in 2004 and therefore adverse possession has not been demonstrated as the years before 2004 cannot be taken into account in computing the twelve (12) years period for adverse possession. The answer to this argument is provided by section 30(f) of the Registered Land Act, under which the suit property is registered. It provides:-

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register.

.....
.....

(f) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions on prescription.”

It follows from the above, therefore, that rights in the process of being acquired under the Limitation of Actions Act, are in the nature of overriding interests and go with the land and not the registered proprietor. It has been stated in the case of **Janet Ngendo Kamau V. Mary Wangari Mwangi**, Civil Appeal No. 173 of 2003 that:-

“Change of ownership does not affect those rights as they attach to the land.”

However, it still remains to be shown whether the applicants have proved adverse possession. All I have said in the foregoing paragraph is that a claim for adverse possession is not confined to the present registered owner. That is a matter of evidence. For the reasons stated, this objection is overruled with costs.

Dated and delivered at Meru this 6th day of June 2008.

W. OUKO

JUDGE