



**Ngoje v Ayoo (Environment & Land Case E024 of 2021)
[2022] KEELC 15474 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E024 OF 2021
MN KULLOW, J
NOVEMBER 22, 2022
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22
AND
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF LIMITATIONS ACT**

BETWEEN

PETER ACHUODHO NGOJE PLAINTIFF

AND

OJALA FRANCIS AYOO DEFENDANT

RULING

1. The defendant herein filed a notice of preliminary objection dated June 30, 2021 in response to the plaintiff's suit anchored on the following ground: -
 - a. That there is a pending suit Rongo SRMC Case No 54 of 2019, on the same subject matter yet for hearing and determination and shall request this honourable court to dismiss the suit with costs for being an abuse of the inherent powers of the honourable court.
2. The preliminary objection was canvassed by way of written submissions. Both parties filed their respective submissions together with authorities which I have read and taken into account in arriving at my decision.
3. On a perusal of the defendant/ applicant's submissions, I do note that the copy filed is incomplete as the same only has the background information of the suit on page 1, be that as it may, I will proceed to issue my ruling.



4. The plaintiff/ respondent on the other hand submitted that ELC Case No 54 of 2019 seeks orders of eviction from the suit parcel No Kamagambo/ Kanyajuok/370 while the instant suit seeks for an order of adverse possession. It is the Plaintiff's contention that the 2 suits are dissimilar as they relate to different issues and seeks different reliefs. He thus maintains that the plaintiff is properly before the court and the PO should be dismissed with costs.
5. The sole issue for determination before me is whether the notice of preliminary objection dated June 30, 2021 is merited and I will proceed to discuss the same on account of;
 - i. Sub judice
 - ii. Jurisdiction to entertain claims on adverse possession
6. A preliminary objection is raised on a pure point of law and is argued on the assumption that all the facts pleaded by the other side are correct. Preliminary objection was described in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am aware, 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”.

Further Sir Charles Nebbold, JA stated that: -

“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.

The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

Sub Judice

7. The defendant has sought the dismissal of the plaintiff's suit instituted by way of an originating summons dated May 13, 2021 on the basis that the same is sub judice. Section 6 of the [Civil Procedure Act](#) defines what amounts to res sub-judice as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are 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 in Kenya to grant the relief claimed.”

8. The Court of Appeal in [Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others](#) [2019] eKLR; while grappling with the application of section 6 of the [Civil Procedure Act](#) held as follows: -

“Section 6 of the [Civil Procedure Act](#) is meant to prevent abuse of the court process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of



concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

9. As earlier stated, a preliminary objection must only be based on pure points of law and must not include contested facts which calls for the court to ascertain and/or use its judicial discretion. The defendant has made reference to a previous case pending in Rongo SRMC Case No 54 of 2019. The respondent/ plaintiff on the other hand, with regards to the said suit No 54 of 2019 stated that he perused the court file in Rongo and noted that no summons were issued in the said suit; further, it is his claim that he has neither been served with the pleadings in the case nor has the suit been set down for hearing and determination.
10. It is important to note that the applicant has not availed any document as evidence of the previous suit as alleged. Further, the plaintiff contends that summons have never been issued in the said suit. Therefore, in order to clearly ascertain some of the alleged facts; for instance, the issue at the center of the suit, whether summons were issued within the stipulated timelines or not and whether the suit has abated on account of the service of summons; are all matters of fact which have been contested and are not pure points of law. The issue of sub judice does not therefore arise.

Jurisdiction to entertain claims on Adverse Possession.

11. Section 38 of the *Limitation of Actions Act* provides as follows: -
Registration of title to land or easement acquired under Act
 - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
12. It is my considered opinion that section 38 of the *Limitation of Actions Act* indicated above as read with the provision of the *Constitution of Kenya* and the *Environment and Land Court Act*; grants this court the exclusive jurisdiction to handle claims pertaining to adverse possession.
13. In view of the foregoing, I find that even though the subject matter and parties is similar between the instant case and the case in Rongo SRMC Case No 54 of 2019; the substantial issue on the present suit is on adverse possession and whether the plaintiff/ respondent has acquired the prescriptive rights and interests over the suit parcel owing to the continued occupation. It is my opinion that the subordinate court in Rongo SRMC Case No 54 of 2019 does not have the jurisdiction to entertain an issue of adverse possession.
14. The upshot of the foregoing analysis is that the defendant’s preliminary objection dated June 30, 2021 is not merited on account of the issue of adverse possession being sub judice and is therefore dismissed with costs to the plaintiff/ respondent.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22ND DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -



.....for the Applicants
.....for the Respondent
Tom Maurice - Court Assistant

