



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 25 OF 2020**

**IN THE MATTER OF REGISTRATION OF PLOT BY ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF LOCK-UP TMP/267/76**

**BETWEEN**

**MARY MABUTI MAGONDU.....APPLICANT**

**VERSUS**

**ANN GRACE WAIRIMU.....RESPONDENT**

**RULING**

**Introduction**

By a Notice of Motion brought under certificate of urgency dated 7<sup>th</sup> September 2020, the Applicant seeks the following orders:-

- (1) Spent.***
- (2) That the Honourable Court be pleased to issue temporary injunction restraining the respondent from evicting the applicant, selling, transferring and dealing in any way with plot Lock-up TMP/267/76 pending the hearing and determination of prayer No. 3 and 4.***
- (3) That the Honourable Court be pleased to issue an injunction restraining the respondent from evicting the applicant, selling, transferring and dealing in any way with plot Lock up TMP/267/76 pending the hearing and determination of the suit.***
- (4) That the costs of the application be provided for.***

The application is supported by grounds on the face of the said application and the affidavit of the applicant dated and sworn the same date. In response to the said application, the respondent filed a Notice of Preliminary Objection and a replying affidavit both dated 4th November 2020. When the application came up for hearing, the parties agreed to dispose of the same by written submissions.

**Summary of Facts**

In the supporting affidavit, the applicant contends that the suit property described as Lock Up TMP/267/76 is registered in the name of Ann Grace Wairimu, the respondent herein. She annexed a copy of minutes by a Committee calling itself Land Housing and urban Development, Planning Committee held on 20/5/2060. The applicant stated that the respondent allegedly bought the suit property from her mother Jane

Kamori Magondu (deceased). She further stated that in the year 1981, she entered into the suit property Lock up TMP 267/76 and occupied the same and has since built on the plot and has been doing business in open, exclusive un-interrupted and continuous use and occupation of the same.

The applicant also stated that the respondent has obtained a judgment in CMCC Case No. 243 of 2017. She annexed a copy of the judgment marked "MMM 4".

The respondent in her Notice of Preliminary Objection raised the following grounds:-

- (1) It is an undisputed fact that the defendant became the owner of the plot on 20th May 2016 and that there is a judgment given in Kerugoya CMCC No. 243/2017 in favour of the defendant and against the plaintiff for eviction from the suit plot, which judgment was delivered on 21st May 2020. The minutes of the County Government of Kirinyaga approving the transfer of the plot to the defendant herein, and a copy of the judgment in Kerugoya CMCC No. 243 of 2017 are part of the plaintiff's annexures.
- (2) The suit is incompetent and bad in law as it has been filed pre-maturely.
- (3) That the application and the suit should be struck out/dismissed with costs.

On the other hand, the respondent in her replying affidavit deposed that the application is without merits and bad in law. The respondent also stated that the applicant has conceded that judgment was entered against her and in favour of the respondent in CMCC No. 243 of 2017 for her eviction from the suit property on 21st May 2020. The respondent further contends that no Appeal has been preferred against the judgment and that no order of stay has ever been issued. In conclusion, the respondent argued that in the absence of stay of execution of the decree, an order of injunction cannot issue against her on the face of a valid judgment by a Court of competent jurisdiction.

#### **Applicant/Applicant's Submissions**

The Plaintiff/Applicant failed to file submissions within the time lines given.

#### **Defendant/Respondent's Submissions**

The defendant through the firm of Maina Kagio & Co. Advocates submitted that the plaintiff's claim is for adverse possession where she must prove the required ingredients. He submitted that the applicant is the daughter to the previous owner of the land and having gained entry on to the suit land and continued occupation with the authority of the mother who was the owner, she is not entitled to the prayer sought under the doctrine of Adverse possession. The respondent further submitted that the applicant cannot be allowed to compute time in a claim for adverse possession in her favour based on the consent given by her mother (now deceased) when she was owner of the suit property. She cited the case of *David Kipkoech Kogo Vs Esther Chesaina Bedford P.M (2016) e K.L.R* where **Obaga J.** (as he then was) held as follows:-

*"There is no time a child can cease to be a parent's child and acquire a different status as to allow him to mount a claim for adverse possession. One remains a child in the African context in as long as the parents are alive however old one may be. That child cannot be legally allowed to lay claim to a parent's land by way of adverse possession except through succession upon the demise of a parent or through any other lawful means such as consensual distribution by a parent to his children during his life time".*

It is the respondent's submissions that since the respondent only became the owner of the plot in 2016, it means that the applicant has only been in occupation of the plot for a period of 4 years and the time stopped running the moment she filed a counter-claim to the previous suit being CMCC No. 243 of 2017 and therefore the applicant has only been in occupation of the subject land for a period of 2 years.

Secondly, the respondent submitted that *Section 41 (a) (1) of the Limitation of Actions Act* excludes public land from being acquired through adverse possession. The respondent also averred that the applicant has not established the threshold for the grant of the injunction orders and that the application should fail.

#### **Legal Analysis**

I have considered the Notice of Motion dated 7th September 2020 and the supporting affidavit dated 7th September 2020. I have also perused the annexures to the supporting affidavit and the response by the respondent. What I can glean from the pleadings and the annexures which is not in dispute is that the plaintiff in conjunction with one Phyllis Wanjira Magondu had sued the respondent jointly with one Kamori Magondu in a previous suit being CMCC No. 243 of 2017 (Kerugoya). In that suit, the plaintiffs were seeking the following orders:-

- (a) *Cancellation of the transfer to the defendant of Lock Up TMP 267/76 vide minutes number LH/UD/3/2016 and registration of the same in the name of the plaintiffs and the 2nd defendant.*
- (b) *Costs of the suit and interest.*

In the former suit, the plaintiff had sued the present defendant jointly with one Kamori Magondu for cancellation of the transfer to the defendant of Lock Up TMP/267/76 vide minutes number LH/UD/3/2016 and registration of the same in their favour. It can be seen from those annexures that the subject matter of the former suit is the same as the property in the present suit. The parties are also the same. The only difference are the prayers sought. Whereas the plaintiff had sought an order for cancellation of the transfer of the suit property from the

defendant and registration of the same in favour of the plaintiff, the plaintiff is now seeking an equitable relief in the present suit.

**Section 7 of the Civil Procedure Rules** is instructive on parties who file multiple suits in respect of the same claim. The applicable law provides as follows:-

*“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.*

The annexures to the supporting affidavit is a clear confirmation that the parties and issues in controversy in the former suit are the very same parties and issues in the present suit. The only difference is the ingenuity by the plaintiff to camouflage the claim in the present suit as a new cause of action. The doctrine of res-judicata was put into perspective by the Court of Appeal in the case of **The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) e K.L.R** where it was held:-

*“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 not in distinctive but conjunctive terms:-*

- (a) “The suit or issue was directly and substantially in issue in the former suit.*
- (b) The former suit was between the same 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”.*

The Court also went further and stated as follows:-

*“The rule or doctrine of res-judicata serves the solitary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court.*

*It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of indrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at least outcomes favourable to themselves.*

*Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny.*

*The foundation of resjudicata thus rest in the public interest for swift, sure and certain justice”.*

I can’t agree more with the decision by the Superior Court. I am satisfied beyond peradventure that the issues the Court in the former suit was called to determine are directly and substantially the same issues which the Court in the present suit camouflaged as new causes of action the Court is being called upon to determine. I am also satisfied that those issues were heard and finally determined in the former suit which is a Court of competent jurisdiction. The present suit in my view is intended to vex and annoy the defendant/respondent in endless litigation which can only put our Courts into disrepute. I find the Notice of Motion dated 7th September 2020 frivolous, vexatious and bad in law. This suit commenced by way of Originating Summons dated 7th September 2020 is also vexatious and both are hereby struck out with costs to the defendant/respondent. It is so ordered.

**RULING READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 19<sup>th</sup> day of March, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Makazi for Applicant
2. Wambui holding brief for Maina Kagio for Respondent
3. Kabuta – Court clerk.