



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC CAUSE NO. E1 OF 2020 (O.S)

ADREW KIPKOSKEI TOO.....PLAINTIFF/APPLICANT

VERSUS

**FRANCIS ARAP TERER (*Legal administrator to the estate of Sarah Kebor Kigen
alias Kigen Chebor DECEASED*).....DEFENDANT/RESPONDENT**

RULING

1. Pursuant to the Plaintiff/Applicant's application by way of Notice of Motion dated the 16th September 2020 seeking for inter alia mandatory injunctive orders restraining the Respondent, his agents and/or servants from interfering in any way with parcel No. Kericho/Kebeneti/2198, 2201, 2202 and Kericho/Kebeneti/2204 pending the hearing and determination of the suit, the Respondent in response filed their replying affidavit as well as a Notice of Preliminary objection dated the 6th October 2020 to the effect that the Applicant's suit and Application were substantially incompetent and fatally defective in that they sought orders that offended the provisions of Order 1 Rule 3 of the Civil Procedure Rules and further that the suit was grounded on an expired consent as well as on a nonexistent and/or unregistered Power of Attorney.
2. Their objection further was that the suit was a knee-jerk reaction to an adverse ruling in a Succession Cause No. 49 of 2019 which rendered the Respondent functus officio upon the conclusion of the said succession process. He therefore had no power and/or authority over the suit properties.
3. The Plaintiff did not respond to the preliminary Objection.
4. On the 7th October 2020, by consent parties agreed to dispose of the Preliminary Objection in the first instance by way of written submissions to which the Respondent's submission was that he alongside his siblings, who were beneficiaries to the estate of their deceased mother Sarah Kebor Kigen, upon learning that the Applicant herein, who was not even related to them, had filed Succession Cause No. 49 of 2019 before the Chief Magistrate's Court with the sole intent of disinheriting them, applied to have the Grant that had been issued to him (Applicant) revoked and nullified.
5. The said Grant was revoked on 15th of July 2020 wherein the genuine beneficiaries proceeded to file their mode of distribution of their deceased mother's properties (as per her wishes) wherein their Grant was confirmed on 9th September 2020. The Plaintiff herein did not seek to have the proceedings of the lower court stayed.
6. The Respondent raised his issues for determination as follows;
 - i. Whether this court had original jurisdiction in a just concluded succession matter.
 - ii. Whether the matter before court was res judicata the Chief Magistrate's court Succession Cause No. 49 of 2019.
 - iii. Whether at the conclusion of the Succession Cause the Defendant became functus officio and had no locus to defend the suit.
 - iv. Whether the 1993 Land Control Board consent was still enforceable after 27 years.
 - v. Whether an alleged power of Attorney still exists.
7. On the first and second issues for determination, it was the Respondent's submission that this suit was res judicata the trial Magistrate's Succession Cause No. 49 of 2019 wherein the matter had been conclusively adjudicated between the same parties and a certificate of confirmation issued. That the orders sought in the suit were a disguise for stay of execution of the Chief Magistrate's court's decision and

that in the circumstance, this court had no jurisdiction over the same.

8. On the third issue for determination, the Respondent submitted that whilst the Plaintiff in his suit made claim against Francis Arap Terer, one of the Administrators of the estate of their deceased mother Sarah Kebor Kigen, he had left out John Kimutai Terer the 2nd Administrator and had adversely mentioned the properties of other beneficiaries in the said suit, beneficiaries who had not been enjoined to the suit.

9. That notwithstanding, it was the Respondent's submission that the Probate Court having confirmed the Grant on 9th September 2020, the beneficiaries had been awarded their respective share of the deceased's estate as per the mode of distribution agreed by all of them to wit ;

i. No. Kericho/Kebeneti/2198 was issued to John Kimutai Terer.

ii. No. Kericho/Kebeneti/2201 was issued to Grace Chelangat.

iii. No. Kericho/Kebeneti/2202 was issued to Samson Kiprono Terer.

iv. No. Kericho/Kebeneti/2204 was issued to Francic Arap Terer.

10. That upon confirmation of the Grant, the Respondent had thus ceased being an administrator of the estate of the deceased thus becoming *functus officio* as each individual had acquired the right in dealing with their respective parcels of land. To this effect thereof, the Plaintiff could not sue the Respondent in his capacity as ***the Legal administrator to the estate of Sarah Kebor Kigen*** and neither could he seek injunctive orders barring the Respondent, his agents and/or servants from interfering in any way with parcel No. Kericho/Kebeneti/2198, 2201, 2202 and 2204 since he no longer had locus standi.

11. The Respondent's submission as to whether the 1993 Land Control Board consent, upon which the Plaintiff's claim was pegged on was still enforceable after 27 years was that the Plaintiff could not rely on such consent as it had lapsed by operation of the law after the expiry of six years from when it was alleged obtained. That the only remedy left for him as provided for under Section 7 of the Land Control Board Act, was the recovery of the consideration paid in the cause of the said controlled transaction.

12. Their further submission was that although the Applicant had sought to base his claim on the Power of Attorney entered between himself and the deceased, the said Power of Attorney was neither registered nor produced as evidence to prove its existence.

13. The Respondent's submission was that since this court did not have the Appellate jurisdiction on Probate matters that the preliminary objection had merit and the Plaintiff's suit ought to be dismissed with costs.

14. The Plaintiff, in his response also relied on the above captioned matters for determination to submit that issues on jurisdiction were well set out in the case of ***Owners of the Motor Vessel 'Lillian' vs Caltex Oil (Kenya) Limited 19(sic)*** and that if this court found that it had no jurisdiction then it ought to down its tools. The Plaintiff further went ahead to rely on both the provisions of Rule 41(3) and (4) of the Probate and Administration Rules under the Law of Succession Act as well as the provisions of Order 37 of the Civil Procedure Rules, to submit that the trial Magistrate had no obligation to stay the succession proceedings and determination of the questions regarding his claim. That it was the duty of the Magistrate in the Magistrates Succession Cause No. 49 of 2019 to invoke the provisions of Rule 41 of the Probate and Administration Rules and then only if he thought that such questions could not be conveniently determined at that stage.

15. That since this was not done, the only conclusion that this court could arrive at, is that the Magistrate did not find it necessary to do so as the Plaintiff's protest could be conveniently determined in the Succession Cause. With this in mind, the Plaintiff submitted that there could be neither a reasonable challenge to the filing of the Originating Summons by the Plaintiff nor to this court's jurisdiction to handle the same.

16. That the claim for adverse possession as enumerated in Sections 7, 13, 17 and 38 of Limitations of Actions Act was to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of that land.

17. That the Plaintiff's possession of the portion of that suit land has been with the knowledge of the Defendant. The subdivision of the original parcel of land into parcel No. Kericho/Kebeneti/2198, 2201, 2202 and 2204 and the resultant change of ownership did not defeat a claim founded on adverse possession as was held in the case of ***Githu vs Ndeete 1984 KLR 776***.

18. That a misjoinder or non-joinder of parties was not incurably defective, and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realized notwithstanding the irregularity. Reference was made to Order 1 Rule 9 of the Civil Procedure Rules,

19. That further, the preliminary objection herein filed by the Respondent could not lie if the facts herein were to be ascertained as was held in the case of ***Kenya Commercial Finance Co. Ltd. vs Richard Akwesera Civil Appeal (Application) No. 329 of 2009***. That the preliminary objection therefore did not meet the requisite threshold, it should not be allowed.

20. On the 3rd-6th limbs of the matters to be determined, the Plaintiff herein submitted that the same remained mere allegations and nothing else. That the principles regarding the doctrine of adverse possession were well settled. That the basis of the Plaintiff's entry into the suit properties was by the sale agreements entered into with the deceased and other beneficiaries of the estate to which agreement stipulated that parties obtain consent of the Land Control Board. That at the expiry of six months, the point of entry into possession became null and void for want of consent of the Land Control Board and the period of adversity in the premises started running. The current originating summons therefore became mature at the expiry of 12 years and the Plaintiff was properly suited.

21. That the preliminary objection therefore was unmerited and should be dismissed for being frivolous and a waste of the court's time.

Determination.

22. Having considered the submissions herein submitted, and authorities cited thereof to the Preliminary Objection dated the 6th October 2020, I find the matter for determination as being:

- i. Whether the present suit is res judicata the Chief Magistrate's court Succession Cause No. 49 of 2019.
- ii. Whether the Defendant/Respondent herein has locus standi
- iii. Whether the Preliminary Objection raised is sustainable.

23. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“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.”

24. In **Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that:

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

25. From the above holding, it is clear that Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of Court process.

26. The Respondent herein in opposing the Applicant's application seeking for interim mandatory injunctive orders barring him from interfering with the suit land has sought for the said Application and the Applicant's entire suit to be dismissed with costs on a point of Preliminary Objection to the effect that the Court lacked original jurisdiction in a just concluded succession matter which was now res judicata pursuant to the Chief Magistrate's court Succession Cause No. 49 of 2019 and further that the Defendant became functus officio and had no locus to defend the suit.

27. The Applicant's assertion on the other hand was the subdivision of the original parcel of land into parcel No. Kericho/Kebeneti/2198, 2201, 2202 and 2204 and the resultant change of ownership did not defeat his claim founded on adverse possession. That further a misjoinder or non-joinder of parties was not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realized notwithstanding the irregularity and finally that the preliminary objection herein filed by the Respondent cannot lie because the facts therein had to be ascertained.

28. It is not in dispute that there was a Succession Cause No. 49 of 2019 before the Chief Magistrate's Court filed by the Defendant in respect to the same suit property. The question one would pose is whether the current suit is res judicata thus denying this court jurisdiction to try the same given the existence of the 2019 case.

29. In the 2019 suit, the Defendant herein had sought for confirmation of a Grant to the estate of their deceased mother Sarah Kebor Kigen in relation to the suit land wherein the probate Court confirmed the Grant on 9th September 2020 and the beneficiaries were awarded their respective share of the deceased's estate wherein they effected the respective transfers of the suit property in their names.

30. The current suit though seeking ownership is based on Limitation i.e. adverse possession. The issue for determination in the current suit is whether or not the Plaintiff has established ownership by way of adverse possession. Admittedly although in both suits parties were pursuing a right of ownership, the divergence is the claim through transmission as against a claim based on a legal claim of adverse possession to which the trial Magistrate's court had no jurisdiction to try matters where a party is seeking adverse possession. In conclusion therefore, I find that the causes of action in both cases being different, the suit is not res judicata. I see no bar to the jurisdiction of this Court in determining the matter before it.

31. On the second issue as to whether the Defendant/Respondent herein has locus standi to be sued as a legal representative of the Deceased's estate pursuant to the confirmation of the Grant, the answer is negative.

32. Indeed it is not in contention that pursuant to the confirmation of the Grant on 9th September 2020, the beneficiaries of the deceased's estate the Respondent herein included were awarded their respective share of the estate wherein they effected the respective transfers and the suit properties were registered to their respective names thus title deeds having been issued the estate of the deceased was extinguished.

33. That notwithstanding, Order 1 Rule 9 of the Civil Procedure Rules provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

34. Having considered the pleadings in both the suits, I am satisfied that the claim in the present suit cannot and could not be litigated in the Kericho Chief Magistrate's Court for lack of Jurisdiction. I also find that, pursuant to the provisions of the law coupled with the submissions herein submitted and the holding in the case in **Avtar Singh Bhamra & Another** (supra) that the preliminary Objection herein raised by the Respondent should fail as it lacks merit. To this extent the said Preliminary Objection dated the 6th October 2020 is herein dismissed with costs.

Dated and delivered at Kericho this 11th day of March 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE