



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 27 OF 2020

PETER NGIGI KANGETHE.....PLAINTIFF/APPLICANT

VERSUS

IRENE WANJIRU MUYA.....1ST RESPONDENT /DEFENDANT

MUNGAI KAMAU.....2ND RESPONDENT/DEFENDANT

The estate of MWANGI MACHARIA KANYATTE....3RD RESPONDENT/DEFENDANT

THE LAND REGISTRAR, MURANGA.....4TH RESPONDENT /DEFENDANT

HON ATTORNEY GENERAL.....5TH RESPONDENT /DEFENDANT

RULING

1. The Plaintiff/Applicant took out Originating Summons on the 26/10/2020 seeking interalia orders that it is entitled to be registered as the owner of the suit land by way of adverse possession. Inter alia he states that he acquired the land from Muthithi Cooperative Society where he was a member and pursuant to the membership, he was issued with a title of the suit land in 1989 which he claims he holds upto date. Equally that he has been in possession of the land since 1989 to date. That he received information in 2012 that the suit land had changed hands and he sought help from the land's office, the offices of the Cooperative as well as the Attorney General with no success. That on 17/9/2020 he was arrested with a charge of forcible detainer of the property belonging to the 2nd Defendant. That he discovered that the title had been altered to read that of the Defendants and his name was cancelled. Hence the filing of the suit.
2. Simultaneously the Plaintiff filed an application on even date seeking interalia stay of criminal proceedings in Kigumo CRCC NO 644 of 2020 – Peter Ngigi Kangethe & Anor pending the hearing and determination of this suit.
3. In response to the application the 1st and 2nd Defendant filed a Preliminary Objection dated the 8/12/2020 on the following grounds;
 - a That the jurisdiction of this Court is wrongfully invoked
 - b. That the claims by the Plaintiff ought to be dealt with in another entire different forum moreso under the jurisdiction of the Probate and administration Rules founded under the Law of Succession
 - c. That the statutory requirements and the time for warrant of grant of proprietorship by adverse possession has not run out yet.
 - d. That the summons and the entire suit are bad in law and in abuse of the Court process and should be dismissed.
4. The parties have filed written submissions which I have read and considered.
5. The test in determining a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd –Vs- West End Distributors Ltd [1969] EA 696** where the Court 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.
6. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must

not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

7. To start with the 1st and 2nd Defendants have not filed their defence to the Plaintiffs suit and therefore it is unknown if the point of law has been pleaded therein. In the absence of the pleadings the Court is left in the dark.

8. Going by the definition given in the above case, I find that the three limbs of the objection which are; claim should be dealt by the succession Court; adverse possession has not matured and that the suit is bad in law and an abuse of the process of the Court are purely issues that would call upon the Court to inquire into factual details to enable it make the determination. The 1st and 2nd Defendant's submissions that they acquired the suit land pursuant to succession and therefore their claim cannot be defeated by that of a third party will require a Court of law and a Court of equity to call for inquiries into the claims of the parties thus delving itself into matters of law and facts.

9. The solemn question of adverse possession is the crux of the suit. It cannot be determined by way of summary proceedings. The question of adverse possession is a question of both facts and the law. A Court of law would require to interrogate the facts of the case and make legal inference so as to arrive at the conclusion as to whether or not a claim of adverse possession is founded. The claim of adverse possession must of necessity be left to the trial Court to determine through due process.

10. As to whether a matter is bad in law and an abuse of the due process of the Court cannot be in itself a pure point of law. The Court would have to examine the facts and circumstances of the case that are bad in law. What constitutes an abuse of the process of the Court is wide and innumerable. For example, filing multiplicity of suits, instituting vexatious litigation, obstructive and dilatory proceedings, the list is endless. These are not matters that do not of themselves to constitute a pure point of law.

11. That leaves me with the issue of issue of the jurisdiction of this Court which as I can see has been challenged.

12. The jurisdiction of the Environment and Land Court(ELC) flows from Art 162 (2) of the Constitution read together with Section 13 of the ELC Act. The section is quoted for emphasis as follows;

“a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land”.

13. In addition, the Court is empowered to grant reliefs as it deems fit and just including the following;

“(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.”

14. It is crystal clear to me that the jurisdiction of this Court does not extend to the arena of criminal litigation of the nature contemplated by the application.

15. In the end the Preliminary Objection is upheld on this ground. The application dated the 19/10/2020 is hereby dismissed with costs to the Respondents.

16. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 11TH DAY OF MARCH 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ndungu HB for Ms. Mungai for the Plaintiff

1st Defendant: Absent

2nd Defendant present in person. Advocate is absent.

3rd – 5th Defendants: Absent

Njeri/Kuiyaki, Court Assistants