



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 48 OF 2019**

**GILBERT KINYUA KWARIA (Suing on behalf of  
the estate of PETER RITARA (Deceased) and on  
his own behalf.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOSES MURIIRA alias MURIIRA MWENDIA.....DEFENDANT/RESPONDENT**

**RULING**

1. This matter was initially filed at Nkubu court vide a plaint dated 13.6.2019 in PM ELC NO. 47 OF 2019, but the suit was later transferred to this court. A notice of motion was also contemporaneously filed with the suit and was brought pursuant to provisions of Section 17, 18, 37 and 38 of the Limitations of Actions Act Cap 22 and order 40 rule 1 and 2 of the Civil Procedure Rules.
2. The applicant had sought orders of injunction and inhibition against the respondent in so far as the suit parcel no. *NKUENE/NKUMARI/2361* is concerned as well as costs of the application.
3. The application is based on the grounds on the face of it and on the supporting affidavit dated 13/06/2019. The applicant had also filed a further affidavit on 8/10/2020, but on 18.1.2021, counsel for the applicant made an application before the court to have the said affidavit substituted. There being no opposition from the opposite side, the application was allowed whereby the applicant was to file the further affidavit along with submissions within 3 days. I have not seen any such documents in the file. The affidavit filed on 8.10.2020 is therefore disregarded.
4. The applicant avers that his late uncle and himself used one acre of land while his other uncle, the father to the defendant used the other 1 acre, that the defendant's father sold portions of the land and later the remaining parcel was registered in his uncle Peter Ritara's and the defendant's name. He further avers that his uncle was mentally challenged and he is the only one who took care of him and made the funeral arrangements by himself.
5. Applicant avers that later, the defendant who is his cousin, and defendant's mother threatened him with eviction and that is how he conceded to entering into an agreement to rent the land and he has since then used the land peacefully and quietly. Recently, the applicant conducted a search and found that there is a pending transaction on that land and when he made inquiries about it, defendant threatened to take over the suit parcel.
6. The application was opposed vide the replying affidavit of Moses Muriira dated 17/9/2020 who contends that the land belonged to his late father who inherited it from his grandfather. His father started selling off the land to the detriment of the family hence it was decided that the land be registered in his name and his uncles name as he was a minor at the time for purposes of safeguarding his interest. That he only agreed to lease the land to the plaintiff for 20 years because his father had sold the land and the family objected. The plaintiff offered to refund the purchase price in return for leasing the land for 20 years.
7. He also states that the current issues arose when he tried to cancel the lease agreement as provided for in the contract and the plaintiff is trying to deprive him of his land by fraudulent means. He prays that the court dismisses the said application.
8. The respondent also filed a preliminary objection dated 17/9/2020 raising grounds that the plaintiff lacks locus standi, and that the suit offends provisions of Section 91 (4) of the Registered Land Act together with the provisions of Section 7 of the Limitations of Actions Act.
9. The court gave directions for both the Preliminary Objection and the application to be canvassed simultaneously by way of submissions. However only the respondent filed his submissions in regard to the preliminary objection

### The Preliminary Objection

10. What constitutes a Preliminary Objection was set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was 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 off the suit..... 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.”***

11. The respondent submits that an action to recover land can only be instituted within 12 years and that the applicant has taken over 12 years without claiming the land. They relied on Section 7 of the Limitations of Action which provides :-

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.***

12. The applicant’s claim is for the reversion of the suit land into the name of PETER RITARA (deceased) or in the alternative, he be declared the owner of the suit land through the doctrine of adverse possession. It follows that reliance on Section 7 of the Limitation of Actions Act works against the respondent since the applicant could not come to court before the expiry of 12 years in so far as the claim of adverse possession is concerned.

13. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

***“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.***

14. By dint of the claim of adverse possession, the respondent’s preliminary objection cannot stand.

15. On the issue of locus standi, I find that applicant has a limited grant over the deceased estate Peter Ritara, hence he has capacity to sue in that respect.

16. On the issue of joint tenancy, I make reference to paragraph 7 of the plaint where the joint registration of the suit land has been challenged on basis of fraud. Just like any other challenge to a registered property, that is an issue which elicits arguments and needs to be subjected to the usual motions of a trial.

17. In the circumstances, I find that the preliminary objection is without merits and is hereby dismissed.

### **Application dated 13.6.2019**

18. In regard to the application dated 13/06/2019, none of the parties filed their submissions and as such, I have relied on the affidavits filed. At one point, the applicant avers that he is entitled to the land as it was originally his grandfather’s and as his grandson he ought to inherit, adding that he was the one who took care of his ill uncle and catered for all burial arrangements and the joint registration of title between the respondent and his uncle was fraudulent. He also claims the suit land via the doctrine of adverse possession.

19. The respondent on the other hand has given an account of how the suit land came to be registered in his name and that of his uncle, that he was a minor when his father was selling the family land to the detriment of the family. He contends that the registration of the suit land in his name and that of his late uncle was to safeguard the rights of the respondent and that such registration did not confer any rights upon his uncle.

20. At this stage of the trial, the court is not dealing with the issue of ownership of the suit land. As far as the application of 13.6.2019 is concerned, the issue for determination appertains to preservation of the suit property as well as the utilization of the same. As was stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, the requirement for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

21. The purpose of interlocutory injunction is to facilitate the chance of the court to do justice. This injunction is issued for a particular time period. **Order 40 Rule 6 of the Civil Procedure Rules** provides that;

***“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”***

22. J. L. Onguto J elaborated this point in **Maxam Limited & 2 others v Heineken East Africa Import Co. Ltd & 2 others [2017] eKLR** as follows:

***“I must however also appreciate that Order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory***

***injunction has been issued on merit, then the suit is to be determined and the parties respective rights .....asserted within one year of the interlocutory order being made”.***

23. In his replying affidavit, the respondent does state that the family offered the whole land to the applicant but on a lease basis. The lease was to subsist for 20 years but the respondent desired to bring the lease to an end as provided in the agreement. What resonates from those averments is that the applicant is the one utilizing the suit parcel. I therefore hold the view that the applicant has raised triable issues which can only be determined at the trial. I therefore find that the application is merited and is allowed albeit for a limited period.

**24. Final orders**

**1. The orders of inhibition issued on temporary basis on 25.6.2020 are hereby confirmed.**

**2. An order of Injunction is hereby issued restraining the defendant whether by himself, his agents or any other person acting on his behalf or at his behest from entering or in any way interfering with the plaintiffs use/occupation of land parcel no. NKUENE/NKUMARI/2361 for a period of ONE YEAR.**

**3. Each party to bear their own costs of the application and the Preliminary objection.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF MARCH, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 18.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGEA**