



Signon Co-operative Savings and Credit Society Limited v Kiriga & 3 others; Karisa & 66 others (Applicant) (Environment & Land Case 226 of 2016) [2024] KEELC 6356 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 226 OF 2016
SM KIBUNJA, J
OCTOBER 2, 2024**

BETWEEN

SIGINON CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED PLAINTIFF

AND

KIRIGA 1ST DEFENDANT

KANJA 2ND DEFENDANT

CHENGO 3RD DEFENDANT

MUMBA 4TH DEFENDANT

AND

ROBERT KADENGE KARISA & 66 OTHERS & 66 OTHERS & 66 OTHERS & 66 OTHERS & 66 OTHERS & 66 OTHERS APPLICANT

RULING

(Notice of Motion Dated 15th March 2024 and Notice of Preliminary Objection Dated 12th April 2024)

1. The applicants moved the court through the application dated 15th March 2024 that was brought under Article 159 (2)(d) of the Constitution of Kenya, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 12 Rule 7, Order 40 Rule 1, Order 51 Rule 1 and 2 of the Civil Procedure Rules, seeking for orders;
 1. “Spent.
 2. Spent.



3. Spent.
4. That this honourable court be pleased to order that the applicants herein be joined to the proceedings as defendants.
5. That upon the joinder the honourable court be pleased to set down the suit herein for hearing and determination on merit.
6. That costs of this application be in cause.”

The application is premised on twelve (12) grounds on its face, and supported by the affidavit of Robert Kadenge Karisa, 1st applicant, sworn on the 15th March 2024, in which he inter alia deposed that the applicants are the beneficial owners, and the current occupants of Land Parcel Subdivision No. 12914 (Original No. 405/3) Section 1 MN, suit property; that they had been enjoying peaceful occupation of the suit property without any claim until 15th March 2024, when they were served with a copy of the decree demanding vacant possession, and in default eviction to commence; that the decree was obtained through fraud and misrepresentation, including non-disclosure of material facts, as the defendants are not residents of the suit property; that the residents have been in occupation since the 1980s and have never been served with any proceedings to be part of the suit; that they should be granted a fair hearing by staying the said decree, which demands their eviction from the suit property.

2. The plaintiff opposed the application through a notice of preliminary objection dated 12th April 2024, raising the grounds inter alia that the application was res judicata to the judgement of this court dated 11th March 2019; that the said judgement is in rem as per Section 44 of the *Evidence Act*; that the court is bound to take the said judgement as conclusive proof that the plaintiff is the registered proprietor of the suit property, and is entitled to exclusive and vacant possession. The plaintiff also responded to the application through the replying affidavit of David Kones Kiptum, the chairman, sworn on 25th April 2024, deposing inter alia that the plaintiff is the registered proprietor of the suit property and holds the certificate of title dated 13th December 2012; that the application was res judicata for raising the issue of adverse possession, which was heard and determined in the court’s judgement dated 11th March 2019; that in the said judgement, the court concluded the plaintiff is the registered owner of the suit property, and any occupants of the suit property were trespassers, and ordered their eviction; that the applicants have not challenged the plaintiff’s title to the suit property in the application or by an appeal; that the plaintiff had inspected the suit property at the time of purchase in 2012, and had confirmed it had no squatters when fencing it; that the applicants only invaded the suit property between May and June 2016, which prompted the plaintiff to file this suit, and obtained judgment in its favour; that the pictures attached to the application as evidence of the applicants’ occupation of the suit property were non-conclusive evidence of their occupation; that the applicants’ allegations of fraud were unfounded, as no evidence was adduced to support the claims, and the court should dismiss the application with costs.
3. On 29th April 2024, the court directed that the notice of motion dated the 15th March 2024 and notice of preliminary objection dated 12th April 2024 be heard and determined together through written submissions, to be filed within the timelines given.
4. The learned counsel for the plaintiff filed their submissions dated 28th May 2024, which the court has considered. Though the learned counsel for the intended defendants/applicants was given additional time up to 31st May 2024 to file submissions, I have at the time of preparing this ruling checked the CTS and noted none has been filed as of today, 21st September 2024.
5. The following are the issues for the court’s determinations:



- a. Whether the applicants are necessary parties to be joined in the suit for the issues raised to be effectively determined with finality.
 - b. Whether the application is *res judicata* the judgement of 11th March 2019.
6. I have carefully considered the grounds on the application and notice of preliminary objection, the affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
- a. A preliminary objection must be correctly raised and satisfy the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“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 the 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.”

Sir Charles Newbold P. further held,

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the case of *Oraro versus Mbaja* (2005) 1 KLR 141, the court held:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary objection’. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

For a ground of preliminary objection to be upheld, the same must stem from undisputed facts in the pleadings and should be based on pure points.



- b. In this case, the plaintiff has averred that the application is res judicata to the judgement of the court delivered on 11th March 2019. The law on res judicata is provided for under Section 7 of the *Civil Procedure Act* chapter 21 of Laws of Kenya which states that:

“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 suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Res judicata originated from the Roman law, “ex captio res judicata” which means “one suit and one decision is enough for any single dispute,” and the Latin phrase has further been defined by *Spencer Bower and Handley: Res Judicata* (Butterworths Common Law) 4th UK ed. Edition as:-

“... a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their privies.”

Indeed, res judicata qualifies to be a pure point of law when it is raised in a preliminary objection, where the pleadings are undisputed, and is capable of being determined without considering any evidence.

- c. However, it is not in all cases that the ground of res judicata can be properly articulated as a preliminary objection, capable of being determined without according the parties an opportunity to tender evidence in support and or opposition thereof. Indeed, it has been said time, and again that res judicata is best raised through a formal application, where evidence can be tendered. In this case, the issue of whether the application is res judicata is in contest, with the facts of whether or not the applicants were part of the squatters occupying the suit premises when the court rendered its judgement, being in the fore for determination. The preliminary objection on the ground of res judicata should therefore, have been raised through an application to accord the applicants an opportunity to give their version of events of whether or not they were in occupation of the suit property, when the defendants herein were served with the pleadings relating to these proceedings. Further, where the court like in the instance case, is invited to exercise its discretion in determining any issue at hand, the issue stops being a pure point of law that can be raised through a notice of preliminary objection. Such a ground brought through a notice of preliminary objection, as opposed to an application, ought to be dismissed, as lacking the purity of a point of law. The plaintiff's notice of preliminary objection is therefore, without merit. The plaintiff's notice of preliminary objection Dated 12th April 2024 is taken as part of their reply to the Applicants application. In any case, the grounds raised thereon are more or less the same ones raised in their depositions in the replying affidavit sworn on the 25th April 2024.
- d. Now, turning to the applicants' application, the issue at hand is whether the applicants have shown they are necessary parties to be joined to the proceedings as defendants. The record confirms that this suit was commenced through the plaint dated and filed on 17th August 2016 before this court. The defendants were served with the summons and entered appearance through the memo dated 10th January 2017, and filed their statement dated 8th March 2017



through Ms. Angelo Owino & Company Advocates. The suit was fully heard and determined through the judgement delivered on 11th March 2019, *inter alia* ordering that:

“ 15. In conclusion therefore, I enter judgement for the plaintiff as against the defendants jointly and severally as follows;

- a. The defendants are directed to give vacant possession and vacate from the plaintiff's land known a subdivision Number 12914 (Orig. 405/3) of section 11 Mainland North as delineated on land survey plan Number 333195 in default they be evicted therefrom.
- b. A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees, relatives or any other person from remaining in occupation of the suit property.
- c. Costs of this suit to be paid by the defendants.”

e. In the present application dated 15th March 2024, the applicants are seeking to be joined as defendants in this case post judgement. The court in the case of *Mudembei & Another versus Malembi & Another* (Environment & Land Case 2 of 2020) [2024] KEELC 1239 (KLR) (7 March 2024) (Ruling) held that:

“The jurisdiction to join a party to a case post judgment is exercised only in exceptional and justifiable circumstances. One such exception is where a case has been determined and adverse orders have been issued against a party who was neither given notice of the case nor heard on the issue in dispute.

In *Mary Beach Limited v Attorney General and 18 others* (2018) eKLR the Court of Appeal outlined the relevant principle as follows:

“However there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party a court would also have to set aside the judgement entered to give him/her an opportunity to be heard.”

The Applicants claim to have peacefully occupied the suit property from the 1980s, and developed it fully, prior to the issuance of the decree and judgement that sought their eviction. The applicants have attached pictures of some modern permanent and semi-permanent houses/structures. However, as argued by the plaintiff in their replying affidavit, the court is not in a position to establish whether the said structures on the pictures are indeed on the suit property, and or that they belong to the applicants. The pictures of houses could simply have been taken from anywhere. The applicants have not provided any linkage between themselves and the suit property.

f. If indeed the applicants' claim to the suit property is that of adverse possession, they ought to have presented evidence to demonstrate that their possession and occupation of the suit property has been unequivocal, exclusive and in an adverse manner to the title of the



respondent for at least 12 years. They have claimed that the judgement and decree were obtained through fraud, misrepresentation of material facts, and that the defendants are not occupants of the suit property. It is trite law that particulars of fraud must be pleaded and strictly proved on a higher degree of probability than a mere balance of probability. The applicants have not particularized the allegations of fraud, and have not tendered proof of any of the allegations of fraud levelled against the plaintiff. They have also not demonstrated that the defendants herein do not occupy the suit property.

- g. The plaintiff produced a certificate of title for the suit property, which under section 26 of the *Land Registration Act* No. 3 of 2012 was taken by the court as conclusive evidence of ownership, as there was no evidence to the contrary. There being no evidence of fraud or misrepresentation that would warrant the court to impugn the judgement delivered herein, the court finds the applicants have failed to show the existence of exceptional circumstances that would call for the setting aside of the judgement, and their joinder in the suit after judgement has been delivered, so as to give them an opportunity to be heard.
- h. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs should follow the event unless where for good cause the court directs otherwise. The applicants, having failed in their joinder application should meet the plaintiff's costs.

7. Flowing from the foregoing, the court finds and orders as follows:

- a. The applicants' notice of Motion Dated 15th March 2024 is without merit and is dismissed.
- b. The applicants to meet the plaintiff's costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: Mr. Karina

Defendants : No Appearance

Applicants : No Appearance

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

