



**Ndavi v Ngewa (The Administrator of the Estate of Jonathan Ngewa Kitolo
- Deceased); Kasia & 6 others (Interested Parties) (Environment & Land
Case E007 of 2021) [2023] KEELC 675 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E007 OF 2021
A NYUKURI, J
FEBRUARY 8, 2023**

BETWEEN

ATANUS MUTUKU NDAVI PLAINTIFF

AND

**FREDRICK KIMEU NGEWA (THE ADMINISTRATOR OF THE ESTATE OF
JONATHAN NGEWA KITOLO - DECEASED) DEFENDANT**

AND

JACKSON MUSYOKA KASIA INTERESTED PARTY

STANLEY MUTINDA KASIA INTERESTED PARTY

NICODEMUS NZIOKI KASIA INTERESTED PARTY

DANSON KITOLO KASIA INTERESTED PARTY

JOHNSON NGEWA KASIA INTERESTED PARTY

MICHAEL KASIA INTERESTED PARTY

SHADRACK MUTHINI KASIA INTERESTED PARTY

RULING

1. Before court is a Preliminary Objection to the proceedings herein dated 4th October 2021 filed by the Defendant and the Interested Parties with no specific prayer but based on the following grounds;
 - (a) That the proceedings herein are res-judicata in view of the ruling dated and delivered on 8th February 2021 by the High Court Succession Cause No. 146 of 2010 (In the matter of the Estate of Jonathan Ngewa Kitolo – deceased).



- (b) That the Application and/or suit by the Plaintiff is incompetent, the same is a non-starter as the Defendant/Respondent as well as the Interested Parties lack the requisite capacity to participate in the proceedings.
 - (c) That the Honourable Court lacks the requisite jurisdiction to entertain the instant suit as presented.
2. The Preliminary Objection was canvassed by way of written submissions. On record are the submissions filed on 25th January 2022 by the Applicants and the submissions filed on 13th April 2022 by the Respondents.

Submissions

3. Counsel for the Defendant and the Interested Parties/Applicants submitted that where facts are not contested, pure points of law contended in the Preliminary Objection must arise from the pleadings on record. Counsel relied in the cases of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors* [1969] EA 696 and *Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others* [2015] eKLR, which this court has considered.
4. Counsel submitted that this suit is res judicata as the High Court in Succession Cause No. 146 of 2010 made a conclusive finding on the ownership of the suit property. Counsel went in detail in describing and restating what, according to him, was the finding of the High Court. Reliance was placed on Section 7 of the *Civil Procedure Act* and the case of *Diocese of Eldoret Trustees (Registered) vs. Attorney General (On Behalf of the Principal Secretary Treasury) & Another* [2020] eKLR, for the proposition that adding or substituting litigants cannot assist a party to circumvent the doctrine of res judicata.
5. On whether the Defendant and Interested Parties are vested with the requisite capacity to participate in the proceedings herein, counsel submitted that it is trite law that the estate of a deceased person can only be represented in legal proceedings by a person duly authorized to do so on behalf of the estate. Counsel contended that the suit property is registered in the name of Jonathan Ngewa Kitolo – deceased and that the same was sold by one Benjamin Kasia Ngewa who is also deceased and hence the Interested Parties have no locus to defend this suit. Counsel referred to Section 2 of the *Law of Succession Act*, the cases of *Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR and *Julian Adoyo Ongunga & Another vs. Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (deceased))* eKLR.
6. Contending that this court lacks jurisdiction to entertain this suit, counsel submitted that the Defendant and Interested Parties do not have letters of administration for the late Benjamin Kasia Ngewa – deceased. Counsel argued that Section 13 of the *Environment and Land Court Act* does not mandate this court to determine matters pertaining to the estate of a deceased person.
7. On the other hand, counsel for the Plaintiff/Respondent argued that the question of res judicata can only be determined by looking at the issues for determination in both cases. Counsel pointed out that while the Applicants were referring to the ruling of 8th February 2021 in Succession Cause No. 146 of 2010, both the court and the Respondent have not been furnished with the said ruling to show in which court the matter was filed, the parties involved and the issues that were determined.
8. Counsel stated that Section 7 of the *Civil Procedure Act* bars a court from trying a matter or an issue which was directly and substantively in issue in a former suit between the same parties or their privies, the issue was finally determined and the court that heard the matter had jurisdiction to determine the current suit. It was counsel's view that in the alleged Succession Cause, issues raised could only relate to the beneficiaries and distribution of the estate of the deceased but that the issue in the instant suit



is on adverse possession of land. Reliance was placed in the cases of *Kibii Koskei vs. Kiplangat Arap Kimutai & 3 Others* [2017] eKLR, *Rose Wangui Wanderi (Suing as the Personal Legal Representative of the Estate of Hezron Gatheru Kuria) vs. Samuel Mwangi Githamaro* [2019] eKLR and *Richard Wefwafwa Songoi vs. Ben Munyifwa Songopi* [2020] eKLR, which the court has considered.

9. On whether the Defendants and Interested Parties have capacity to participate in these proceedings, counsel submitted that the Defendant was sued in his capacity as the Administrator of the Estate of Jonathan Ngewa Kitolo (deceased) and that the suit property is registered in the said deceased's name. Counsel relied on Section 82 (a) of the *Law of Succession Act* to argue that it is the administrator of an estate that ought to defend and or sue on behalf of the estate of a deceased. It was contended for the Respondent that the Applicant does not dispute that he is the legal administrator of the estate of Jonathan Ngewa Kitolo – deceased, but only contends that the estate of the deceased has been succeeded and passed on to the beneficiaries. Counsel's view was that once the Plaintiff proves his claim before this court, he will move the Succession Court to revoke the grant. Further, that the Interested Parties have been sued because they are in occupation of part of the land in dispute and are also beneficiaries of the deceased's estate.
10. On whether this court has jurisdiction, counsel argued that no other court has primary jurisdiction to determine the issue of adverse possession except this court and that a claim for adverse possession cannot be raised in a Succession Cause either in the Magistrates Court or in the High Court. Counsel relied on Section 38 of the *Limitation of Actions Act* to argue that it is this court where a claimant for adverse possession can make their application. It was contended for the Respondent that a claim for adverse possession can only be heard and determined in this court by dint of Section 38 (1) of the *Limitation of Actions Act* as read with Article 162 2(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*.

Analysis and Determination

11. The court has considered the Preliminary Objection and the submissions filed. The issues that emerge for determination are;
 - a. Whether the Preliminary Objection is a proper Preliminary Objection.
 - b. Whether the Preliminary Objection is merited.
12. A Preliminary Objection is an objection based on pure points of law. Where facts are disputed or where evidence ought to be presented to prove the Applicants contention, then that cannot be termed as a Preliminary Objection. I have stated before in other decided matters and I will still restate that allegations of res judicata cannot be raised as a Preliminary Objection as a party raising the issue must show pleadings and the decision in a former suit to prove the ingredients of the doctrine of res judicata as spelt out in Section 7 of the *Civil Procedure Act*.
13. I note that the Defendant and Interested Parties' counsel tried to evade this position by quoting the alleged former decision dated 9th February 2021, of the High Court in Succession Cause No. 146 of 2010, essentially, providing "evidence" in their submissions.
14. This strategy is of no assistance to the Applicants. Filing a Preliminary Objection on the basis that a suit is res judicata is not a proper way of presenting that issue. Dismissing a party's suit without granting them an opportunity to be heard on the basis that their suit is res judicata is not a matter to be taken lightly, as the right to be heard is sacrosanct. Therefore, the Applicant must demonstrate to the satisfaction of the court that there is a former suit touching on the same issue, involving the same parties or their privies where the decision made was conclusive and the court had jurisdiction to



determine the issue raised in the current suit. My view is that this can only be done by way of Notice of Motion supported by an affidavit attaching the relevant evidence in satisfaction of elements set out under Section 7 of the Civil Procedure Act. I therefore find that the first ground raised in the Preliminary Objection is not a proper Preliminary Objection.

15. On the second limb of the Preliminary Objection, the Applicant stated that the Interested Parties lack the requisite capacity to participate in the proceedings. No explanation for lack of capacity was offered. A party raising a Preliminary Objection must not be vague. A Preliminary Objection is not a platform for a party to play their trump card. A party raising a Preliminary Objection must raise their Preliminary Objection precisely stating which law or legal doctrine has been violated. Merely stating that the Defendant and the Interested Parties lack capacity to participate in the proceedings without further clarity is meant to leave both the opposite party and the court guessing. This practice should be discouraged. A party should not give a vague ground, only to reveal the basis for their objection in their submissions. Submissions are merely a persuasive tool and not a pleading. Therefore, that ground must also fail for want of precision.
16. On the last ground in the Preliminary Objection, the Applicant stated that the court lacked jurisdiction to entertain this suit. No basis was given for the contention of want of jurisdiction. It is only in the submissions where the Applicant tried to flesh their contention using a convoluted argument that as the suit property was sold by one Benjamin Kasia Ngewa, deceased, then the person to be sued ought to be the administrator of his estate. This argument is misleading because Section 38 of the Limitation of Actions Act requires a claimant of land under the doctrine of adverse possession to make a claim against the registered proprietor. In this case, the registered proprietor is Jonathan Ngewa Kitolo and not Benjamin Kasia Ngewa -Deceased. In any event should this court decline jurisdiction on a claim for adverse possession, then which court would have such jurisdiction?
17. Under Article 162 (2) (b) of the Constitution, this court has jurisdiction to determine matters touching on environment and land. Under Section 13 of the Environment and Land Court Act, this court has jurisdiction to hear and determine disputes relating to enforceable interests in land, which in my view include adverse possession.
18. The upshot is that there is no merit in the Preliminary Objection dated 4th October 2021 and the same is dismissed with costs to the Plaintiff.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mikeya for the Plaintiff

No appearance for the Defendant

No appearance for the Interested Parties

Josephine – Court Assistant

