M'murithi & another v Kigia (Environment & Land Case E014 of 2022) [2023] KEELC 17760 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17760 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E014 OF 2022

CK YANO, J

JUNE 7, 2023

BETWEEN

LUSETA M'MURITHI ..... 1ST PLAINTIFF

JOSPHAT MURIUNGI MURITHI ..... 2ND PLAINTIFF

AND

MICHAEL KUNGU KIGIA ..... DEFENDANT

RULING

1. By a notice of motion dated September 27, 2022, brought pursuant to Sections 68, 69 and 70 of the *Land Registration Act*, Order 5 Rule 17 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law, the plaintiffS/applicants seek for orders;

    1. Spent

    2. Spent

    3. Spent

    4. That the Honouable court be pleased to issue an order of inhibition inhibiting any dealings with land parcels number Abothuguchi/lower Kaongo/700 And Abothuguchi/ lower Kaongo/701 either by way of transfer, sale, lease, charge or otherwise pending the hearing and determination of this suit.

    5. That the Honourable court be pleased to issue an order of injunction restraining the defendant whether by himself, his agents/employees/servants/children/siblings or anyone claiming through him from entering, trespassing, occupying, taking possession or in any other way interfering with the 1st and 2nd plaintiff quiet possession, occupation and use of land parcel Number Abothuguchi/lower Kaongo/700 And Abothuguchi/lower Kaongo/701 pending the hearing and determination of this suit.

6. That costs of the application be provided for.

2. The application is supported by the affidavits sworn by the applicants on September 28, 2022 and a supplementary affidavit sworn by Josphat Muriungi Murithi on January 19, 2023 and is based on the grounds-;

I. That the plaintiffs have been in exclusive, open and uninterrupted occupation of land parcels No. Abothuguchi/lower Kaongo/700 and Abothuguchi/lower Kaongo /701 since the year 1979 which is a period of more than 12 years.

II. that the plaintiffs have made substantial developments on the suit land, to wit, built semi-permanent houses, done farming and generally developed the suit land.

III. That the defendant has never set foot on the suit land since 1979.

IV. That the registration of the defendant as the owner of the suit land is against the plaintiff's proprietary interest by way of adverse possession

3. In their affidavits in support of the application, the applicant's aver that the suit parcels of land are registered in the defendant's name. That in the year 1979 the 1st applicant's late husband who was the 2nd applicant's father sold and transferred the suit parcels of land to the defendant but that the defendant did not take possession and abandoned it completely. The applicants aver that after the transfer, the applicants and their family continued being in possession of the suit lands and have occupied them ever since. That they have developed the land greatly by building houses and carrying out farming and that the defendant has never sought to remove them from the land. The applicants' claim is that they are entitled to the suit parcels of land by way of adverse possession since they have occupied it for more than 12 years. The applicants have annexed copies of the green cards for the suit parcels showing that the same are registered in the defendant's name.

4. In opposing the application, the respondent filed a notice of preliminary objection dated October 31, 2022 on the grounds that the court lacks jurisdiction to issue the orders as prayed as the case is res - judicata, fictitious and not compliant with the law.

5. The respondent also filed a replying affidavit sworn on October 31, 2022 and another one sworn on February 7, 2023. The respondent admitted that both parcels of land were sold to him by the family of Murithi M'chora in 1979 and Peter Githui Githongori on March 5, 1994 and averred that he has been in occupation or possession since and even getting credit loans from Agricultural Finance Corporation. He further averred inter alia that the suit is res-judicata CMC case no 257 of 1996, Misc Application No. 48 of 2013 and Meru High Court Petition No. 3 of 2018. The respondent has annexed copies of various correspondences, pleadings, orders and other documents. It is the respondent's contention that the applicants concealed some material facts including the previous cases and argued that they are not entitled to the orders sought. The respondent states that at no time did the plaintiffs or the family of Murithi N'Chore or Japhet Muriungi Murithi occupy or possessed the lands and denied the existence of any developments on the suit properties. The respondent also accused the applicants of serving him with unsigned documents which he termed defective and urged the court to reject them and dismiss the application.

6. Both the application and the preliminary objection were heard together by way of written submissions which were duly filed by both parties and which I have read and I need not reproduce herein.

7. I have considered the application, the preliminary objection raised, the affidavits in support and against and the rival submissions together with the authorities relied on. The issues for determination are

whether the preliminary objection has merit and whether the applicants are entitled to the orders sought as well as the issue of costs.

8. The law on preliminary objection is now settled. The Court of Appeal for East Africa in *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696 held that:

> " A preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... A preliminary objection is in the nature of what used to be a 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"

9. Much more recently, the Supreme Court pronounced itself on the use of preliminary objection as follows in the case of *Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 others* (2015) eKLR;

> " The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: Firstly, it serves as a shield for the originator of the objection- against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially and on merits."

10. Since a preliminary objection may only be raised on a pure point of law, the Supreme Court in the case of *Aviation & Allied Workers Union Vs Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014 [2015] eKLR had this to say;

> " Thus a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

11. On this basis, the question that emerges is what points of law is the respondent raising in his preliminary objection and are they settled? The respondent has submitted that the suit is res – judicata.

The test for determining the application of the doctrine of res – judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 others* [2017] eKLR, the Supreme Court while considering the said provisions held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is-;

"(a) the suit or issue was directly and substantially in issue in the former suit.

(b) that former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised"

12. In the case of *Henderson Vs Henderson* (1943) 67 ER 313 res – judicata was described as follows

> "... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

13. Similarly, in the case of Attorney General & another ET vs (2012) eKLR where it was held that;

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of re-judicata by merely adding other parties or cause of action in a subsequent suit."
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> In that case the court quoted Kuloba J (as he then was) in the case of Njanju Vs Wambugu and another Nairobi HCC no. 2340 of 1991 (unreported) where he stated: if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res – judicata..."

14. The court went further to reason that the essence of the principles of res-judicata is to not only to protect the courts from disrepute, but also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel. The respondent has submitted that the suit is res -judicata. The court has perused the documents attached to the replying affidavit. The same do not indicate whether the cases mentioned have been concluded and whether it involved the same parties. In my view, there are so many facts which are not clear and which need to be established. From the documents on record, I cannot safely conclude that the suit herein is re-judicata. Once a court relies on evidence to ascertain the claim, it is no longer a point of law and it fails. As already stated, a preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained. I find that the objection in that regard cannot be sustained.

15. The respondent has also submitted that the application and the suit should be dismissed because the affidavits in support are unsigned. I have perused the affidavits on record and I note that the same are signed and have been commissioned. This court is a court of record and relies on the documents on the record. I also find that the objection on that ground cannot be sustained.

16. The other issue to be determined is whether the applicants ought to be granted the orders sought. The applicants are seeking orders of inhibition and injunction.

17. The order of inhibition is provided for under Section 68 (1) of the *Land Registration Act*. This section gives the court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event. As such, an inhibition order is an order which is in the nature of a prohibitory injunction restraining dealings on land pending further orders of the court. The purpose of the said order is to preserve the property in question from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter. In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions; that the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued, that the refusal to grant orders of inhibition would render the applicant's suit nugatory, and that the applicant has an arguable case.

18. I have perused the documents annexed to the affidavits in support of the application herein. Among the annextures are copies of green cards which show that the properties are already inhibited. In that case, whatever fears the applicants may have, the same are already protected by the inhibitions in place. In view of that, I do not see the logic for issuing another order of inhibition. For that reason, prayer (4) of the application fails.

19. The last issue for determination is the order of injunction. The principles in granting a temporary injunction are well settled in the case of *Giella Vs Cassman Brown* (1973) EA 358 where it was held that-;

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly if the court is in doubt, it will decide an application on the balance of convenience.

20. In the instant case, the applicants base their claim on adverse possession. However, they have not shown any evidence of their alleged occupation. All that the applicants have merely stated is that they have been in open, exclusive and uninterrupted occupation for more than 12 years and have built houses and are cultivating and farming on the land. However, there is no evidence to support their allegations. Moreover, the applicants have not demonstrated that they are in danger of suffering any possible harm or injury which is irreparable and which cannot be adequately compensated by an award of damages. I am therefore not satisfied that the applicants have discharged their burden required of them for an order of injunction to issue. The relief of injunction cannot be claimed as of right. It is a discretionary and equitable relief and the court can only grant it when and where it is proved that it is necessary and this is not one of the circumstances.

21. In the result, I find that the notice of motion dated September 27, 2022 has no merit and the same is dismissed with costs to the respondents.

22. Orders accordingly.

Dated, Signed And Delivered At Meru T His 7Th Day Of June 2023

IN THE PRESENCE OF

Miss Gachohi present for plaintiff/applicant

No appearance for respondent/defendant

Court Assistant - V. Kiragu

C.K YANO

JUDGE