Wilson & 3 others v Shah (Environment and Land Case Civil Suit 225 of 2021) [2022] KEELC 2538 (KLR) (5 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2538 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 225 OF 2021

LL NAIKUNI, J

JULY 5, 2022

BETWEEN

JOHN KIURA WILSON ..... 1ST APPLICANT

SIDI KAZUNGU KITSAO ..... 2ND APPLICANT

CHANZERA MOLE MBITHA ..... 3RD APPLICANT

ALI JUMA IBRAHIM & 162 OTHERS ..... 4TH APPLICANT

AND

JANENDRA RAICHAND SHAH ..... RESPONDENT

RULING

I. Introduction

1. The Notice of Motion application dated November 5, 2021 filed by the 1st, 2nd, 3rd and 4th Applicants herein is what is before this Honorable Court for its determination. It is brought under the provision of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rules 1, 2, 3 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*.

II. The 1st,2nd,3rd & 4th Applicant's case

2. The Applicants herein seek for the following orders. These are:-

    a) Spend.

    b) Spend.

    c) That pending the hearing and determination of this application, the honorable court be pleased to issue an order of temporary injunction restraining the respondent by himself, employees, agents and/or anyone claiming under him from demolishing the Applicants

houses, destroying the Applicants' property in the land, selling, sub - dividing, trespassing or in any way interfering with Sub - division No. 890 (Original No. 284/99 SEC III MN) Measuring 10.65 Ha.

d) That the cost be provided for.

3. The application is grounded on the facts and averments on the face of the application and the 14 Paragraphed Supported Affidavit of John Kiura Wilson, the 1st Applicant herein sworn and dated November 5, 2021 and two (2) annextures marked as "JKW – 1 & 2" annexed hereto. He averred that he was the Chairperson of the residents occupying Sub - division No. 890 Original No. 284/99 SEC III MN Measuring 10.65 Ha (approximately 26.32 acres), the suit property had the authority to swear this affidavit on behalf of all the other Applicants herein. He deposed that they had been in occupation of the land for a continuous and uninterrupted period of over twelve (12) years while others had been for over fifty (50) years. During all this period they had never been served with any eviction notice at all or by anyone. They indicated having caused extensive development on the suit land for this period through construction of permanent house, cultivation of plants, crops and planting of trees, built a local administration office for the Deputy Commissioner and established other social amenities such as playing grounds and social halls. Thus, they had a claim for the title and interest on the land based on the doctrine of land adverse possession. He further averred that in recent times some strange individuals believed to be the agents of the Respondent had been making several visits to the suit property. They were threatening them with eviction and destruction of their homes and property on the suit property. He argued that from their own investigations they had found out that there was a conspiracy between the Respondents herein and the local administration authorities to have then arbitrarily evicted from the land and their property destroyed. He posited that their eviction was imminent and they were apprehensive that they would lose their property and source of their livelihood. He held that the Applicants stood to suffer irreparable loss if the Respondent was able to proceed with the eviction. Hence, they urged court to grant them the orders as prayed.

III. The Respondent's Replying Affidavit

4. On December 16, 2021, the Respondent herein filed a Notice of Preliminary Objection dated December 15, 2021 on the filed application and the entire suit mainly on two (2) grounds. These were that:-

a. The application and suit offended the provision of Section 7 of "the Limitation of Actions, Act Cap. 22';

b. The Applicants were guilty of the doctrine of laches and having been filed prematurely.

Therefore, the Respondent claimed that the application was defective, bad in law, incompetent and ought to be struck out with costs.

5. Further, the Respondent while opposing the application, on 25th February, 2022 filed a 14 paragraphed Replying Affidavit sworn by Janedra Raichand Shah and dated on even date. He claimed to be the registered owner of all that parcel of land known as Sub - division No. 890 (Original No. 284/99 SEC III MN) Measuring 10.65 Ha, the suit property. He refuted that the Applicants had been on the suit land as they claimed. He informed and drew the Court's attention to previous suit he had litigated over the same issue before in high Court being "HCCC 233 of 2009 Janendra Raichand Shah – Versus - Nassor Mohamed Nahdy", where the court delivered its judgement on 9th March 2021 where it was determined that he was the duly registered owner of the suit property. He further claimed that although the Applicants were allowed by court to be enjoined in HCCC 233 of 2009 as Interested Parties but they had since remained adamant to frustrate his efforts to enjoy the fruits of his judgement. They

failed to participate in the said suit. The deponent argued that the application and entire suit were premature as the entire suit offended the provisions of "the *Limitation of Actions Act*, Cap. 22". In saying so, he argued that the 12 years had not lapsed since the delivery of judgement in HCCC 233 of 2009 to which the Applicants were parties to by virtue of their enjoinment into the suit. He claimed that the Applicants should not be granted any injunctive orders as they had not met the criteria for granting of the injunctive orders and they were simply abusing the court process. He urged court to dismiss the application with costs.

IV. Submissions

6. On 22nd January, 2022, while in the presence of all the parties herein, the Honorable Court directed the parties to have both the Notice of Motion application and the Preliminary Objection be canvassed by way of written submissions. Pursuant to that, its only the Respondents who obliged by filing their written submissions and Court reserved a date of the delivery of its ruling accordingly.

A. The Respondent's Written Submissions

7. On February 25, 2022, the Learned Counsels for the Respondent, the Law firm of Messrs. Muturi Gakuo & Kibara Advocates, filed written submissions dated the same date in opposition of the application and in support of the filed Preliminary Objection. M/s. Mulongo holding brief for Mr. Kibara Advocate submitted that suit "Res Judicata" offending the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 in that there existed another Civil Suit being ELC 233 of 2009 where this Honorable Court had declared the ownership of the suit property as belonging to the Respondent herein through a Judgement delivered on March 9, 2021. The Counsel argued that the wheels of justice must move and the application together with the suit herein was stopping the Respondent from releasing the fruits of his judgment. To buttress her case, she relied on the case of "*Shadrack K. Kimose & 148 others v Lomolo Limited* [2014] eKLR", where it was held that "...judgement relates to no other property but the suit property herein... secondly the basis of the plaintiff's claim in the former suit is similar to the basis for the claim in the instant suit, namely some of the plaintiffs were born in the suit property.... thirdly the question of law which the court is called upon to determine is basically the same as the question of law in the current suit, to wit, whether the occupants of the suit property had grained proprietary rights over the property by operation of law" .

8. The Counsel argued that the suit herein is has met all the requirements for doctrine of Res Judicata, that ELC 233 of 2009 as the case involved the same property as the suit property herein. Therefore, the parties herein were litigating over the same title. Further, she argued that the Applicants had ample time to defend their suit herein when they were enjoined in the ELC 233 of 2009, which since been heard and determined by a court of competent jurisdiction. The Counsel further claimed that the Applicants claim for the land adverse possession was interrupted in 2009 as provided the provision of Section 7 of the Limitation of Action Act, Cap. 22 when they were enjoined into the suit and they ought to have filed their Originating Summons suit at that time. Now that there was a judgement issued on 9th March 2021 and a determination made on the issue of ownership of the suit property, the suit herein could not be sustained as held by the decision of the Court of Appeal in "*Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, that once a suit is filed by the owner claiming interest over his parcel of time, interrupts the computation of time. With that regard, the Honorable Court held inter alia:- "from the evidence on record, we find that the Appellant's occupation of the suit property was always under constant challenge by the Respondent. The fact that the Appellant had occupied the suit property for a period in excess of 12 years does not per se prove adverse possession."

9. The Counsel submitted that the Applicants were guilty of laches and could not be aided by equity which aids the vigilant and not the indolent. He claimed that after being enjoined in ELC 233 of 2009,

the Applicants became spectators instead of filing their claim on the suit property. It was further argued that the Applicants had no clean hands as they have concealed material facts before court that they were parties to the Civil Suit being ELC 233 of 2009 where judgment was delivered in favour of the respondent.

10. On the issue of injunctive orders, Counsel submitted that the Applicants had failed to meet the requirements set out by the famous case of "*Giella v Cassman Brown* [1973] EA 358". The Counsel submitted that the Applicants had no "prima facie case" with a probability of success on the ground that this court had already determined the question of ownership of the suit property in ELC 233 of 2009 in its judgement delivered on 9th March 2021. The Counsel submitted that the Applicants had not appealed against the said judgement and that this application and suit were efforts to frustrate him from enjoying the fruits of his judgement. He argued that for the Applicants to bring a claim of title and interest on land adverse possession suit against the Respondent they ought to have occupied and used the suit property for more than 12 years from the March 9, 2021 when the judgement was delivered. On the second limb of irreparable damage, the Learned Counsel submitted that the Applicants had not demonstrated existence of irreparable damage they stood to suffer if the injunctive orders were not granted. On the other hand, Learned Counsel argued that any injunctive orders would prejudice the Respondent who had been anxiously waiting for a decade in litigation. The Counsel submitted that the balance of convenience tilted in favour of declining the injunctive orders. She urged court to dismiss the application with costs.

V. Analysis and Determination.

11. I have read all the pleadings filed in relation to the Applicants' Notice of Motion dated November 5, 2021 and the Respondent's Notice of Preliminary Objection dated December 15, 2021, the written submissions, the citations and the relevant provisions of *the Constitution* and statutory laws. In order to arrive at an informed, just and fair decision, the following three (3) issues have been raised therein for determination by court are:-

    a. Whether the Preliminary Objection raised by the Respondent through its Notice of the Preliminary Objection dated.....meets the threshold of an objection in law and precedents.

    b. Whether the Notice of Motion dated 5th November, 2021 by the Applicants herein meets the requirements set out for a grant of an order of interlocutory injunction orders under Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010*

    c. Who will meet the Costs of the application.

ISSUE No. a). Whether the Preliminary Objection raised by the Respondent through its Notice of the Preliminary Objection dated.....meets the threshold of an objection in law and precedents.

12. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> "In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited*. [1969] EA 696. Where Lord Charles

Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " 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 a demurer 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 in 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 issue. The improper practice should stop"

13. In addition, this Honorable Court wishes to cite the case of *Attorney General & another v Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

    ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

    iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

    It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Respondent are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Respondent was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to *Mukisa Biscuits Manufacturing Co. Limited (Supra)*. Applying the above test, the matters raised by the Respondent in their preliminary question are clearly pure points of law that I shall proceed to consider them and determine them accordingly.

14. The suit herein is brought by John Kiura Wilson and 162 others vide an Originating Summons filed on November 5, 2021, they seek to be registered as the proprietors of all that parcel of land "Cr No. 39208, Subdivision NO. 890 (Originally No. 284/99) Section/III/MN measuring 10.65 ha, the property of the Janendra Raichand Shah, the respondent; which they claim to have acquired an adverse possession interest over. The application herein therefore seeks to restrain the respondent from evicting the applicants from the suit property pending the hearing and determination of the suit.

15. On the other hand, the Respondent argue that he stands to suffer prejudice if the injunctive orders are granted against him since the court has already determined the ownership of the suit property in a similar case "ELC 233 of 2009 Janendra Raichand Shah v Nasor Mohammed Nahdy and 3 others. The Respondent deponed that on 9th March 2021 this court delivered a judgement in ELC 233 of 2009, where the Applicants were enjoined to, held that the suit property belongs to the respondent. The Learned Counsel for the Respondent argued that the suit for adverse possession can only be brought by the Applicants, if they stayed for more than 12 years after the said judgement was delivered.

16. In his Replying Affidavit dated February 25, 2022, the Respondent annexed a judgement delivered by Justice C.K Yano on March 9, 2021 in ELC 233 of 2009 which I have taken the liberty of perusing. The issue before my brother Justice Yano was, who the registered owner of Plot Sub - division Number MN/III/890. It was determined that the Plaintiff therein (the respondent herein) is the registered owner of Parcel Number MN/III/890 (Orig. 284/99) and the court ordered the defendant to evict from the said parcel of land. Counsel for the respondent argued that the applicants came to court with unclean hands as they did not disclose to court that they were part of the suit ELC 233 of 2009. To support this claim he also annexed an application dated December 18, 2009 where the 1st Applicant and 29 others were seeking to be enjoined in the suit as interested parties. However, on keen perusal of the records, this Court has not seen any Order of court attached that would demonstrate to court that the said application was allowed and that the Applicants were indeed parties to ELC 233 of 2009. Further, I have perused the said judgement and I have not come across any part of it where the Honourable Judge, indicated that the Applicants indeed were granted leave to be enjoined as interested parties. I do find that though ELC 233 of 2009 may have determined the issue of ownership of the suit property, it has not been conclusively demonstrated that the Applicants were part of that suit nor whether they would be making any claim to the said suit land whatsoever. These are matters to be fully tackled during the full trial and can not be decided at the inter locutory stage.

17. The two issues raised by the Respondent being that the Applicants offending the doctrine of "Res Judicata" contrary to the provisions of Section 7 of the *Civil Procedure Rules, 2010* and caught up by laches as it is contrary to the provisions of Section 7 of the Limitation of Action Act, Cap. 22 though matters of law but would require to be proved through empirical evidence through filing of documents. That may not be achievable through merely filing a notice of Preliminary objection but through proper affidavits being matters of facts. That was not the case here. on the case of "*George Kamau Kimani & 4 others v the County Government of Trans-Nzoia & another* [2014] eKLR, where court held that "One cannot raise a ground of Res judicata by way of preliminary objection. The best way to raise a ground of Res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of Res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of Res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection. In this regard I adopt the words of Sir Charles Newbold P. in *Mukisa Biscuit case (Supra)* which are applicable in the present circumstances.

> " 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 a demurrer. It raises a pure point of law which is argued on 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."

18. This Honorable Court is inclined to fully agree with my Brother Obaga J, that indeed a Notice of preliminary objection cannot sustain the doctrine of res judicata as provided by Section 7 of the *Civil Procedure Act*, Cap. 21 on the ground that reference has to be made to pleadings in the previous suits. Once a court steps out of the premise of law and looks at facts and evidence, that stops to be a pure point of law, matters of adducing evidence which can only be conducted adequately and appropriately during a full trial thereof. The objection must fail on that front.

Therefore, the Honorable Court finds the Preliminary Objection bears no merit at all.

ISSUE b). Whether the Notice of Motion dated 5th November, 2021 by the Applicants herein meets the requirements set out for a grant of an order of interlocutory injunction orders under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010

19. The next issue for determination is whether the plaintiffs have fulfilled the requirements of a grant of temporary injunction as melted out in the famous case of *"Giella v Cassman Brown Company Limited [1973] EA 358"*, where it was stated: "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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

20. It is the Applicants' case that they have acquired an adverse possession interest over the suit property and as such the Respondent's imminent actions of evicting them from the suit property is prejudicial. They urge court to protect their interest on the suit property by granting them an order of interlocutory injunction to restrain the respondent and his servants from evicting them. A suit for adverse possession seeks to aggressively possess the property of another by asserting hostile title in denial of the true owner. It is trite law that an adverse possession suit is not merely proved because the registered owner has abandoned possession and ceased to use it. The abandonment of possession must be coupled with the applicants taking possession of the land, with all the intention of possession and asserting proprietary rights which are inconsistent with those of the owner of the land.

21. The question before court would be, what a prima facie case looks like in an adverse possession suit? We already have the basic definition of what a prima facie case is, as it was defined in "*Mrao Limited v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125,

> " So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

22. In my view, a prima facie case is an adverse possession suit would be where the Applicants prove to court that they have had a peaceful and uninterrupted use of the suit property for more than 12 years. They demonstrate to court that they have physically and exclusively possessed the suit property as its owner would, in total exclusion of the actual owner. When I turn to the Applicants' case, in the supporting affidavit sworn by John Kiura Wilson, he deponed that the Applicants have occupied the suit property continuously and uninterrupted for 12 years. He further deponed that they have constructed permanent houses, cultivated that land as well as build local administration offices and other social amenities. To support this claim he annexes photographs showing permanent buildings of homes and shops.

23. In my view, there is no evidence from the applicants that they entered the suit property with the intention of dispossessing the Respondent as the registered proprietor of the suit property. In the Supporting Affidavit, the deponent avers that '...we have filed a suit for adverse possession against the Respondent, who is to our best knowledge the registered owner of the land.' The applicants have failed to demonstrate to court at what point they dispossessed the respondent of his title to the suit property

as the registered proprietor, making their case a weak link to the land adverse possession. It is trite law that the fact that the Applicants have occupied the suit property for a period in excess of 12 years does not per see prove adverse possession. I do find that the Applicants have failed to prove to court that they have a prima facie case of adverse possession with a probability of success at trial.

24. Where a prima facie case is not established, the court need not consider irreparable injury and balance of convenience. This was held by the Court of Appeal in "*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR,

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Also See the decision of "the *Kenya Commercial Finance Co. Limited v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

For all these reasons, the Honorable Court finds that the Applicants have failed to demonstrate that they ought to be granted the interim temporary injunction orders sought.

ISSUE No. c). Who will meet the Costs of the application.

25. The issue on costs is purely at the discretion of Court. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 27 provides that costs follow the event. The event here is the result of the litigation involving the parties herein.

26. In this case, the results are that both the Preliminary objection dated November 29, 2021 raised by the Respondent and the Notice of Motion Application dated November 5, 2021 by the 1st, 2nd, 3rd and 4th Applicants are not meritorious successful. Thus, the cost deems it fit in the given circumstance that each party bears its own costs.

VI. Conclusion & Disposition

27. In view of the above analysis to the framed issues, this Honorable Court on the preponderance of probability makes the following findings:-

    a. That the Notice of Preliminary Objection dated November 29, 2021 by the Respondent herein be and is hereby dismissed for being unmeritorious with no order as to costs.

    b. Thatthe Notice of Motion application dated November 5, 2021 by the 1st, 2nd, 3rd and 4th Applicants herein be and is hereby dismissed for lack of merit with no orders to Costs.

    c. Thatfor expediency sake the Originating Summons suit filed herein to be heard within the next One Hundred and Eighty (180) days from the date of this ruling as guided by the following stringent timelines:-

i. The parties to ensure that they all comply by filing and serving each other all the necessary further documents within the next documents within the next 21 days from today.

ii. The matter to be mentioned on September 28, 2022 for pre trial conference session and taking of directions of the Originating Summons filed on November 5, 2021 under the Provision of Order 37 Rules 16, 17, 18 and 19 of the *Civil Procedure Rules*, 2010.

iii. Fixing of a hearing date thereof.

d. That each party to bear its own Costs.

28. It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JULY 2022.

HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:-

M/s. Yumnah Hassan, Court Assistant.

Mr. Birir Advocate for the 1st, 2nd, 3rd & 4th Applicants.

M/s. Mulingo Advocate holding brief for Mr. Kibara Advocate for the Respondent.

HONL.L. NAIKUNI (JUDGE)