



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU

ELC CASE NO. 311 OF 2018(OS)

HILAM KAIRU MBUGUA1ST PLAINTIFF

GRACE WANJIKU KAIRU2ND PLAINTIFF

VERSUS

MARY WANJIKU NJIIRI.....DEFENDANT

RULING

1. The preliminary objection filed on **11/06/2021** is on the following grounds:

1. This suit has abated for want of service and dormancy from the time it was instituted on 19th November 2018 as the defendant has never been served by the plaintiffs.
2. The defendant has never been accorded an opportunity to defend herself in this suit contrary to the law and the National Constitution of Kenya.
3. The honorable court has no pecuniary jurisdiction to try this suit as there is another suit pending before the Chief Magistrate's Court in the case No. ELC 183 of 2018 CMCC Mary Wanjiku Njiiri vs Hilary Kairu Mbugua & Grace Wanjiku Kairu over the same subject matter as this suit which was instituted by the defendant against the plaintiffs' and served before they filed this suit.
4. This honorable court's role over subordinate courts is a supervisory one.
5. This suit and its proceedings be stayed.
6. This honorable court is bound by the procedure laid down in the Civil Procedure Act Cap 21.
7. This suit instituted against the defendant by the plaintiffs' is barred.
8. The recourse for approaching this honorable court by any of the parties is only by way of an appeal against a decree passed by the subordinate court.
9. No decree has been passed in the case No. ELC 183 of 2018 pending before the Chief Magistrate's Civil Court.
10. The Notice to show cause (NTSC) dated 5th January 2021 pends correction of the case number, replacement and directions by this honorable court.
11. There are no proceedings and directions herein for service and hearing of the plaintiffs originating summons (OS) by the Environment & Land Court (ELC) judge when this suit was instituted by the plaintiffs' on 19th November 2018.
12. There are no proceedings, directions & notice to parties herein for disposal of the plaintiffs' Originating Summons (OS) dated 15th November 2018 within 30 days from the filing of this suit on 19th November 2018 by the deputy registrar of the Environment and Land Court division of this Honorable court.

13. This suit has been unprosecuted and dormant for more than 24 months since its institution by the plaintiffs' on 19th November 2018 and should have been dismissed without notice to the parties.

14. This suit's title/ description doesn't include the words (O.S) to distinguish it from other suits.

15. The plaintiffs' are precluded from filing the Originating Summons (OS) they have filed herein dated 15th November 2018 as there is a pending suit no. ELC 183 of 2018 CMCC in which they can make an application for adverse possession.

16. The plaintiff's claim for adverse possession in this suit can still be tried as a counter –claim as pleaded by themselves in their defence to the defendant's case No. ELC 183 of 2018 CMCC which they have abandoned to file this suit.

17. The plaintiff's Originating Summons (OS) dated 15th November 2018 herein have not been supported by copies of title(s) or certified title(s) extracts of the subject matter and is defective.

18. The defendant has adduced a title, certified title extract and official search certificates for the two plots subject to both suits reason for which the plaintiff's claim for adverse possession cannot stand herein and they have not produced the required documents by law served upon them by the defendant in the case of ELC 183 of 2018 CMCC.

19. This suit and the other suit No. ELC 183 OF 2018 before the Chief Magistrate's Civil Court (CMCC) cannot be consolidated.

The Response

2. The defendant filed her submissions on 16/07/2021 while the plaintiffs did not file any.

Determination

3. After considering the contents of the preliminary objection, the issue I would wish to first address is whether there is a competent preliminary objection before the court.

4. The court in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Per Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 of the suit. Examples are an objection on 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.”

Per Newbold, P.:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

5. The Court of Appeal in the case of **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** stated as follows:

“...A Preliminary Objection 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...”

6. The Supreme Court in the case of **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** stated as follows:

“...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 of the suit.”

7. From the Notice of Preliminary Objection before the court, the only grounds that are pure points of law as provided for by the above quoted cases are in my opinion as follows:

1. That the applicant ought not to have filed the present suit as there is a pending suit in the Chief Magistrate's Court no. ELC 183 of 2018 in which they could have raised the issue of adverse possession. (See grounds no 3, 9 and 16 in the notice of preliminary objection.)

2. That the applicants Originating Summons dated 15/11/2018 is not supported by copies of title(s) and is therefore defective. (See ground no 17 in the notice of preliminary objection.)

8. I will now address the issue of whether the applicants ought to have raised the issue of adverse possession in **ELC Case No. 183 of 2018** that is pending before the Chief Magistrate's Court in Nakuru. This court relies on the objector's affidavit filed in this court on **26/2/2021**. That suit was filed on **18/07/2018** while the present matter was filed on **19/11/2018** which is about four months later. The prayers sought in **CMCC ELC 183 of 2018** are for a declaration that the applicants in these proceedings be declared trespassers on **LR No. Dundori/Miroreni/ Block 2/1086** and **Dundori/Miroreni/Block 2/1082** and be ordered to give vacant possession as the suit properties are alleged to belong to the late husband of the respondent herein. In both matters, the parties are the same and the subject matter is also the same. The issue of adverse possession is mentioned briefly in **paragraph 5** in the defence dated **15/11/2018** filed in **ELC 183 of 2018** as follows:

"The defendants deny that Wilson Njiiri Gikonyo was the legal & registered owner of Dundori /Miroreni /Block 2/1086 (Ndimu) and Dundori /Miroreni /Block 2/1082 Ndimu) and if at all the deceased Wilson Njiiri Gikonyo obtained title, the same is superseded by the defendant's rights to the same by virtue of adverse possession.'

9. The case of **Mtana Lewa v Kahindi Ngala Mwangi [2015] eKLR** defined adverse possession as :

"... essentially a situation where a person takes possession of land and assets rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

"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."

10. **Section 38** of the **Limitation of Actions Act** provides that any person who seeks to be registered as the owner of a parcel of land by way of adverse possession ought to apply to the High Court. While expressly disagreeing with the assertion of the defendant in **ground no 3** of the objection that this court lacks pecuniary jurisdiction, I state here that this court being a court of equal status is seized of jurisdiction to hear and determine a claim in adverse possession among other claims that have been envisaged in **Article 162(2) (b)** of the Constitution and **Section 13** of the **Environment and Land Court Act** regarding occupation, use of and title to land.

11. In the circumstances of this case it behoves this court, owing to the provisions of **Section 6** of the **Civil Procedure Act**, to determine if the subordinate court seized of **CMCC ELC 183 of 2018** has jurisdiction to hear and determine such a claim as is contained in the instant suit. If that court is possessed of jurisdiction, then there is no good reason why the claim for adverse possession was not filed there. In other words, as stated by the defendant, there would be no need to have the instant suit filed in this court is the same parties herein are engaged in a legal tussle elsewhere before a court of competent jurisdiction.

12. While considering the issue of whether magistrates' courts can try adverse possession claims, the Court in the case of **Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR** the court held as follows:

"In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015, the principles of interpretation of the constitution as well as the principles of the constitution such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the Environment and Land Court Act, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession."

13. I have already noted hereinbefore that the issue of adverse possession was mentioned briefly in the case in the subordinate court. It is also a fact that the subordinate court case was according to the court date stamp filed on **18/7/2018** while the instant suit was filed on **19/11/2019**, about **4 months** later.

14. I maintain the same position held by the court in the **Patrick Ndegwa Munyua case (supra.)** It is therefore my opinion that in light of the above, that the Chief Magistrate's court in Nakuru has the requisite jurisdiction to hear and determine cases of adverse possession.

15. The other issue for determination is whether there is a competent originating summons before the court as no extract of title is attached. A determination on that issue is the preserve of the court that will hear the matter to finality and I do not need to engage myself in a discourse aimed at the determination thereof at this point in view of what I am about to state herein below.

16. In conclusion therefore, it is this court's opinion that since the Chief Magistrate's Court in Nakuru has the jurisdiction to hear claims of adverse possession, the present matter is hereby transferred to that court for hearing and determination. The case file record shall be placed before the Deputy Registrar for dispatch. The parties will be at liberty to seek consolidation of this matter with **CMCC ELC 183 of 2018** upon transfer.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 2ND DAY OF NOVEMBER, 2021

MWANGI NJORGE

JUDGE, ELC, NAKURU