



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 10 OF 2018

VIRNEKAS MWANAHARUSI NIHAZI.....PLAINTIFF

VERSUS

BONIFACE KAHINDI KATANA.....1ST DEFENDANT

SIASA SALIMU JUMA.....2ND DEFENDANT

THE REGISTRAR OF TITLES, MOMBASA.....3RD DEFENDANT

RULING

(Preliminary objection seeking to strike out suit; plaintiff having been defendant in an Originating Summons (OS) claiming adverse possession; judgment entered against her in that suit; plaintiff filing a new case to plead that the said OS was a fraud; 1st defendant in this suit being the claimant in the OS; objection that the plaintiff cannot file this suit to attack the judgment in the OS; no collateral attack allowed on a judgment through the filing of a new suit; all issues in the previous suit to be determined within that suit; Section 34 of the Civil Procedure Act applied; preliminary objection succeeds; plaintiff's suit struck out with costs)

1. This ruling is in respect of a preliminary objection raised by the defendant which objection is drawn as follows :-

(i) That the plaintiff's suit filed by a plaint dated 22nd January 2018 is an abuse of the court process as it constitutes a collateral attack on the judgment and decree issued in Civil Suit No. 86 of 2010 (OS) (High Court of Kenya at Mombasa).

(ii) That the plaintiff's suit filed by a plaint dated 22nd January 2018 is bad in law as it seeks to re-litigate Civil Suit No. 86 of 2010 (OS) (High Court of Kenya at Mombasa).

(iii) That this Honourable Court lacks jurisdiction to determine the present suit as it does not have appellate jurisdiction over the judgment and decree in Civil Suit No. 86 of 2010 (OS) (High Court of Kenya at Mombasa) and neither has this Honourable Court been seized of any of the jurisdictional avenues stipulated by law for re-opening Civil Suit No. 86 of 2010 (OS) (High Court of Kenya at Mombasa).

2. To put matters into context, this suit was commenced through a plaint which was filed on 23 January 2018 against Boniface Kahindi Katana, Siasa Salimu Juma and the Registrar of Titles, Mombasa. The plaintiff averred that she was the registered proprietor of the land parcel Plot No. 2630/III/MN (Title No. CR 25067) vide a certificate of title issued to her on 14 January 1994. She contended that she and her deceased husband since 1997 have been in actual use and occupation of the suit land. It is pleaded that sometimes in the year 2010, the 1st defendant filed the suit HCCC NO. 86 of 2010 (OS) claiming the land by way of adverse possession. A decree was issued in his favour and the property was vested in him. Subsequently he was issued with a certificate of title on 11 October 2016. That title was then transferred to the 2nd defendant. The plaintiff pleaded that in a strange twist of events, the 1st defendant distanced himself from the said proceedings and claimed not to have filed the same. It is thus the contention of the plaintiff that there was fraud and irregularity in the title of the 1st and 2nd defendants. Inter alia it is pleaded that the 1st defendant has never been in actual use and occupation of the suit property; that the 1st defendant has never transferred the suit property to the 2nd defendant; and that the 1st defendant has sworn that he never instituted Mombasa HCCC NO. 86 of 2010 (OS).

3. In the suit, the plaintiff asked for the following orders (slightly paraphrased for brevity) :-

(a) A declaration that the transfer of the suit property to the 1st and 2nd defendants was irregular, unlawful, and fraudulent.

(b) A declaration that the title of the 1st and 2nd defendants is irregular, unlawful and fraudulent.

(c) An order of permanent injunction to restrain the 2nd defendant from the suit land.

(d) An order that the 2nd defendant fraudulently acquired title to the suit land.

(e) Any other relief deemed fit and just.

4. The 1st and 2nd defendants filed a joint statement of defence. It was denied that the plaintiff has been in possession of the suit land and it was asserted that the claim for adverse possession was justified. It was denied that the 1st defendant has distanced himself from the proceedings in Mombasa HCCC No. 86 of 2010 (OS). The 2nd defendant pleaded that he is accessing the property because he is now the owner thereof.

5. In arguing the preliminary objection, Mr. Okere, learned counsel for the defendants, submitted inter alia that this suit is a collateral attack on a decree issued in a former suit. He submitted that this collateral attack is not permissible. He submitted that the plaintiff ought to have appealed or sought a review of the judgment. He referred me to several authorities to buttress his point.

6. Mr. Ngure, learned counsel for the plaintiff, inter alia submitted that the preliminary objection lies in the plea of res judicata, and res judicata will not apply, since the issues and the parties in this case are different. He submitted that the plaintiff is not attacking the judgment in the adverse possession case and referred me to an affidavit purportedly sworn by the 1st defendant denying that he filed the previous suit.

7. I have considered the matter. First, it is apparent that the 1st defendant obtained judgment in his favour as against the plaintiff herein, vide the suit Mombasa HCCC No. 86 of 2010, where it was held that he is entitled to the suit land by dint of the doctrine of adverse possession. I know there is back and forth argument that the 1st defendant never filed that case, but that is not for me to decide at this stage of the proceedings, for there is a defence on record where the 1st defendant has asserted that he is the one who filed the suit. For now, I will abide with what is in the defence. It will be observed that in this case, the plaintiff claims that the OS was a fraud and further that she has always been in possession of the suit land. She claims to still have title to the land and thus the need to restrain the defendants from her land.

8. The forum for attacking a judgment is not through the filing of a second suit. If a person is aggrieved by a judgment, that person ought to file an appeal or an application within that case to quash the judgment. I agree with the dictum in the case of **Wilson vs The Queen (1983) 2 S.C.R 594**, referred to me by Mr. Okere, where it was stated as follows :-

“...It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exists. Without attempting to a complete list, such grounds would include fraud or the discovery of new evidence.”

9. This dictum has support in our Civil Procedure Act, at Section 34, which provides as follows :-

34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

10. The plaintiff in this suit has raised various issues including the claim that the 1st defendant never filed the OS, and thus that the said OS was a fraud. The question whether the OS was actually filed by the 1st defendant or whether it is a fraud, are questions arising between the parties in that OS, and can only be determined within the proceedings of that suit as required by Section 34 above. The avenue is not for the plaintiff to attack the OS in a separate suit. Further, if it is the position of the plaintiff that she has all along been in possession of the suit land and has never been dispossessed by the 1st defendant so that no proper judgment could have been entered for the 1st defendant under the doctrine of adverse possession, that is an assertion that she had avenue to make in the OS, and she cannot now attack that judgment in new proceedings. If the plaintiff feels that the said judgment was improper, it is upon her to seek to set it aside. The title of the 2nd defendant is derived from the 1st defendant and clearly if the plaintiff succeeds in setting aside the judgment, then the title of the 2nd defendant may very well be affected.

11. For the above reasons, I am persuaded that this Preliminary Objection is merited and I allow it. The result is that the plaintiff's suit is

hereby struck out with costs to the defendants.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Ngoya holding brief for Mr Ngure for the plaintiff/respondent.

Mr. Okere present for the 2nd defendant.

No appearance for the 1st & 2nd defendant.

Court assistant; David Koitamet.