

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 66 OF 2019 (OS)

SUSAN KATHAMBI KINOTI M'RINGERA.....PLAINTIFF

VERSUS

MESHECK RINGERA M'IKWINGA.....DEFENDANT

RULING

1. The defendant has filed a Preliminary objection dated 10th March 2020 raising the following grounds;

a) The Honorable Court lacks jurisdiction to hear and determine this suit by dint of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.

b) This suit is res-judicata and therefore incompetent, bad in law and an abuse of the court process having been determined by a court of competent jurisdiction in Meru CM ELC CASE O. 11 of 2018, in which the parties were the same and so was the subject matter. The judgment of the court was delivered on 30/10/2019 by the Hon. S. Abuya, SPM.

2. In his submissions, defendant averred that the main issue for determination in CM ELC 11 of 2018 was whether there was a breach of trust by the defendant by failing to transfer 2.5 acres of the suit land and purporting to transfer 1 acre instead and whether plaintiff was entitled to the 2.5 acres. In both suits she claims that she has been occupying the suit land with her deceased husband and the defendant was holding the same in trust for her and by refusing to transfer the same to her, he breached the said trust. The lower court held in its judgment that the plaintiff had not proven that the land was ancestral or that the defendant was holding it in trust for his children and dismissed her suit.

3. The defendant contends that this court ought to down its tools for want of jurisdiction, hence the suit ought to be dismissed with costs.

4. The plaintiff filed her response to the preliminary objection stating that this court has jurisdiction to determine the suit as the claim of adverse possession is a new issue, hence the matter is not res judicata.

5. The single issue for determination is whether the preliminary objection by the defendant has merit. The threshold for a preliminary Objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, 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.’

6. Thus a preliminary objection must be a matter of law which is capable of disposing off the suit. It must not be blurred by factual details calling for evidence and it must not call upon the Court to exercise discretion.

7. It is the defendant's contention that the suit herein is res judicata as the issues herein were already dealt with by a court of competent jurisdiction. I have perused a copy of the judgment before the magistrate's court. The main issue placed before the court for determination related to the subdivision of the land. The then plaintiff who is also the current plaintiff wanted to be allocated the place where she has developed during the subdivision. Her claim was dismissed on the basis that she had failed to prove that the subdivision was unlawful. The court also stated that the plaintiff had failed to prove that the suit land was ancestral land which was held in trust for her.

8. The issue raised before this court is anchored on the doctrine of adverse possession. Thus the issues for determination are different from the ones in the case MERU CM ELC 11 of 2018. In the circumstances, I find no merits in the Notice of Preliminary Objection which is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE