



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 767 OF 2017 (O.S)

CLEMENT MASANGA ATONGA.....PLAINTIFF

-VERSUS-

LEWKADIA MILUNGI.....DEFENDANT

RULING

1. This ruling is in respect to a Notice of Preliminary Objection ('the preliminary objection') dated 2nd March 2018 and filed in court on 13th March 2018. Through the firm of **Amos O. Oyuko & Co. Advocates**, the defendant, Lewkadia Milungi raised the preliminary objection on the grounds infra: -

- a. The Origination Summons herein is misconceived, misdirected and an abuse of the due process of this Honourable Court.**
- b. The court has no jurisdiction to hear and determine this Originating Summons.**
- c. The defendant herein has no capacity to be sued over land parcel No. KAKSINGRI/KAGUTU WAREGI/652 (The suit land herein) registered in the name of JOSEPH MILUNGI (deceased).**
- d. The Originating Summons herein is therefore defective, frivolous and vexatious and the same ought to be dismissed with costs.**

2. The preliminary objection was canvassed by way of written submissions. Both parties submitted as noted hereinbelow.

B. DEFENDANT'S WRITTEN SUBMISSIONS

3. In support of the preliminary objection, the Learned Counsel for the defendant filed submissions dated 11th March 2021 on 22nd March 2021 and submitted on four (4) issues for determination: -

- i. Whether the originating summons herein offends the provisions of Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya (The CPA).**
- ii. Whether this Honourable Court has jurisdiction to hear this matter.**
- iii. Whether the Defendant herein has capacity to be sued over the suit land.**
- iv. Costs.**

4. On whether the originating summons offends the provisions of **Section 7** of the **CPA**, Counsel submitted that the plaintiff herein instituted **KISII ELC No. 349/2013** against **the deceased** over the ownership of **the suit land** which suit was dismissed. That the present originating summons constitutes **res judicata** and violates the provisions of **Section 7** of the **CPA**.5. On the competence of this court to

hear this matter, Counsel directed the court to the provisions of **Sections 5 and 11** of the CPA; that the suit is statute barred by dint of *res judicata* and the pecuniary jurisdiction of the suit land falls within the jurisdiction of the Magistrates' Court.

6. On the third issue for determination, Counsel submitted that the land search results of the suit land show that the land belongs to the **deceased thus**, the suit land forms part of his estate; that suing the defendant offends the provisions of **Section 2 of the CPA**. Counsel also submitted that the defendant is not a legal representative of the estate of the deceased hence, she has no capacity to be sued over the suit land.

7. On the issue of costs, Counsel submitted that **Section 27** of the CPA provides that costs do follow events. Therefore, prayed that the court allows the preliminary object and costs be awarded to the defendant.

C. PLAINTIFF'S WRITTEN SUBMISSIONS

8. The preliminary objection was opposed by the plaintiff through the firm of **Okong'o, Wandago & Company Advocates** who filed his submissions dated 10th May 2015 filed on 11th May 2015. Learned Counsel submitted on behalf plaintiff and opted to answer to the issues for determination raised by the defendant as opposed to framing his own issues.

9. Counsel defined what constitutes a preliminary objection and its effect thereof. Reference was made to the cases of **Mukisa Biscuit Company Limited vs West End Distributors (1969) EA 696; Oraro v Mbaja (2005) KRL 141** and **John Musakali v Speaker, Bungoma County & 4 Others (2015) eKLR**.

10. On the issue of *res judicata*, Counsel submitted that the instant suit was commenced by way of originating summons and based on the doctrine of adverse possession as provided for under the provisions of **Section 38** of the **Limitation of Actions Act Cap 22** and **Order 37** of the **Civil Procedure Rules, 2010 (the Rules)**; that *res judicata* applied when a matter which is directly and substantially in issue namely a cause of action has been heard and determined on merits and finality; that this court lacks the benefit of the judgement and decree in **Kisii ELC No. 349 of 2013**, that therefore, the court cannot have a way of telling that adverse possession as raised in this suit was raised in **Kisii ELC No. 349 of 2013** and determined on merit so as to constitute *res judicata*. To further buttress this point, the plaintiff relied on **Africa Oil Turkana (previously known as Turkana Drilling Consortium Ltd) & 3 Others v Permanent Secretary, Ministry of Energy & 17 Others (2016) eKLR** and **Joseph Adera Ayugi vs Lawrence Adera Ayugi Migori ELC Case No. 835 of 2017**.

11. Rebutting the issue on jurisdiction, Counsel submitted that the suit is anchored on **Section 38** of the **Limitation of Actions Act (supra)** as operationalized by **Order 37 Rule 7** of the **Rules** which prescribe that an application of this kind shall be filed in the High Court which is a superior court like the court herein; that notwithstanding the changes in the law, **Section 38** of the **Limitation Act (supra)** makes a mandatory provision that the suit should be filed in the High Court. Learned Counsel urged the court to take judicial notice of the provisions under **Sections 59 and 60** of the **Evidence Act Cap 80**; that the court recently allowed an originating summons in **Lucy Wambui Kamau & Another vs Leonard Nganga Karuga (2021) eKLR**.

12. On the issue of jurisdiction, Counsel submitted that the defendant has not pleaded the pecuniary value of the suit land. It cannot thus, be determined whether the pecuniary value falls under the jurisdiction of this court or the Magistrates' Courts.

13. On the capacity of the defendant to be sued, Counsel submitted that the failure to describe the defendant as the personal representative of the deceased is not fatal. This is a lapse that can be cured by way of an amendment. The capacity of the defendant to be sued as the administrator of the deceased is one which can only be adduced on evidence. Counsel relied on the decisions of **Soloh Worldwide Inter - Enterprises v County Secretary, Nairobi Country & Another (2016) eKLR; Republic v Charles Lutta Kasamani & Another ex parte, Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officer (2006) eKLR** and **County Government of Migori vs Hope Self Help Group (2021) Eklr**, to buttress this issue.

14. Further to the foregoing, Counsel submitted that there are records indicating that the plaintiff took out citation cause against the defendant and she was appointed an administrator of the estate of the deceased. Therefore, Counsel urged this court to dismiss the preliminary objection with each party to bear its own costs.

D. ISSUES FOR DISCUSSION

16. I have duly considered the notice of preliminary objection, the rival submissions inclusive of all authorities cited therein. On that account, it is this court's considered opinion that the issues for determination that arise therefrom are whether: -

a. **This court has jurisdiction to hear and determine this matter on account of:**

i. **Res judicata.**

ii. **Pecuniary limit.**

iii. **Original and unlimited jurisdiction.**

b. **The defendant has *locus standi* to be sued.**

E. DISCUSSION AND DISPOSITION

17. The plaintiff commenced the instant suit by an originating summons filed on 27th July 2017 being **Migori ELC Case 767 of 2017 (O.S)** where he claims to have acquired title to a portion of Land measuring approximately **7.6HA of the suit land** by way of adverse possession.

18. On 13th March 2018 the defendant filed a replying affidavit sworn on 1st March 2018 in response to the originating summons. Simultaneously, the defendant filed the preliminary objection which is anchored on the grounds as enumerated in paragraph 1 hereinabove.

19. On the issue of jurisdiction, the defendant contends that the jurisdiction of this court fails on the basis that the suit is ***res judicata*** on account of **Kisii ELC No. 349 of 2013** and that the pecuniary value of the suit land falls within the jurisdiction of the Magistrates' Court. On the other hand, the plaintiff submits that the issue of ***res judicata*** does not arise in this instance since this court lacks the benefit of scrutinizing the proceedings in **Kisii LEC No. 349 of 2013**; that there is no evidence of the value of the suit land to warrant this court to be devoid of jurisdiction and that the provisions in **Section 38 of the Limitation of Actions Act**, provide that adverse possession suit can only be filed in the High Court. The **Mukisa Biscuits case (supra)** outlined what constitutes a preliminary objection. Examples include an objection to the jurisdiction of the court which when argued disposes of the suit. The issue of this court's jurisdiction has been challenged on three grounds that is ***res judicata***, pecuniary value of the subject matter and the original jurisdiction of the court to handle adverse possession claims.

20. The **Black's law Dictionary 10th Edition** defines "***res judicata***" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

21. In the case of **Christopher Kenyariri vs Salama Beach (2017) eKLR**, The court clearly stated the ingredients to be satisfied when determining ***res judicata thus***;

"...the following elements must be satisfied...in conjunctive terms;

- a) **The suit or issue was directly and substantially in issue in the former suit**
- b) **Former suit between same parties or parties under whom they or any of them claim**
- c) **Those parties are litigating under the same title**
- d) **The issue was heard and finally determined.**

e) The court was competent to try the subsequent suit in which the suit is raised.”

24. The essentials of *res judicata* in litigation were stated in the case of The **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR**, that:

“...the rule or doctrine of *res judicata* serves the salutary (sic) aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.” (emphasis mine)

25. **Section 7** of the **CPA** provides for the doctrine of *res judicata*. It prohibits courts from determining matters in which the same parties litigated on issue (s) which were substantially the same and adjudicated upon to their finality, there being no appeal or review arising from the decision therefrom. The only possible way for this court to determine whether a matter before it constitutes *res judicata*, is to scrutinise the pleadings, proceedings and final decision made in a previous suit filed by the same parties litigating before it in order to know whether the issues raised then and, in the suit, before it is similar.

27. In the absence of such, the court cannot imagine the issues raised in and the decision made in the previous suit in this instance **Kisii ELC No. 349 of 2013**. The evidentiary burden lies on who alleges pursuant to **Section 109** of the **Evidence Act (Cap 80)**. The defendant has not sufficiently proved that this matter is *res judicata*. In the absence of that, there is no possible conclusion that this court lacks of jurisdiction over the matter based on the doctrine of *res judicata*.

28. On the second limb of the jurisdiction of this court, the defendant contends that this suit ought to be heard in the Magistrates’ court on account of the pecuniary value of the suit land. The plaintiff submitted that there is no evidence to prove the pecuniary value of the suit land even from the pleadings.

29. The pecuniary jurisdiction of any dispute is determined from the pleadings. As is common practice, the pecuniary value of a land and/or fixtures can only be determined from a valuation report. From the documents on record, there is no valuation report. A perusal of the originating summons does not indicate the value of the suit land. Again, there is no plausible conclusion that this court can reach on whether or not it has jurisdiction to determine this matter based on its lack of pecuniary jurisdiction.

30. The plaintiff submitted that this court has the territorial and original jurisdiction to hear and determine this matter pursuant to the mandatory provisions of **Section 38** of the **Limitation of Actions Act (supra)**. The said provision as operationalized by **Order 37 Rule 7** of the **Rules** prescribe that adverse possession applications shall be filed in the High Court.

31. **Section 38** of the **Limitation of Actions Act (supra)** provides as follows: -

38. Registration of title to land or easement acquired under Act.

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

2...

3...

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

5...” (emphasis added).

32. Further provisions on how adverse possession claims are filed is provided for under **Order 37 Rule 7** of the Rules which states as follows:

“(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.”

33. There is no doubt that the suit was rightly filed before this court owing to the provisions under **Section 38** of the **Limitation of Actions Act (supra)** which specify that claims as the one before this court should be filed in High Court. However, I shall not hesitate to demystify this notion.

34. The hierarchy of the judicial system in Kenya includes Magistrates Courts established under **Article 169** of the **Constitution (supra)**. Pursuant to **Article 169 (2)** of the **Constitution**, parliament was mandated to enact legislation to confer jurisdiction, functions and powers to the Magistrates Court. One such legislation was the provisions at **Section 26 (3) and (4)** of the **Environmental Land Act, 2015 (2011)**:

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle -

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

[Emphasis laid]

35. Later on, Parliament also enacted the **Magistrates' Courts Act, 2015** so as to give effect to **Articles 23 (2) and 169 (1) (a) and (2) of the Constitution (supra)** and to confer jurisdiction, functions and powers on the Magistrates' courts. **Section 9**

(a) of the Magistrates' Court Act (supra) provides:

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally. [Emphasis mine]

36. Pursuant to **Section 26 (3) and (4)** of the **Environment Land Act (supra)** the retired Hon.Chief Justice D.K. Maraga (Rtd) gazetted various Magistrates to determine disputes arising from occupation and title to land.

37. In **Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another (2020) eKLR, Ohungo J** observed: -

“Although Section 38 (1) of the Limitation of Actions Act specifically refers to the High Court without mention of the magistrates' courts, it must be remembered that is an old statute that came into operation way back on 1st

December 1967 compared to the more recent Environment and Land Court Act, 2011 and the Magistrates' Courts Act, 2015, both of which were enacted after promulgation of the Constitution of Kenya, 2010.

Since Section 38 (1) of the Limitation of Actions Act predated the Constitution of Kenya, 2010, its interpretation must be guided by Section 7 (1) of the Sixth Schedule of the Constitution of Kenya titled Transitional and Consequential Provisions which provides:

'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'

38. The Learned Judge continued to observe that: -

"The alterations, adaptations, qualifications and exceptions referred to above must give Section 38 (1) of the Limitation of Actions Act conformity to Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 both of which were enacted to give effect Article 162(2)

(b) and Article 169(1) (a) and (2) of the Constitution. So as to attain that conformity, Section 38 (1) of the Limitation of Actions Act must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with Article 259 which enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles."

39. Further, the court held:

"Even if one were to argue that the procedure for commencing and prosecuting adverse possession claims as provided for under Order 37 Rules 7, 16, 17 and 18 of the Civil Procedure Rules requires that such proceedings be commenced and prosecuted before a "judge", I note that the word "judge" is defined at Section 2 of the Civil Procedure Act to mean "the presiding officer of a court". Thus as used in the Civil Procedure Act and the rules thereunder, "judge" does not exclusively refer to judges of the High Court or the Environment and Land Court as established under Article 162 of the Constitution. It includes a magistrate."

40. The essence of devolution is access to services as per the provisions of **Article 6 (3) of the Constitution (supra)**. Access to justice is an important service as much as access to health and education as affirmed by the provisions of **Article 48 of the Constitution (supra)** which mandated the state to ensure that there is access to justice to all.

41. It is noteworthy that our judicial system is not privileged enough to have High Court stations in every place unlike the Magistrates Courts which have permeated to the inner most parts to the country. Thus, there was need to enhance the jurisdiction of the Magistrates Courts to include to determine but not limited to disputes relating to land. See also the finding of **Lenaola J (as he was then) in Edward Mwaniki Gaturu & Another vs. Hon. Attorney-General & 3 others [2013] eKLR**.

42. On that score, I respectfully disagree with the submissions of Learned Counsel for the plaintiff that adverse possession claims are only a preserve of the High Court. In addition, this may become the case if the pecuniary value of the subject matter in dispute is established to have exceeded the jurisdiction of the Magistrates' Courts.

43. On the third issue of determination, I have noted the certificate of official search document dated 28th September 2016 (**LM-1**) as regards the suit land and indicates that it belongs to the deceased. The defendant submitted that she has been wrongly sued since the owner of the suit land is deceased and she is not an administrator of the estate of the deceased. This piece of submission has been further supported by Certificate of Death (**LM-2**) which shows the name of the deceased as Joseph Milungi. The plaintiff states that there are citation proceedings taken against the defendant in which she was appointed as an administrator of the estate of the deceased; that this being a mere misjoinder of the defendant, it should not defeat the suit as it is curable with an amendment.

44. **Order 9 Rule 1** of the Rules makes it abundantly clear that a joinder or misjoinder of a party cannot defeat a suit. A joinder or misjoinder of a party to a suit can only occur when the party was under capacity or was properly sued in the first place.

45. In the instant suit, for the defendant to have been properly sued, she ought to have been appointed through the requisite court order as the legal representative to sue and to be sued on behalf of the estate of the deceased as per the provisions of **Section 2 of the Civil Procedure Act (supra)**.

45. This court is of the considered view that when a certain procedure has been prescribed under the law, to make a suit filed in court to be competent, it should be strictly followed. The same observation was made by the Court of Appeal in the case of **Speaker of the National Assembly vs James Njenga Karume (1992) eKLR** that:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

46. Since it is not disputed that the suit land is in the name of the deceased, it is no brainer that the provisions of the Law of Succession Act come into play. Section 54 of the Law of Succession Act Cap 160 provides:

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.” Fifth Schedule (14)

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis).

47. I am duly guided by the above provisions that letter of administration limited for the purposes of representing a deceased in a suit commonly known as *ad litem*, should be granted for a person to competently represent a deceased in a suit: see also **Morjaria-vs-Abdallah (1984) KLR 420**.

48. It is also not disputed that the plaintiff took out citation proceedings in the estate of the deceased in the High Court at Homabay being **Succession Cause No. 902 of 2015** citing the defendant to take out letters of administration in the estate of the deceased which comprised of the suit land. I have not been able to trace an extracted order from the succession proceedings appointing the defendant as a legal representative of the estate of the deceased as recognized in Morjaria case (supra) to reach the conclusion that this was a mere wrong description of a party to the suit which should not warrant it to fail.

49. I take cue from the famous decision in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR** in which the Court of Appeal interalia;

“But an administrator is not entitled to bring as action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception.”

50. Similarly, an administrator cannot be sued before taking out letters of administration. This being the case herein, I find that this was not a case of a joinder or misjoinder, but the defendant had no capacity to be sued *ab initio*. Thus the instant suit was wrongly initiated.

51. Perhaps, the plaintiff ought to have withdrawn the whole suit against the defendant and file it afresh. Alternatively, he had the opportunity move the court for correction of the capacity in which the defendant is being sued after getting the orders from the Succession Court.

52. In the end I make a finding that the preliminary objection succeeds partially on account that the defendant had no capacity to be sued in the instant originating summons. Wherefore, the originating summons filed on 27th July 2017 is hereby struck out with no orders as to costs.

It is so ordered.

DELIVERED SIGNED AND READ IN OPEN COURT AT MIGORI THIS 28TH DAY OF JULY 2021.

G.MA. ONGONDO

JUDGE

In presence of:-

Mr Jaoko holding brief for Okongo, Wandago, learned counsel for the plaintiff.

