



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 30 OF 2018 (OS)

AGNES WAMBUI MWANGI..... 1ST PLAINTIFF/APPLICANT

KARUGU MWANGI.....2ND PLAINTIFF/APPLICANT

VERSUS

ANTHONY BUNDI (Sued as the legal administrator of the

Estate of M'RAIKURU RAIKURU-Deceased).....1ST DEFENDANT/RESPONDENT

MARTHA MWIGWAMIKWA (Sued as the legal administrator of the

Estate of M'RAIKURU RAIKURU-Deceased)....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is on a Notice of Motion dated 21st February 2020 filed by the Plaintiffs and a Preliminary Objection raised by the defendants dated 14th September 2020. This Court directed that the said Notice of Motion and Preliminary Objection be heard and determined together, and parties were directed to file and serve their submissions on the same.

The Application

2. The application is brought pursuant to the provisions of Order 11 rule 3 (1)(h) of the Civil Procedure Rules and Section 1, 1A, 3 & 3A of the Civil Procedure Act. The applicant seeks the following orders;

- 1) Spent
- 2) *That the lower court proceedings be stayed pending the hearing and determination of this application.*
- 3) *That the Honorable Court be pleased to transfer Meru CMCC ELC NO.194/2018 for consolidation with this suit, to be heard as one suit.*
- 4) *That the Honorable Court be pleased to make such further orders as may meet the ends of justice.*
- 5) *That cost of this application be provided for.*

3. The application is premised on the grounds on the face of the application as well as the supporting affidavit sworn by the 1st plaintiff who avers, that she is suing as the legal representative of the Estate of her father Peter Mwangi Ngang'a who died on 20/11/1987. That both plaintiffs are claiming land parcel No. NYAKI/THUURA/1203 which is registered in the name of M'Raikuru Raikuru who is the grandfather of the respondents whose father sold the land to their father. That their father bought the land in 1985 and took vacant possession in the same year moving the family to live on it and they have been in possession and occupation of the suit land for a period of over 33 years. Their claim to the land is based on the doctrine of adverse possession.

4. The applicants contend that after the respondents obtained letters of administration, they began issuing eviction threats and sued the plaintiffs in 2018 in Meru CM-ELC CASE 194 OF 2018 seeking eviction. It is therefore just and fair that the two cases be consolidated and heard together as the parties are litigating over the same parcel of land, hence their application ought to be allowed.

5. The application is opposed by the defendants vide a replying affidavit dated 15/09/2020 sworn by the 2nd defendant, who avers that they filed a suit in the magistrates court at Meru seeking eviction of the plaintiffs on 18/06/2018. In response to the said suit, the plaintiffs filed this suit on 4/08/2018 seeking to acquire the suit property through the doctrine of adverse possession which is irregular and awarding the prayers in the applicant's application would embarrass the court. The plaintiffs are trying to defeat a legitimate claim by sneaking in this application against the doctrine of *res judicata* and their claim of adverse possession is an abuse of the court process, unfounded, incompetent as the case for eviction had already been filed in court.

Preliminary Objection

6. The preliminary objection is raised on the grounds that;

1) *That this suit is Res Judicata; the same having been instituted on 1/08/2018 in ELC Meru while there was another suit lodged by the defendants on 18/06/2018 against the same parties and the court was never informed of the same.*

2) *That this suit offends the provisions of Limitation of Actions Act (Cap 22) because it is time barred, the same having been lodged a whopping 33 years from the date when the alleged cause of action arose.*

3) *That this suit offends the provisions of Limitation of Actions Act (Cap 22) with regard to the doctrine of adverse possession the same being brought 2 months after a suit was filed for the eviction of the trespassers from the suit land.*

4) *That this suit is a gross abuse of the court process, vexatious, frivolous and erroneously instituted thus ab initio fatally defective, incurably incompetent and misconceived in substance therefore a nullity in law and fact.*

7. The Plaintiffs filed grounds of opposition dated 13/10/2020 in opposition to the preliminary objection averring that;-

1) *That the defendants Notice of Preliminary Objection lacks merit and is tantamount to an abuse of the process of this Honorable Court.*

2) *That the allegation that this suit is Res Judicata is neither here nor there as the said case at the lower court has not been adjudicated upon and moreover the causes of actions are distinct.*

3) *That the contention that this suit offends the provisions of the Limitation of Actions Act Cap 22 are unfounded as Section 38 of the said Act strictly applies herein.*

4) *That on a whole, on consideration of the facts and the law, the Notice of Preliminary Objection is vexatious, incompetent, unfounded and an abuse of the court process.*

Submissions

8. The plaintiffs did not file their submissions, while defendants filed separate submissions on the application and on the preliminary objection both dated 19th November 2020.

9. The defendants submitted that the suit is not properly before the court due to the doctrines of *Res Judicata* and *Sub Judice* as provided in Section 6 of the Civil Procedure Act, the same does not only apply to matters that have been adjudicated and finalized but also guards against abuse of the court by filing of multiple suits and prevents inconsistent determinations by different courts. They contend that there being another ongoing suit in the magistrate's court, then this court has no jurisdiction to make a single step. They relied on the following cases; **Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989]eKLR, In the Matter of Advisory Opinions of the Supreme Court Under Article 163(3) of the Constitution- Constitutional Application NO. 2 of 2011, Mtana Lewa V Kahindi Ngala Mwangandi [2015]eKLR.**

Analysis and determination

10. I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the Defendant's preliminary objection raises pure points of law, and if so, whether the said preliminary objection is merited. If not, the court will then proceed to address the second issue as to whether the Plaintiff's application is merited.

11. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

"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."

12. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

13. Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

14. In the present suit, the defendants contend that the court lacks jurisdiction to hear the case by virtue of the existence of another suit before the magistrates court hence the suit herein is *res judicata and sub judice*. Thus the court must examine the question of jurisdiction. The locus classicus case on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.**

15. **Section 6 of the Civil Procedure Act** provides as hereunder:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

16. The suit in the magistrate's court is seeking eviction of the current plaintiffs herein, while the instant suit relates to a claim of the suit land by the said plaintiffs through the doctrine of adverse possession. The issues for determination in these two suits are not similar. It follows that the doctrine of *resjudicata* and *sub-judice* is not applicable herein.

17. The other ground was that this suit offends the provisions of **Section 7 of the Limitation of Actions Act** which provides ;-

"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".

18. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

"In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition".

19. Thus the claim of land through adverse possession is anchored on a statutory period of 12 years and above. In the final analysis, I find that the preliminary objection is not merited.

20. In regard to the application, the court has considered that just like in any suit filed before a court of law, there are two scenarios contemplated in this suit as well as the suit before the magistrate's court. That a claimant may lose or succeed. In the event that the two suits proceeds separately, and each claimant succeeds, it would result in an absurdity! The current plaintiffs have not disclosed as to what is the nature of defence they advanced before the trial court (if any).

21. It is evident that **Section 26** of the **Environment and Land Act** gives Magistrates court jurisdiction to handle suits relating to land disputes. In **Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR** it was held that;

"The upshot of the provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land.

22. In that regard, the plaintiffs ought to advance their claim as a counterclaim in the suit which was earlier filed. Ultimately, the application dated 21.2.2020 is dismissed. This suit is hereby struck out not because of the strength of the preliminary objection, but because the issues being raised herein ought to be dealt with in the earlier suit. Each party is to bear their own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 10.3.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE