



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 62 OF 2020 (OS)

IN THE MATTER OF AN APPLICATION FOR ACQUISITION

OF TITLE BY ADVERSE POSSESSION OF THOSE PARCELS

OF LAND DESCRIBED NORTH-NYAKACH/GEM RAE/567

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

BETWEEN

SIMEON JUMA ASEWE.....1ST APPLICANT

MARGARET AJWANG' OBONGO.....2ND APPLICANT

BRIAN OCHIENG ONYANGO.....3RD APPLICANT

VERSUS

PAUL AUGO ODENY

(Sued as the Legal Representative and Administrator to the estate of

GILBERT ODENY OTIENO- deceased).....RESPONDENT

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **26th November 2020**, brought by the Respondent on grounds that pursuant to the provisions of Section 7 of the Civil Procedure Act 9Cap21) this matter is res judicata, already having been settled in CIVIL SUIT NUMBER 89 OF 1987, JOSEPH SANGO OTIENO legal representative of GILBERT ODENY OTIENO vs BERNADUS ASEWE OLIECH. The Notice of Preliminary Objection was canvassed by way of written submissions as discussed below:

Applicants' Submissions to the Preliminary Objection

The Applicants filed written submissions on 20th April 2021 whose import is that the Applicants are sons of the Defendant, Bernadus Asewe, the Defendant in Civil Suit 89 of 1987 and the Respondent's father, Gilbert Odeny was the plaintiff. The Plaintiff in Civil Suit 89 of 1987 sought for eviction orders against Bernadus Asewe and the case was determined and eviction orders were issued. The Defendant was given 3 months to comply but has failed to date.

In the case of **Nguruman Limited vs Jan Bonde Nelsen & Another (2017) eKLR** the court listed fundamental conditions for a case to be held as *res judicata*. Aburili J quoted with approval the case of **Bernard Mugo Ndegwa v James Githae & 2 Others (2010) eKLR**. At paragraph 36, the judge observed:

- a) That the matter in issue is identical in both suits;
- b) The parties in the suit are substantially the same;

- c) There is concurrence of jurisdiction of the court;
- d) The subject matter is the same; AND
- e) That there is a final determination as far as the previous decision is concerned.”

On the issue of whether the matter in issue is identical in both suits; the Applicants submitted that the issues in the two suits are completely different and not identical in any way whatsoever. That in Civil Suit 89 of 1987, the issue that was substantially canvassed was the issue of the alleged trespass by the Defendant therein which led to the eviction orders being issued. In the present suit the issue is adverse possession but not trespass or eviction which was litigated in the previous suit of Civil Suit.

On whether the parties in the suit are substantially the same; the Applicants submitted that parties are not substantially the same as in Civil Suit 89 of 1987, parties were Joseph Sango Otieno (as the Legal Representative of Gilbert Odeny Otieno) vs Bernadus Asewe Oliech. That the Plaintiff in that suit brought the suit in respect of the estate. The Defendant was sued in his own right as the occupant of the suit parcel.

That the Applicants have brought this suit in their own right as adverse possessors to the estate of the Respondent herein and not as legal representatives or administrators of Bernadus Asewe Oliech’s estate. They are seeking to enforce their own rights as adverse possessors but not the rights of their deceased father.

The order issued in Civil Suit 89 of 1987 as against their father has never been executed by the Plaintiff. Bernadus has since died and his sons and family members have continued to stay on the parcel since the year 1987 when the order was made to date without any further interruption from the Respondent or any of his family member leading to the rights of adverse possession to accrue for the possessors to which the Applicants now claim. That the Applicants are not claiming under their deceased father but on their own rights as the present possessors of the suit parcel since 1987 to date.

On the issue of whether there is concurrence of jurisdiction of the court, the Applicants submitted that civil suit 89 of 1987 was litigated in the High Court before the creation of the Land and Environment court, the High Court had the jurisdiction to deal with land matters.

On whether the subject matter is the same; the Applicants submitted that the subject matter in Civil Suit 89 of 1987 was trespass and eviction of the Defendant over the land parcel **NORTH-NYAKACH/GEM RAE/567** while in the present suit the subject matters are acquisition of title through adverse possession by the Applicants who have been in possession for over 60 years. The Applicants relied in the case of **James Maina Kinya v Gerald Kwendaka (2018) eKLR** where the court held as follows:

“19. It is not in dispute that there was a case HCCC No. 30 of 1988 filed by the Plaintiff against the Defendant in respect to the same suit property. The question one would pose is whether the current suit is res judicata given the existence of the 1988 case. In the 1988 suit the Plaintiff sought Specific performance pursuant to a contract of sale of land upon which he was put in possession. The matter was determined in favour of the Plaintiff through an arbitral committee and the award/decision adopted by the Court by way of its judgement granted on 7/5/96. That judgement lapsed and the Plaintiff was unable to effect the transfer of the suit property in his name.

20. The current suit though seeking ownership is based on Limitation i.e. adverse possession. The issue for determination in the current suit is whether or not the Plaintiff has established ownership by way of adverse possession admittedly the Plaintiff in both suit was/is pursuing a right of ownership with the divergence being the issues of specific performance pursuant to a contractual claim and while the present suit is based on a legal claim. In conclusion therefore, the causes of action in both cases are different and I see no bar to the jurisdiction of this Court in determining the matter before it.”

On the issue of whether there was a final determination as far as the previous decision is concerned; the Applicants submitted that although civil suit 89 of 1987 was heard and determined, it related to a totally different issue of eviction in the present suit where the Applicants claim adverse possession.

The Applicant prayed that the Preliminary Objection dated 26th November 2020 be dismissed with costs to the Applicants and the court allow the Applicants to set down the main suit for hearing.

Respondent’s Submissions

The Respondent filed his Submissions on 8th April 2021. The main issue or determination in the Respondent’s Submissions was whether the Applicant/Plaintiffs have contravened section 7 of the Civil Procedure Act Cap 21.

The Respondent submitted that Section 7 of the Civil Procedure Act provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Respondent submitted that the suit herein is a ploy by the Applicant to circumvent the wheels of justice and mislead the court. That the Applicant’s father Bernadus Asewe Oliech (deceased) being the Defendant in Civil Suit 89 of 1987 was ordered by the court to vacate the suit property and pay damages of Kshs. 10,000/=. The Defendant never appealed the said judgment and the same has the force of law.

The Respondent relied in the case of **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others, Nairobi CA Civil Appeal**, the court held that:

“... Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The Respondent submitted that the subject matter, issue in question and interest therein were effectively tackled by the trial court in civil suit 89 of 1987 and that the Applicants are trying to sneak in through the back door with a view of getting their way at the expense of this this Honourable Court.

That the premise of res judicata is to prevent a party who has had his day on court from re-litigating upon the same issues already decided in a previous case. The Respondent placed reliance in the case of **E.T vs Attorney General & Another where Hon. Justice Majanja** stated that:

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring the court in another way and in a form a new cause of action which has been resolved by court of competent jurisdiction.”

The Respondent also relied in the case of **Omondi vs National Bank of Kenya Limited & Others (2001) EA 177**. The Respondent concluded by stating that the claim before court is an abuse of the court process and the Application should be dismissed with costs to the Respondent.

ANALYSIS AND DETERMINATION

Section 7 of the Civil Procedure Act provides for the principle of res judicata in the following terms;

‘No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’

Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated;

“A preliminary objection raises a pure point to 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”.

In the case of **Henry Wanyama Khaemba ...Vs... Standard Chartered Bank Ltd & Another (2014) EKLR**, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

In the case of **George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR**, the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not

qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

In this matter, the Respondent has only attached a Ruling in respect of Civil Suit 89 of 1987. This court finds that the Respondent has not raised his Preliminary Objection on a pure point of law as this court will be tasked to probe the evidence in Civil Suit 89 of 1987.

Civil Suit 89 of 1987 was heard and determined, the parties therein did not Appeal on the same. This court concurs with the Applicants that the present suit is not res judicata as the parties and issues for determination are not the same. Parties in Civil Suit 89 of 1987 were seeking for eviction orders while in the present suit parties who are different from the previous suit are seeking orders for adverse possession.

CONCLUSION

In the upshot, this court finds that the Notice of Preliminary Objection lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE