



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 11 OF 2021(OS)

CHARLES KIPNGENY LIMO.....APPLICANT

VERSUS

CHERUTICH CHEPKEMOI CHEBII.....1ST RESPONDENT

HARUN KIBYEGON CHEBII.....2ND RESPONDENT

EDWIN KIPLAGAT CHEBII.....3RD RESPONDENT

RULING

The Application

1. By a Notice of motion application dated **2/06/2021** and filed in court on **03/06/2021** brought under **Order 40** and **51** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** the plaintiff sought the following orders:

1. Spent

2. Spent

3. That an order of declaration be issued declaring the applicant the lawful and legitimate owner limited to approximately 3 ¾ acre in respect to the said parcel of land.

4. That an order of declaration be issued declaring the applicant an adverse possessor limited to the 3 ¾ acre in respect of the parcel of land.

5. That an order directing the Registrar Of Titles and the District Land Registrar to issue titles as register the applicants interest limited to the 3 ¾ in respect to the parcel of land.

6. That an order directing the District Land Registrar the reestablishment of boundaries on the applicants parcel of land as per the demarcations.

7. That a permanent order of injunction restraining the respondents from interfering in the parcel of land limited to approximately 3 ¾ of LR No. 8956 Torongo Farm (Thirando Farm)

8. That the costs of the application be borne by the Respondents.

2. The application is supported by the sworn affidavit of the applicant sworn on **2/06/2021**. The grounds

on the face of the application and the supporting affidavit are that the applicant entered into a land sale agreement with the late **Samuel Chebii** on **26th July 1994** and that he paid consideration in kind and in cash before he took possession of the property, fenced it and has occupied it uninterrupted for over **27** years; that he was not able to secure the title to the suit property until Samuel Chebii died; that succession proceedings were commenced but they did not cater for his interests; that the administrators now claim that he is only entitled to two acres; that new beacons have been put up on the parcel of land and that he is now suing the defendants as wife of the late Samuel Chebii and his 2 sons who are the administrators of the estate of the deceased.

The Response

3. The 2nd and 3rd respondents filed a replying affidavit sworn by **Harun Kibyegon Chebii** and **Edwin Kiplangat Chebii** sworn on **4/08/2021** and the notice of preliminary objection dated **16/06/2021** in response to the application.

4. The preliminary objection is to the effect that the suit against the 1st Respondent is a nullity as the same is filed against a dead person, that the present suit is *sub judice* as there is pending **Nakuru Succession Cause No. 189/1998** where the applicant is claiming beneficial interest and that the suit is framed in express violation of **Order 37 Rule 8** of the **Civil Procedure Rules 2010**.

Submissions

5. The plaintiff filed his submissions on **28/07/2021**. The 2nd and 3rd defendants filed their submissions on **16/09/2021**.

Determination

6. I will first address the preliminary objection. The first ground on which the preliminary objection is premised is that the suit against the 1st respondent is a nullity as she is deceased. Annexed to the replying affidavit is a death certificate which indicates that the 1st respondent died on **2/04/2018**. The present suit was instituted on **3/06/2021**, three years after her death.

7. **Order 1 rule 3** of the **Civil Procedure Rules, 2010** provides for who may be enjoined in a suit. It provides as follows:

“Who may be joined as defendants.

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

8. In the case of **Ernest Ngugi Waithaka & 2 others v Peter Mutunga Gachigi [2017] eKLR** the court held as follows:

“The word "person" can only refer to either a natural living person or a legal person. It follows therefore that a deceased person is not a person for purposes of Order 1 rule 3. When a suit is filed against a non-existent person, it is void ab initio. There is no suit.”

9. I am therefore persuaded that the suit against the 1st respondent does not lie because at the time the present suit was instituted she was deceased. The court in the case of **Benjamin Leonard Mcfoy –vs- United African Company Ltd (1961) All ER 1169** held as follows: -

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado,

though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

10. The second ground on the 2nd and 3rd respondents’ preliminary objection is that the present suit is *res sub judice* as a similar matter is pending for determination. That matter is **Succession Cause No. 189/1998** where the applicant herein claims beneficial interest in the suit property. The *res sub judice* rule is provided for under **Section 6** of the **Civil Procedure Act, (Cap 21)** as follows:

“6 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 time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

11. This rule is meant to prevent courts of concurrent jurisdiction from entertaining two parallel suits over the same subject matter and for it to apply, the parties and the issues or subject matter in both suits ought to be substantially the same.

12. The 2nd and 3rd respondents allege that there is pending in **Nakuru Succession Cause No. 189/1998** a similar application dated **6/04/2021** filed by the applicant herein which seeks similar orders to the one’s being sought in the present application.

13. The prayers sought in the application dated **6/04/2021** in **Nakuru Succession Cause No. 189/1998** are as follows:

a. That this honorable court be pleased to certify the instant matter as urgent and meriting to be heard on priority basis.

b. That pending the hearing and determination of this application, this honourable court be pleased to restrain the carrying out of any further or other survey to the suit premises that is subject of the succession cause herein and further to restrain the implementation of the survey already done during the pendency of the succession cause herein.

c. That this application, this honorable court be pleased to issue summons against the assistant Deputy County Commissioner or one Daniel Mutemi for purposes of explaining his role of ensuring the carrying out of the survey in the suit premises whilst the pendency of the succession cause herein.

d. That this honorable court be pleased to issue summons against the surveyor one Charles Ouma for purposes of explaining to court the person who authorized him or on whose mandate he carried out the survey in the suit premises.

e. That pending the hearing and determination of this application, this honorable court be pleased to restrain the assistant deputy county commissioner or one Daniel Mutemi and the surveyor herein Charles Ouma from interfering with the estate of the deceased and in particular the portion that the objector is set to be bequeathed by the court or otherwise.

f. That this honorable court be pleased to invalidate the survey already carried out by on the suit premises and order that the status quo ante be maintained until the determination of the application.

g. That this honorable court be pleased to invalidate the survey already carried out by on the suit properties and order that the status quo ante be maintained until the determination of the succession cause herein.

h. That pending the hearing and determination of this succession cause, this honorable court be pleased to restrain the carrying out of any further or other the survey to the suit premises that is subject of the succession cause herein and further to restrain the implementation of the survey already done during the pendency of the succession cause herein.

i. That this honorable court be pleased to issue orders restraining the administrators hereon from trespassing and or in any manner interfering with the 3 ½ acres of land as purchased by the objector.

j. That the administrators herein to be compelled to render to the objector the 3 ½ acres of land as purchased.

k. That costs of this application be provided for.

14. It is important to note that the objector in **Succession Cause No. 189/1998** is the applicant in the present proceedings. After perusing the prayers being sought in the present application and those sought in the application dated **6/04/2021**, it is evident that the prayers are different as the present application is premised on adverse possession.

15. The court in the case of **In Re Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR** held as follows:

Finally, the applicant appears to stake his claim on the principle of adverse possession, that he has been in occupation of the land for the last thirty years. The concept of adverse possession is not one of succession law The mandate of a probate court is distribution of the assets of the estate to the persons beneficially entitled. Persons beneficially entitled to such assets do not include trespassers who would want to rely on the doctrine of adverse possession. The doctrine is one of property or land law, and it involves the party relying on it suing the property owner in a suit, properly instituted for that purpose of a declaration that the trespasser is entitled to the property by dint of adverse possession. Adverse possession is about occupation and user of property, and by virtue of Articles 162(2) and 165(5) of the Constitution 2010, the High Court has no jurisdiction to determine any disputes that center on occupation and use of land.

16. It is therefore my opinion that the suit herein is not *sub judice* in relation to **Nakuru Succession cause No. 189/1998** as the orders sought in both suits are essentially different and both courts have different jurisdictions.

17. The third ground on the notice of preliminary objection is to the effect that the suit as framed is in express violation of **Order 37 rule 8** of the **Civil Procedure Rules 2010**. **Order 37 Rule 8** provides as follows:

“Application under the Registered Land Act [Order 37, rule 8.]

An application under the Land Registration Act, 2012 other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.”

18. It is my opinion that this ground is similar to ground two of the preliminary objection which has already been addressed.

19. The preliminary objection only succeeds on its first limb and only with regard to the case against the 1st respondent.

20. With regards to the application dated **2nd June 2021**, the prayers sought in that application are the same prayers in the Originating Summons which orders the court cannot grant at the interlocutory stage without hearing the originating summons. This was the holding of the Court Of Appeal case of **Olive**

Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR where it quoted with approval the cases of **Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others (2015) eKLR** and **Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR** and stated as follows:

“It has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraph 62 (c), (d) (f) (g) (h) and (j) of the Petition.”

21. The application dated **2/06/2021** therefore lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF OCTOBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.