



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 40 OF 2019 (OS)

DENNIS KIYOGLI.....1ST PLAINTIFF

MUGAMBI MITAMBO.....2ND PLAINTIFF

(Being legal representative of the estate of JEREVASIO MITAMBO – Deceased

VERSUS

PAUL MUTWIRI M'MURITHI.....1ST DEFENDANT

TITUS MBAYA MUTWIRI.....2ND DEFENDANT

RULING

1. The applicant Gervasio Mitambo now deceased and replaced with Dennis Kiyogi and Mugambi Mitambo (legal representatives) pursuant to leave granted on 15th October 2020 – filed an originating summons dated 29.7.2019 seeking the following 13 questions for determination:

(i) Whether the defendants are the current registered proprietors of that all parcel of land known as L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 and 1203 formerly L.P No. Nkuene/Taita.627 measuring 2.27 acres or thereabouts.

(ii) Whether the plaintiff has acquired absolute title of land Parcel No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 and 1203 formerly L.R No. Nkuene/Taita/627 measuring approximately 2.27 acres by way of adverse possession.

(iii) Whether the plaintiff have been in possession and occupation of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 and 1203 formerly L.R No. Nkuene/Taita/627 for over twelve (12) years.

(iv) Whether the plaintiff is entitled to be registered as the absolute proprietor of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 and 1203 formerly L.R. No. Nkuene/Taita/627 measuring approximately 2.27 acres or thereabouts.

(v) Whether the occupation by the plaintiff of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R No. Nkuene/Taita/627 was open, notorious and uninterrupted by the defendant for a period of over 12 years.

(vi) Whether the plaintiff has extensively developed of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R No. Nkuene/Taita/627 and has thereon planted crops and trees for commercial purposes and established his residence together with those of his four (4) sons.

(vii) Whether the plaintiff has an overriding interest over L.R No. L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R. No. Nkuene/Taita/627 measuring approximately 2.27 acres or thereabouts.

(viii) Whether the plaintiff has acquired by way of adverse possession of L.R No's L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R. No. Nkuene/Taita/627 measuring approximately 2.27 acres or thereabouts.

(ix) Whether the defendants have lost their legal rights and authority by operation of Section 7 of the Limitation of Actions Acts, Chapter 22 Laws of Kenya to claim from the plaintiff L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R No. Nkuene/Taita/627 measuring approximately 2.27 acres which the plaintiff has been in actual occupation openly, uninterrupted and without the authority of the defendants for a period in excess of 12 years.

(x) Whether the plaintiff has now acquired absolute ownership of L.R No's L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R No. Nkuene/Taita/627 measuring 2.27 acres or thereabouts while the defendants have lost ownership of the

same by operation of law.

(xi) *Whether the plaintiff is now entitled to be registered as the legal proprietor of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R. No. Nkuene/Taita/627 measuring 2.27 acres which the plaintiff has been in occupation of since the year 1950s.*

(xii) *Whether the defendants should be ordered to execute all the necessary documents and instruments to effect the transfer including application for consent and transfer of L.R No's Nkuene/Taita/1198, 1199, 1200, 1201, 1202 & 1203 formerly L.R No. Nkuene/Taita/627 measuring approximately 2.27 acres to the plaintiff and in default, whether the Deputy Registrar/Executive Officer of this Honourable Court should execute the same.*

(xiii) *Whether the plaintiff is entitled to the cost of this suit.*

2. The same is supported by the affidavit sworn on 29.7.2019. witness statement and list of documents. Alongside the originating summons the applicant filed a notice of motion brought under **Order 40 Rule 1, Order 51 Rule 1 Section 68 of Land Registration Act, Section 1A, 1B, 3, 3A and 63E of the Civil Procedure Act and Article 159 (2) of the Constitution** seeking for inhibition orders over **L.R No. Nkuene/Taita/1198, 1199, 1200, 1201, 1202 and 1203**; temporary injunction orders over the said parcels and stay of proceedings in **Nkubu Principal Magistrates ELC 20 of 2019 Paul Mutwiri and another vs Gervasio Mitambo**. The application is premised on the grounds that the applicant is living on **Parcel No. LR Nkuene/Taita/627** now subdivided with his family who have residences therein; there was an oral agreement with the 1st defendant to exchange the same with **L.R No. Abothuguchi/Igene/1072**; transfer and title deed were issued/ the 1st defendant has declined to pinpoint the exact location of the **L.R No. Abothuguchi/Igene/1072**; there is impending eviction through Nkubu law courts case brought by the 1st respondent on account of adverse possessory rights over **Parcels No. L.R's Nkuene/Taita/1199, 1200, 1201, 1202 and 1203** carved out of defunct **Parcel No. 627** which he has extensively developed and occupied uninterruptedly for over twelve years.

3. The court granted interim orders to the motion on 30.7.2019, following which the 1st defendant filed a notice of preliminary objection dated 27th **September 2019** on the following grounds:

(i) *The issues raised in the present suit are res judicata vide Civil Suit No. 223 of 1996 by a court of competent jurisdiction whose findings are not subject to any review proceedings or appeal.*

(ii) *The suit is bad in law as it is marked with laches and barred by statute of limitation.*

(iii) *The suit is fatally defective as it does not comply with the mandatory provisions of the civil procedure rules hence prays it be struck out abinito with costs.*

4. On **4th November 2019**, the applicant filed another notice of motion seeking to have inhibition orders over **Parcels No's Nkuene/Taita/3537, 3535** allegedly having been subdivided from **Nkuene/Taita/1198**. This was however done without amending the originating summons to include those parcels.

5. The 1st defendant opposed the notice of motion dated **29.7.2019** through an affidavit sworn on **15.11.2019** in which he attached the judgment in **Meru Civil Suit No. 223 of 1996**. He makes the claim that the originating summons herein is in the nature of an appeal against the said judgment yet time for appeal had expired, the issues raised were determined therein, the matter had gone before a panel of elders; there is already another matter filed on **28.3.2019** namely **ELC No. 20 of 2019** for eviction, that the applicant is being mischievous and has failed to disclose material facts before the court.

6. Directions were given on **30.9.2019** that both applications and the preliminary objection be disposed together by way of written submissions.

7. The plaintiffs have field grounds of opposition to the preliminary objection dated **30.7.2021** as well as written submissions. The grounds are:

(a) *The suit is properly in court and brought under the statutory period of 12 years as per Limitations of Actions Act.*

(b) *Civil Suit No. 223 of 1996 is based on specific performance pursuant to a contractual claim while the present one is based on a legal claim.*

(c) *The preliminary objection does not raise a pure point of law.*

(d) *The cause of action in Civil Suit No. 223 of 1996 is different.*

(e) *The preliminary objection is misconceived, bad in law and legally untenable.*

8. The applicants submit **Section 7 of the Civil Procedure Act** applies where a cause of action is the same and therefore issues raised in both cases can only be determined at the main hearing of the originating summons as they are matters requiring establishment of facts hence the preliminary objection falls short of the case of **Mukhisa Biscuits Ltd vs West End distributors 1969 E.A 696** and the holding in **Nzele David Nzomo vs Moses Momanyi Anyanga & another 2009 eKLR, James Maina Kinya vs Gerald Kwendoka (2018) eKLR**.

9. On the issue of time the suit being barred and guilty of laches, the applicants submit that cannot arise as the alleged **Meru Civil Case No. 223 of 1996** was filed but the execution has not been effected within 12 years under **Section 38 (1)** of the **Limitation of Actions Act** hence the suit is properly before the court. Regarding defectiveness of the suit the applicants submit the specific mandatory procedures of the **Civil Procedure Act** have not been stated by the defendants.

10. On the side of the defendants, by submissions dated **15.11.2019**, it is submitted the judgment in **Meru CC 223 of 1996** was made on **16.2.2012** and no appeal or review was ever made and hence the plaintiffs should not be allowed to revive determined issues through an originating summons, more so when parties were the same and facts similar. Reliance was placed on **Salim Ahmed vs Faud Hussien Humeienn (1960) E.A 97.**

11. On the suit being bad in law, guilty of laches and statute barred the defendants submit the cause of action arose in 1996 yet the claim is being made 23 years after, which is contrary to **Section 7 of the Limitation of Actions Act**.

12. The plaintiffs did not come to court within 12 years but after hence the same is statute barred. The defendants third submission is that the suit is fatally defective as it does not comply with mandatory provisions of the **Civil Procedure Rules**. Unfortunately the defendants do not specify which rule or section. The respondent relies on **Mwangi, Stephen Murithi vs Daniel T. Arap Moi & another (1017) eKLR.**

13. The court has considered the preliminary objection, submissions from both parties and the authorities relied upon and the pleadings herein. The following issues call for determination:-

(i) If the preliminary objection is properly grounded in law.

(ii) Whether the issues raised are res-judicata and sub judice.

(iii) If the suit is time barred.

14. Having given the background to this suit and the rival issues raised by the parties, on the first issue a preliminary objection as stated in **Mukhisa case (supra)**, is a pure point of law pleaded or arising out of pleadings, which may dispose of the suit based on undisputed facts.

15. In the instant case the parties are unable to agree on basic facts of the dispute. This court at this stage cannot ascertain the facts in issue without going to the evidence and having each party give its set of facts and evidence on merits

16. Whereas the court has perused the judgment in the lower court it is evident the issue at hand was breach of the contract entered between the deceased and the defendants herein. Obviously and without pre-empting the issues to be determined at hearing, the deceased took vacant possession of the suitland, wanted to walk away from the said transfer agreement in the lower court case, the court found as a matter of fact there was part performance of the agreement in which each party was registered as a proprietor of the respective parcels of land as exchanged and therefore on that basis alone the court found that agreement not void and dismissed the suit.

17. In the instant case the plaintiffs are now alleging they are in occupation of the land uninterruptedly without the consent of the defendants for over ten years hence have accrued certain legal rights which they seek to be declared as adverse possessors. Such issues by any stretch of imagination cannot be said to have been determined in the lower court case. They were never pleaded nor evidence led and in the court was seized of and determined to finality.

18. Regarding the issue of the matter in Nkubu law courts and which the defendants submit is res subjudice, again the court will have to look at the pleadings and ascertain the facts. This requires the court to hear the parties on merits and hence cannot be done on a preliminary stage. On that score alone the preliminary point raised falls short of the threshold of what amounts to a preliminary objection.

19. Turning to the issue of the suit being statute barred, when the time started running is a matter of evidence. The court at this stage is yet to give directions on the manner of disposing the originating summons, whether through viva voce or affidavits evidence.

20. On those reasons, it is therefore my considered view the preliminary objection herein fails. The same is hereby dismissed with costs.

21. Turning to the application dated **29.7.2019**, there is no dispute that the parties herein had an oral agreement which culminated into exchange, transfer and registration of **Parcels No's Nkuene/Taita/627 and Abothuguchi/Igane/1027**, the former giving birth to parcels subdivision **No's 1198, (3537, 3538), 119, 1200, 1201, 1202, 1203.**

22. Each of the parties have not disputed. The only dispute is on implementation of the said agreement and whether there has been misrepresentation and or non-performance and the reasons for non-compliance with the same.

23. The applicant has attached copies of searches to the supporting of affidavit indicting that he effected transfer in favour of the respondent over parcel no. 127, who has sub-divided it into portions. The issue is that the defendant has failed to pinpoint Abothuguchi/Igane/1072 on the ground yet he got his part of the bargain. He now seeks revocation of the said titles. At this juncture the court is of the considered view that there is need to preserve the subject parcels of land pending hearing and determination of the originating summons by orders sought as per prayers 2, 3, and 4 pending hearing and determination of this suit.

24. The status quo subsisting as at 29.7.2019 shall also be maintained. The applicants are ordered to file and serve, their respective documents with regard to **Order 11.**

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

Miriti for plaintiff

Kiogora Mugambi - absent

Court Assistant: Kananu

HON. C.K. NZILI

ELC JUDGE