



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

HIGH COURT ELC CASE NO. 01 OF 2021

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

OF THE LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS THEREOF

AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES,

(KENYA SUBSIDIARY LEGISLATION 2010) AND SECTION 3A OF THE SAME ACT AND

ALL OTHER ENABLING PROVISIONS OF THE LAW AND IN THE MATTER OF

MATRIMONIAL PROPERTY ACT 49 OF 2013

LABAN NJAGI MGARI.....PLAINTIFF/APPLICANT

VERSUS

MARY MUTHONI NJAGI.....1ST DEFENDANT/RESPONDENT

CHARLES MACHARIA NJERU.....2ND DEFENDANT/RESPONDENT

RULING

1. I am called upon to determine a preliminary objection dated 21.4.2021 and filed on even date. The objection targets both the application and suit as filed. It is premised on three (3) grounds as follows:-

- i) That the application and the entire suit is res judicata and offends Section 7 of the Civil Procedure Act; the subject matter dispute was heard and determined in Embu Award No. 2 of 2006 and no appeal was filed against the decision.
- ii) The application and the entire suit discloses no cause of action in law, is incontestably bad in law, fatal and incurably defective offending the provisions of Order 2 Rule 15(1), CPR, 2010 which is hereby invoked.
- iii) That the suit is scandalous, frivolous, vexatious, an abuse of the court process and is not sustainable in law or otherwise, a non-starter ab initio.

2. The parties in both the Chamber Summons and Originating summons are three. Laban Njagi Ngari, is the applicant, while Mary Muthoni Njagi and Charles Macharia Njiru, are the respondents. In the suit, the applicant has sought to be recognized as adverse possessor of land parcel Ngandori/Manyatta/T.6. It is his position that he has lived on the parcel of land for more than 12 years without interruption or interference by the respondents. He claims that the 1st respondent is his wife and according to him, she held the suit parcel of land as matrimonial property. The applicant further objected to the transfer of the suit parcel to the 2nd respondent for failure to obtain what he terms as written consent. He further faulted the 2nd respondent, who is said to be nephew of the 1st respondent, for obtaining the transfer with the knowledge that the property was matrimonial property and for disregarding the exclusive occupation of the applicant.

3. The applicant further averred that the respondents had taken over the property despite him having solely constructed a commercial building at his own expense. Ultimately, the applicant urged the court to annul the sale and further sought orders for the land registrar to be ordered to issue title to parcel of land Ngandori/Manyatta/T.6 in his favour.

4. In the Chamber Summons application, the applicant sought conservatory orders, permanent injunction and interlocutory orders to conserve the suit property pending determination of the suit. The applicant further sought orders for the respondents to be restrained from entering, demolishing and collecting rent on commercial buildings on the land and called upon the court to hold the respondents in contempt in the event they fail to comply with the court orders. In his supporting affidavit, he claimed that the respondents had threatened to gain entry on the property and had sought the assistance of the assistant chief and area district officer. Further, the respondents are alleged to have threatened to demolish the commercial building and evict the applicant's tenants.

5. The suit is opposed by way of a replying affidavit and preliminary objection. In the replying affidavit sworn by the 1st respondent, she confirms having being married to the applicant, but alleges to have been separated in the year 1999. It is her contention that the subject parcel of land Ngandori/Manyatta/T6 was awarded to her in Land Tribunal Case No. 38/2003 and the award adopted in Embu Award No. 2 of 2006, both proceedings have been enclosed in support of her case. She claims that the applicant has denied her entry to the land and further that there is a pending suit which is HCC No. 3 of 2019 before the court over the subject parcel of land. Further, the applicant confirms having transferred the land to her nephew and alleges that the applicant has been filing suits in a bid to defeat justice. In support of the case the respondents annexed copies of the proceedings in the Land Tribunal case, the award of the court, a mediation report and a copy of official search and title deed to the property.

6. In the Preliminary Objection, the respondents basically seek dismissal of both the application and the suit in its entirety. The Respondents did not annex any documents to the Preliminary Objection nor did they argue the matter orally or file written submissions to support it. Instead they attached two authorities viz:

a. Grace Njeri Kabiru Vs Stephen Wagiita Kiboi & others ELC CASE No. 227 of 2017 and

b. Diocese of Eldoret Trustees Vs Attorney General (On behalf of the Principal Secretary Treasury and another ELC CASE NO. 19 of 2019. They urged the court to rely on them in support of the Preliminary Objection.

7. The applicant on his part filed submissions on 13th May 2021. In his submissions, the applicant protested that the filing of the Preliminary Objection was an attempt to deny him a fair hearing as stipulated in Article 50 of the Constitution. According to him, the authorities filed with the Preliminary Objection have no use or consequence to the issues in the suit. The applicant is of the view that issues raised by the respondents can be addressed at the hearing or by way of filing written submissions. The applicant urged the court to hear the matter and termed the actions of the respondents of filing the Preliminary Objection as an attempt to prematurely terminate proceedings without having the parties heard before the court.

8. The applicant disputed that the matter is res judicata to Embu ELC No. 38 of 2003. According to him, he could not raise the issue of adverse possession before the Land Dispute Tribunal as the court lacked jurisdiction to determine issues on adverse possession. Reliance was placed on Section 3 (7) of the Land Dispute Tribunal Act (now repealed) which stipulates that the tribunal shall adjudicate on the matter and make a determination in accordance with the recognized customary law.

9. The applicant further made reference to the proceedings in the Tribunal Court where he averred that the 1st respondent made an admission that the land had been acquired jointly by himself and the 1st respondent. He further submitted he has been in exclusive and uninterrupted occupation of the suit parcel of land 15 years after judgment since the matter was delivered and questioned why the applicant despite knowledge of this never raised an objection or obtained an injunction to protest such occupation. It is his case that he was in the property with the consent of the 1st respondent. The applicant urged the court to strike out the Preliminary Objection and allow the suit to proceed on merit. According to him, allowing the Preliminary Objection will prejudice his efforts to redeem his property and will be a denial of a fair trial.

10. I have considered the objection as raised, the authorities attached by the respondents and the submissions by the applicant. I have also looked at the suit as filed. What is a Preliminary Objection was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where it was held as follows:

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

11. For a ground to suffice as a preliminary it ought to be one that raises a pure point of law as articulated in the Mukhisa case. I have considered the three grounds raised in the objection. To me grounds 2 and 3, are grounds that requires the court to establish and verify them by way of evidence. In the case of **Winnie Njeri Kariuki v Consolata Wangechi Muriuki & 4 others [2015] eKLR Justice J.M. Mutungi** when invited to determine a Preliminary Objection on similar grounds as those raised in ground 2 and 3 stated as follows;

“The Court must therefore ascertain the Plaintiff's claim before a determination that the suit does not disclose a cause of action against the 5th Defendant. Similarly, the Court ought to consider the pleadings and evidence before a determination that the Plaint as drawn against the 5th Defendant is frivolous, vexatious and scandalous can be made. The preliminary objection dated 4th November 2014 does not raise pure points of law and requires the court to make a determination on facts which are in dispute. This can only be done after hearing the parties at the trial when the witness give evidence and are cross-examined”.

In placing reliance on the above case I find that ground 2 and 3 are grounds fact and I will therefore only consider ground 1 of the preliminary objection.

12. In the first ground, the respondent alleges that the present suit is res judicata to Embu Award No. 2 of 2006. The law on res judicata is

provided under Section 7 of the Civil Procedure Act which 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.”

13. The considerations as to what amounts to res judicata were expounded in the case of **Fadhila Zahran Mohamed v Khadiha Abdulkaman Mwinzagu & 2 others [2018] eKLR** where **Justice Yano** outlined as follows:

- i) Whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised;
- ii) Whether the parties in the present suit are the same as those litigated in the original claim;
- iii) Whether the Court which determined the original claim had jurisdiction to determine the claim;
- iv) Whether the original action received a final judgment on the merits.

14. The respondent has urged the court to make a determination that Embu Award No. 2 of 2006 which was a result of the Dispute Tribunal Case No. 38 of 2003 is res judicata to the present suit. Both parties have attached the pleadings in the previous suit.

15. I have perused the proceedings in the previous suit. The parties to the suit are the applicant and the 1st respondent with the exclusion of the 2nd respondent. The matters litigated on in the suit were parcels of land alleged to have been acquired by the applicant and the 1st respondent and the parcel subject of this suit is among the said parcels of land. The tribunal seemed to distribute matrimonial property among the two parties, who were said to be husband and wife, and such distribution was done and the award adopted before the court in Embu Award No. 2 of 2006.

16. The applicant in his submission has averred that the present claim is based on adverse possession and the Land Dispute Tribunal had no jurisdiction to handle matters of adverse possession and he could not raise the issue before the Tribunal.

17. The suit before this court has a similarity with the previous suit in terms of the parties litigating and the subject matter in the suit. However, the court is in agreement with the applicant that the claim before it is on adverse possession and the same was not raised in the previous suit and couldn't be raised there.

18. Further, it is trite law that the aim of the doctrine of res judicata is to act as a bar to bringing a suit that has been determined by a competent court between similar parties over the same subject matter and where similar issues are addressed. The issue of adverse possession is a new cause of action not raised before the Land Dispute tribunal. The applicant has argued that tribunal was not a competent court for want of jurisdiction to handle the issue of adverse possession. I fully agree.

19. The jurisdiction of matters to be handled by the Land Dispute Tribunal is set out in Section 3(1) of the Land Disputes Tribunal Act; It is set out as follows:

“All cases of a civil nature involving a dispute as to—

- a. the division of, or the determination of boundaries to land, including land held in common;
- b. a claim to occupy or work land; or
- c. trespass to land, shall be heard and determined by a Tribunal established under section 4.

20. From the express provisions of section 3(1) of the Land Disputes Tribunal Act it is clear that its jurisdiction is limited to only the matters stipulated therein. A claim based on adverse possession, therefore, did not fall within the ambit of the Land Dispute Tribunal and even if the issue had been raised, the Land Dispute Tribunal had no jurisdiction to determine the issue of adverse possession.

21. Further Section 38 of the Limitation of Actions Act stipulates

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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”.

From this it's clear that it only the High court, and by extension this court, that can handle the issue of adverse possession. The tribunal couldn't handle it.

22. **In the case of Rose Juma Ogola & 2 others v Paustina Anyango & another [2020] eKLR** the court in addressing the issue of jurisdiction of the Land Dispute Tribunal to hear matters on adverse possession stated as follows

“The law provides that a claim for adverse possession was to be brought to the High Court by way of an Originating Summons. Consequently, even if the parties litigating is the same and the subject matter is the same, the current cause of action was incapable of being litigated before the Land Disputes Tribunal.

23. In addressing the same issue in the case of **Republic v Funyula Land Disputes Tribunal & 2 others Ex- Parte Hannington Pamba [2005] eKLR** the court stated as follows

“The basis of the Tribunal’s decision is that the interested parties had stayed on the land in Dispute for a period of over 30 years. In essence the land was awarded to the interested parties by virtue of adverse possession. This is obviously outside the province of Land Disputes Tribunals whose mandate is limited as aforementioned. The tribunal therefore acted ultra vires its mandate”.

24. In placing reliance on the provisions of section 38 of the Limitation of actions act, Section 3(1) of the Land Disputes Act and the case law above, this court is of the view that issues of adverse possession could not be handled by the Land Disputes tribunal and even if the issue had been raised the Land dispute tribunal would not have had jurisdiction to determine the issue of adverse possession.

25. It is evident that the Land Disputes Tribunal could not determine the issue of adverse possession and it cannot therefore be held that the matter is res judicata as the issues raised in Embu Award No. 2 of 2006 are not similar to the present suit.

26. The court further notes that the respondents have stated that there is a pending suit before a different court herein being, HCC No. 3 of 2019, which is said to be over the suit parcel of land. The respondents have neither annexed the proceedings in the said court nor have they pleaded the doctrine of sub judice. The court cannot therefore make inference on what is neither pleaded nor proven by the respondents.

27. More crucial for the determination of this objection is the nonchalant casualness with which the respondents approached the issue of its prosecution. The respondents at first wanted to file submissions but then abandoned the idea and asked the court to rely on the material provided. It was a serious and fatal omission to fail to file submissions. Prosecution of an objection like the one before this court can only be done in either of the two ways viz: oral arguments or written submissions. It was a serious lack of tact or strategy on the part of the respondents to assume that the material provided and the authorities attached to the objection would adequately speak to the court about the essence of the objection. Submissions were required to explain both the materials and the case law provided. Where submissions are not filed, one cannot say prosecution has taken place. And if, for any reason, one may argue that the approach adopted by the respondents amount to prosecution, I would counter and say that it is insufficient prosecution.

28. The upshot, when all is considered, is that the objection herein is one for dismissal. I hereby dismiss it for all the reasons stated in this ruling. As to the issue of costs, I realize that this is a matter involving close family members. I therefore order each side to bear its own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF NOVEMBER 2021

In the presence of Muthee for Njoroge Njuguna for defendant and the plaintiff present in person.

Court assistant: Leadys

A.K. KANIARU

JUDGE

30.11.2021