



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT EMBU
HIGH COURT ELC CASE NO. 08 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
JACKSON DAVID MURIITHI NJIRU.....2ND DEFENDANT/RESPONDENT
RULING

1. What is for determination before the court is a preliminary objection dated 21.4.2021 and filed on even date. The objection targets both the application and the suit as filed. The objection is premised on three (3) points 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 Laban Njagi Ngari, as the applicant, while Mary Muthoni Njagi and Jackson David Muriithi Njiru, are the respondents. In the Originating Summons the applicant sought orders to be recognized as having acquired land parcel number Ngandori/Manyatta/T.142 by way of adverse possession. He claimed to have stayed on the parcel of land for more than 12 years without interruption or interference by the respondents. The applicant further averred that the 1st respondent was his wife and she held the suit parcel of land as a matrimonial property. He further challenged transfer of the suit parcel to the 2nd respondent for failure to obtain written consent and faulted the 2nd respondent for obtaining the transfer with the knowledge that the property was matrimonial property and by disregarding the exclusive occupation of the applicant.

3. 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 and called upon the court to hold the respondents in contempt in the event they fail to

comply with the court orders.

4. The respondents opposed the application by way of preliminary objection on the grounds adduced earlier in this ruling and 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 in support of the preliminary objection. However, they enclosed an authority in the case of *Grace Njeri Kabiru Vs Stephen Wagiita Kiboi & others*, ELC CASE No. 227 of 2017, which they urged the court to rely on in support of the preliminary objection.

5. 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 authority filed with the preliminary objection has 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.

6. The applicant disputed that the matter is res judicata Embu ELC No. 38 of 2003 as 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.

7. The applicant went ahead and 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 the applicant and the 1st respondent. The applicant further submitted he has been in exclusive and uninterrupted occupation of the suit parcel of land 15 years after judgment in 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 applicant. The applicant urged the court to strike out the preliminary objection and allow the suit to proceed on merit as according to him allowing the preliminary objection will prejudice his efforts to redeem his property and will be a denial of a fair trial.

8. I have considered the objection as raised, the authority attached by the respondents and the submissions by the applicant. I have also looked at the suit as filed. The principles on preliminary objection were laid out in the case of *Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 Others SCK Petition No. 12013/2014/ eKLR, the Supreme Court of Kenya echoed the Mukisa case (supra) where it was held:*

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit.”

Further in the case of ***Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004***, the Court held that:

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

9. For a ground to suffice as a preliminary, it ought to be one that raises a pure point of law. 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 called 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.

10. On the first ground, the respondents alleges that the present suit is res judicata 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.”*

11. In the case of ***Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR***, the court outlined the test in determining whether a matter is res judicata and summarized it as follows that:

i) *The matter in issue is identical in both suits;*

ii) *The parties in the suit are the same;*

iii) *Sameness of the title/claim;*

iv) *Concurrence of jurisdiction; and*

v) *Finality of the previous decision.*

12. The respondents have called upon the court to make a determination that the present suit is res judicata Embu Award No. 2 of 2006. For the court to establish this issue of res judicata, it has to do a comparison of the pleadings, parties and issues in Embu Award No. 2 of 2006 and the present case herein. The respondents however have not attached the proceedings in the previous case and neither has he made any presentation before the court either orally or in writing on how the present suit is res judicata the matter alluded to in Embu Award No. 2 of 2006.

13. The court however notes that an authority in the case of **Grace Njeri Kabiru Vs Stephen Wagiita Kiboi and others in Nyahururu ELC NO. 227 OF 2017** has been attached and the respondents seek that the court relies on the said authority in support of their case. The court does not see how it can rely on an authority which the respondents have also not elaborated how it is related to this case and issues before it. The respondents have not highlighted to the court what it is exactly the court is to comprehend from the authority. How is a court expected to determine the issues without any documents or submissions made by the parties?

14. Though a preliminary objection raises point of law, the parties need to submit before the court and prosecute the matter diligently in support of the preliminary objection. What the respondents have simply done is file the objection and made it the court's duty to prosecute it for them. This, the court cannot do. The court needs to be clear that the onus of prosecuting the objection is on the parties that file it and the respondents cannot just file and attach an authority and leave it to the court to determine the issue in such circumstances.

15. That notwithstanding, the court notes that the applicant has submitted on the preliminary objection and shall proceed to consider such submissions. It shall confine itself to the grounds raised in the preliminary objection.

16. The applicant in his response to the preliminary objection has annexed the proceedings in Embu Award No. 2 of 2006 and Dispute Tribunal Case No. 38 of 2013. A review of the proceedings clearly shows that the parties to the proceedings were the applicant and the 1st respondent. The dispute was on the suit parcel of land among other parcels of land which are not part of the suit. The contention in the proceedings was on distribution of property alleged to have been acquired by both the applicant the 1st respondent during subsistence of their marriage.

17. The applicant in his response has averred that his claim in the present suit is 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.

18. I have carefully looked at the proceedings and I agree with the applicant that the issue of adverse possession was not raised or addressed in the suit before the tribunal. However, it is trite law that the aim of the doctrine on res judicata is to act as a bar for bringing a suit that has been determined by a competent court between similar parties over the same subject matter. It aims at ensuring that the applicant do not give the suit a cosmetic facelift by adding more parties or bringing in new causes of action. The issue of res judicata is a new cause of action not raised before the Land Dispute tribunal. However, though that is the case, the applicant has argued that the tribunal was not a competent court for want of jurisdiction to handle the issue of adverse possession.

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;

“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 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. The legal position on adverse possession is envisaged under Section 38 of the **Limitation of Actions Act** which stipulates that

“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”.

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 made 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 the court is of the view that issues of adverse possession could not be handled by the Land Disputes tribunal. Even if the issue had been raised, the Land dispute tribunal would not have had jurisdiction to determine the issue of adverse possession.

25. Still on the issue of jurisdiction the court notes that the Land Disputes Tribunal purported to distribute matrimonial property to the parties but the mandate and jurisdiction of the Land Dispute Tribunal as stipulated in Section 3(1) of the Land Dispute Tribunals Act did not in any way confer upon the Tribunal such power to distribute matrimonial property. The actions and the findings of the Tribunal and subsequent award in Embu Tribunal Case No. 38 of 2003 and Embu Award No. 2 of 2006 were, therefore, null and void as the Tribunal acted beyond its mandate.

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 pleaded the doctrine of sub judice. The court cannot therefore infer on what is neither pleaded nor proven by the respondents.

27. The applicant has further submitted that judgment was delivered in 2006 and he has been in exclusive and uninterrupted occupation from that time to date. The applicant holds that he was in occupation of the land with the full knowledge and consent of the 1st respondent. The court is of the view that it shall not proceed to address this issue as this is tantamount to making a determination on the entire suit and it shall only restrict itself to the issues raised in the Preliminary Objection. It is clear that the preliminary objection herein is one for dismissal and the same is hereby dismissed.

28. Regarding the issue of costs the parties involved in the matter have close relations and the court is therefore hesitant to condemn the parties to pay costs and therefore orders that each party bears it’s 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 in person.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

30.11.2021