



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC (O.S.) NO. E018 OF 2021**

**KIRIINYA NEWTON NAIBAE.....PLAINTIFF**

**VERSUS**

**PETER MURIUKI.....1<sup>ST</sup> RESPONDENT**

**MARGARET NTHURWA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The plaintiff has raised a preliminary objection to the suit on account of res judicata; claim is of a licensee – as an adopted child, an abuse of court process as per **Order 2 rule 15**, and is against Limitation of Actions Act hence incompetent.
2. Through written submissions dated **12.10.2021** the defendants expound the grounds submitting there was a **High Court Succession cause No. 198 of 2002 Meru** where the plaintiff' claim as an adopted son – beneficiary was heard and determined with no appeal rendered against it hence this suit offends **Section 7** of the **Civil Procedure Act**.
3. Secondly the defendants submit as a licensed user, cannot claim adverse possession.
4. Thirdly the defendants invoke **Order 2 rule 15 of Civil Procedure Rules** urging the court to strike out the suit for disclosing no cause of action, being scandalous, frivolous and vexatious, out of prejudice and an abuse of the court process.
5. Lastly the defendants urge the court to find the matter complex and raising contentious issues of facts and law which do not fall under **Order 37** of the **Civil Procedure Rules**.
6. The plaintiff's written submissions dated 13.10.2021, it urges the suit is not res judicata since the previous suit was over inheritance. He relies on **Article 162 (2) & 165 (5) of the Constitution** and ***Cosmas Mromba Moka -vs- Co-operative Bank of Kenya Ltd & Another [2018] eKLR*** and ***Mate Gitabi -vs- Jane Kabubu Muga & 3 Others (unreported)***.
7. The plaintiff's originating summons dated 11.5.2021 is brought under **Section 38** of the **Limitation of Actions Act** and **Order 37 rule 7 Civil Procedure Rules** seeking for adverse possession over **L.R Nyanki/Nkabune/67** on account of long use and occupation.
8. The defendants have not filed a replying affidavit to the originating summons or any defence for that matter except preliminary objection. By a notice of motion dated 11.5.2021 the applicant sought for orders of inhibition and temporary injunction pending hearing and determination of the originating summons in which he has attached annexures KNN1, copies of the records of the suit land in the name of the 1<sup>st</sup> defendant claiming he hold the land in trust, the ruling in the succession cause as KNN2, a letter by the 1<sup>st</sup> defendant dated 30.3.2021 as annexure KNN3 and photographs showing development on the land as anexture KNN4 (a) & (b).
9. The defendants have not filed any replying affidavits to counter those averments.
10. The test for determination on whether a matter is res judicata was summarized in ***Kenya Commercial Bank Ltd -vs- Benjoh Amalgamated Ltd [2017] eKLR*** as whether the issues are identical, sameness of parties, sameness of title/claim, concurrence of jurisdiction and finality of previous decisions.
11. In ***The Estate of Banard Mutie Munyaka – Deceased [2019] eKLR*** the court held that when res judicata is raised a court has to look at the decision claimed to have settled the issues in question and the entire pleadings in the previous case vis a vis the instant case and establish if they are the same and were covered in the previous decisions. The court must also check if the parties are the same and a court of

competent jurisdiction determined issues to finality.

12. In *Joseph Kaberia Kumari –vs- Tony Mwenda Muthaura [2021] eKLR* the court held matters falling under use, occupation and title to land and environment are the domain of an ELC even if they arise in relation to the estate of a deceased person.

13. Other than the ruling attached to the defendant's submissions, there are no other materials by way of a replying affidavit to the notice of motion dated 11.5.2021 and a response/defence to the originating summons to demonstrate the pleadings and proceedings in the previous suit(s) so that the court can determine if the instant suit is res judicata or not. The ruling dated 21.5.2020 revoked the grant in favour of the plaintiff. I have not seen anywhere and defendant has not demonstrated if the matter of adverse possession and trust were ever determined to finality in the previous suit.

14. Further in *The Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR*, the court held disputes arising after confirmation of grant particularly which are outside the distribution of the estate must be determined elsewhere for the mandate of a probate court does not include disputes between the estate and third parties.

15. In *Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another [2014] eKLR* the court held matters res judicata require more probing evidence and are incapable of being handled by preliminary objections because of the limited scope of jurisdiction on preliminary objections.

In the premises I find the preliminary objection dated 19.7.2021 lacking merit. The same is dismissed with costs.

16. Turning to the application dated 11.5.2021 I find no replying affidavit in opposition. Given my finding that the applicant has disclosed a legitimate interest and right over the suit land, it is only prudent to preserve it pending hearing of this summons. The interim orders issued on 17.5.2021 are hereby confirmed but to subsist for only 12 months from the date of this ruling. The plaintiff shall file an undertaking as to damages and costs within 3 days from the date hereof. The defendant is granted leave to file a response to the originating summons within 14 days from the date hereof.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

Mutuma for plaintiff

Thangicia for defendant

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**