



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 30 OF 2018

PAULINE MPAKA (Suing as the legal representative of the estate of

GILBERT KARAGANA M'IRINGO..... APPELLANT

VERSUS

MARETE M'IRINGO 1ST RESPONDENT

JACOB MURITHI M'IRINGO 2ND RESPONDENT

SUSAN GACHERI KIRIGIA 3RD RESPONDENT

NATHANIEL KITHINJI IKIUGU.....4TH RESPONDENT

JOHN MBAYA M'IRINGO INTERESTED PARTY

(Being an appeal from the Ruling of Hon. H. Ndungu (C.M.) delivered on 17th July, 2018, in Meru CM ELC No. 108 of 2018)

JUDGMENT

1. Through an appeal dated 30.1.2018 the lower court order is challenged on the grounds that the court granted an order of status quo instead of injunctive orders; upheld a preliminary objection dealing with eviction at an interlocutory stage without the benefit of full evidence; upheld a preliminary objection without caring the substantial injustice to be occasioned to the appellant; did not consider the parties were different in the two suits and lastly denied the appellant an opportunity to be in the suit land pending the hearing.
2. This being a first appeal the court is required to re-assess rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. ***See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.***
3. At the lower court the appellant had sued the respondents as the wife to the deceased, her brothers in law the 1st and 2nd respondents for the breach of trust in subdividing and transferring **Parcel No. Ntima/Ntakira.1808**, without giving her and her family a portion despite her occupation and possession of a portion approximately 63 points for about 40 years. It was averred upon subdivision they sold to the 3rd respondent as **Parcel No. Ntima/Ntakira/3348** who sold it to 4th respondent in a fraudulent manner.
4. She sought for the cancellation of the parcel(s) from the name of the 4th respondent to her name and a permanent order of injunction against the respondents from interfering with the boundaries, pulling down the fence, demolishing her homestead or evicting her from the land.
5. Simultaneously with the plaint the appellant filed an application dated 9.5.2018 where she sought for temporary orders of injunction and in the alternative status quo at the filing of the suit to be maintained.
6. Interim orders were granted with an interpartes hearing for 23.5.2018.
7. The 3rd and 4th respondents entered appearance and filed a preliminary objection dated 22.5.2018 claiming the application dated 9.5.2018 was res judicata on account of **Meru CMCC No. 744 of 1999** consolidated with **No. 321 of 1992** where similar application had been determined on 14.4.2003 ordering for the eviction of the appellant from **L.R Ntima/Ntakira/3348**. They sought for the application to be struck out as an abuse of the court process.
8. The 3rd respondent filed a replying affidavit sworn on 22.5.2018 stating the appellant had made a protest in a succession cause **No. 418 of**

2014 regarding the deceased father-in-law but withdrew it. That during her father-in-law's lifetime he had sued the appellant in **Meru CMCC No. 744 of 1999** over the suit land the court issued an eviction order on 14.4.2003 and a request for review was dismissed on 6.10.2003. Eventually orders of status quo on account of an appeal were granted but the appellant never prosecuted it until it was dismissed for non-prosecution.

9. Further it was stated the court had found the appellant was entitled to another land duly allocated to her hence had no basis of enjoying the suit land.

10. The 1st respondent opposed the application through a replying affidavit sworn on 24.5.2018 stating the suit land did not belong to them as a family, the appellant was only entitled to title **No's 3359 and 3356** and hence all other suits she had brought up had been dismissed.

11. The 2nd respondent filed a defence dated 4.6.2018 and prayed for the suit to be dismissed.

12. The appellant filed a supplementary affidavit sworn on 6.6.2018 regarding the preliminary objection and the replies thereto by the respondents. She stated she had appealed against the other suit, parties were different and averred the orders of eviction had been given in favour of the deceased and could not be prosecuted since there was no legal representative to represent the deceased's father-in-law.

13. She admitted the High Court had given orders of the status quo and if the appeal was ever dismissed what remained were the orders of 14.4.2003. She and sought her application and the case to be heard on merits.

14. Parties made written submission dated 26.6.2018 and 12.6.2018 respectively the latter replying on **Kanorero River Farm Ltd –vs- National Bank of Kenya Ltd [2002] eKLR and Dorcas Mumo Mutua –vs- Equity Bank Ltd & 3 Others [2017] eKLR** on resjudicata.

15. For the appellant, Mr. Ngentu advocate submitted documents in the file showed the appellant had stayed on the land for over 40 year, developed it and had a beneficial share to the land.

16. Secondly counsel submitted it would be wrong to uphold the preliminary objection without a full hearing since the suits were different, involved different parties and the orders granted were in person not in rem though appealed against in **HCCC No. 123 of 2003**. Unfortunately they could not be executed since Silas Kirigia passed on.

17. On ground 3 of the appeal counsel submitted the appellant was on the suit land and hence entitled to a share. He relied on **Orina Kenyariri –vs- Salama Beach Hotel Limited & 3 others [2017] eKLR** on *res-judicata* principles. Counsel urged the court to find the suits were different.

18. Regarding ground 5 of the appeal counsel submitted **Article 159 2 (d) of the Constitution** looks at substantive justice and the preliminary objection raised issues which were not pure points of law.

19. The 1st respondent submitted **Parcel No's 3356 and 3359 measuring 0.12 Ha and 0.04 Ha respectively belonged to the appellant hence had no claim over the suit land.**

20. The 2nd respondent submitted the lower court decision was fair and he had sold the land with a power of attorney.

21. Mr. Karanja advocate for the 3rd and 4th respondents associated himself with the 1st and 2nd respondents' submissions and urged the court to look at the two supplementary records of appeal that there were two previous cases **No. 321 of 1992 and 744 of 1999** where the appellant was a party and the deceased father-in-law the defendant and find the suit land was the same as in the instant case, the only difference being addition of one Nathaniel Kithini Kiuigu.

22. Counsel submitted upon the filing of an appeal there was a consent order for the maintenance of the status quo before Hon. Justice D. Onyancha after which the appeal was dismissed for non-prosecution.

23. As regards the estate of the deceased, counsel submitted in succession No. 418 of 2014, the appellant had filed a protest but eventually withdrew it on 17.5.2017 after which the title changed hands.

24. In the circumstances counsel submitted *re judicata* is a matter of law and a court of law should not allow a party to litigate installments. He sought reliance on **Ben Wangome & Another –vs- Pattansi Valpal and 2 Others [2015] eKLR and Benford Mutegi Bohan & 5 Others –vs- James Mbaka [2019] eKLR**.

25. Having gone through the pleadings, submissions and the grounds of appeal the issues for determination are:-

a) **If the preliminary objection raised by the 3rd and 4th respondents was a pure point of law.**

b) **If the trial court was justified based on the facts and law to strike out the suit.**

26. As set out above, the 3rd and 4th respondents did not file any defence to the suit. The preliminary objection dated 22.5.2018 was specific that the notice of motion dated 9.5.2018 was *res judicata*, incompetent, non-starter and an abuse of the court process. The 3rd and 4th respondents sought for the same to be struck out.

27. Similarly in arguing the preliminary objection and looking at the submissions dated 12.6.2018 the 3rd and 4th respondents merely addressed themselves to the notice of motion and not directly on the entire suit.

28. Even if the notice of motion and the submissions were over the entire suit, there is no record that the respondents brought before the trial court all the pleadings and rulings relating to the previous suits for the trial court to analyze and establish if the parties were the same, issues were the same, the subject matter was the same and that courts of competent jurisdiction had determined the issues on merit and to finality.

29. The trial court was informed there was a consent order on the maintenance of status quo for the pending appeal at the High Court and that, the party who was a respondent was then deceased.

30. Further it was submitted the pending appeal had allegedly been dismissed for want of prosecution. All those materials did not form part of the pleadings but were contained in the replying affidavits to the notice of motion dated 9.5.2018.

31. In my considered view, in order for the trial court to establish if the issues were res judicata or not it had to establish matters of facts and evidence which do not fall under the ambit of a pure point of law as per the *Mukhisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E.A 696.*

32. The court had to look at the affidavits since the 1st, 3rd and 4th respondents had not filed any defence. The facts were also disputed as can be gleaned from the supporting affidavits and the replying affidavits.

33. In *Oraro –vs- Mbaja [2005] 1 KLR 141* the court held that anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence. The respondents' case was that some of the previous suits were still pending hence subjudice.

34. In *Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another [2014] eKLR* the court held issues of re judicata, duplicity of suits and suits having been spent will require probing evidence hence are incapable of being handled as preliminary objection because of the limited scope of the jurisdiction on preliminary objection.

35. In the premises I find the 3rd and 4th respondents' preliminary objection dated 22.5.2018 was not based on a pure points of law. The trial court erred in law and in fact in upholding it.

36. The appeal herein is allowed with costs to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

Ngentu for appellant

Karanja for 3rd and 4th respondents

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE