



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT VIHIGA**

**ENVIRONMENT AND LAND CASE NO. 17 OF 2018(OS)**

**DERICK MASINI ONAMI.....APPLICANT**

**VERSUS**

**JOSAM IBWANA.....RESPONDENT**

**RULING**

**Introduction**

1. This Ruling is in respect of a Preliminary objection raised by the Defendant/Respondent herein vide the Notice of Preliminary objection dated 4<sup>th</sup> November, 2021. The Respondent contends that the Plaintiff/Applicant's suit is incompetent, premature and an abuse of the court process. The Objection is stated to be grounded on the provisions of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya as read with section 7, 9, 13, 37 and 38 of the Limitation of Actions Act.

2. A brief background of the case is that on the 27<sup>th</sup> February, 2018 the Plaintiff filed this suit vide an Originating Summons dated 1<sup>st</sup> February, 2018. In the suit he seeks that he be declared the absolute owner of a parcel of land known as W/BUNYORE/ESSABA/461 (the suit land) by operation of the doctrine of Adverse Possession. The basis of the claim as stated in the plaint is that he has had actual, peaceful, open and uninterrupted possession of the suit land for a period of 23 years since the year 1995 when he purchased the same.

In response to the Originating summons, the defendant filed a Replying Affidavit sworn on 23<sup>rd</sup> May, 2019. He denied that the plaintiff bought the land from the deceased, was in occupation of the suit land or is entitled to any share thereof. The Defendant contends that he lawfully bought the suit land from the personal representative of the deceased.

3. When the matter came up for hearing on 4.11.2021, Counsel for the Defendant had a Preliminary Objection to raise and requested for time to file the same. Directions were given that the Preliminary Objection be filed and be canvassed by way of written submissions. Pursuant to the directions, the Defendant/Respondent filed his written submissions dated 10<sup>th</sup> November, 2021 while the Plaintiff/Applicant filed his written submissions dated 23<sup>rd</sup> November, 2021.

**Submissions by the parties on the Preliminary Objection**

**Submissions by the Defendant's/Respondent.**

4. Through the firm of Kulecho Musomba & Co Advocates, the Defendant submits that the suit land was originally owned by one Mark Okwayo Meyo who died on 25<sup>th</sup> July 2006 and left no children surviving him. His sister and next of kin one Margaret Ayuko Olale succeeded the estate through Vihiga Succession Cause No. 17 of 2021 (Originally Kakamega H.C Succ. Cause No. 134 of 2012) and thereafter sold the suit land to the Defendant/Respondent and had it registered in the name of the Defendant/Respondent on 7<sup>th</sup> September 2012. That by an Application dated 17<sup>th</sup> July 2014 the Plaintiff/Applicant sought to revoke the grant in the succession cause on the ground that he was a buyer of the suit property. That he also sought that registration of the suit land in the name of Defendant/Respondent be cancelled on grounds that the same was obtained fraudulently. That the Application was heard and dismissed. The Defendant/Respondent refers the court to the Ruling by Hon. Mr. Justice C. Kariuki dated 2<sup>nd</sup> November, 2018 annexed to the Replying Affidavit as JI-5b. The Defendant submits that it was after he (Plaintiff) was dissatisfied with the ruling in the succession cause that he filed the suit herein.

5. The Defendant/Respondent submits further that the Preliminary Objection raises two points of law the first one being that the matter is *res judicata*. On this point he relies on the provisions of Section 7 of the Civil Procedure Act and the authority in the case of **Pangaea Holding LLC & Anor -vs- Hacienda Development Ltd & 2 others [2020] eKLR**. He submits that the grounds pleaded in the Originating Summons relate to the grounds set out in the application dated 17<sup>th</sup> July 2014 filed and determined in the succession cause. That the

defendant failed to disclose to the court herein the full details of the earlier application dated 17th July 2014. He submits that in the premises of the pleadings and decision in the succession cause, the Originating Summons is *res judicata*.

6. The second point of law according to the Defendant/Respondent is the principle of Adverse Possession. He submits that the Defendants/Respondent's title to the suit land was obtained on 7<sup>th</sup> September, 2012 and that by the time the Originating summons was filed on 27<sup>th</sup> February, 2018, the Defendants/Respondent's title was only about 6 years old. Hence the plaintiffs claim cannot come within the ambit of section 7, 13, 37 and 38 of the Limitation of Actions Act which prescribe a period of twelve years. He relies on the Court of Appeal decision of **Mtana Lewa –Vs- Kahindi Ngala Mwangandi [2015] e KLR** to buttress the argument that the claim of adverse possession had not matured as at the time of filing the suit.

7. The Defendant/Respondent further submits that the suit is an abuse of the court process. He relies on the case of **Mchanga Investments – vs- safaris unlimited ( Africa) Ltd & 2 others [2009] e KLR** among others to demonstrate the point that the act of the plaintiff to file the suit in the circumstances of the case amounts to abuse of court process. He prays that the Preliminary objection be upheld with costs to the Defendant.

#### Submissions by the plaintiff/Applicant

8. Vide written submissions filed on his behalf by the firm of Mukabi & company Advocates the plaintiff/Applicant opposes the Preliminary Objection. He submits that the suit is not *res judicata*. He relies on the case of **ANMV –VS- PMN [2016] eKLR** where the court dismissed a Preliminary Objection raising the issue of *res judicata* and held that the doctrine of *res judicata* implies that the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction.``

9. He submits further that the matters raised in the Origination Summons have never been delved into by the court. He refers to the ruling in the Succession Cause where the court had noted that the plaintiff ought to have filed his claim under the doctrine of Adverse Possession in the Environment and Land Court but not in the succession cause and submits that it was on the basis of the ruling that the Origination summons was filed.

10. On the issue that the Originating Summons was filed prematurely, the plaintiff submits that death of a proprietor does not extinguish a claim of adverse possession and hence the Originating summons does not offend the provisions of sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act. He relies on the decision in **Kahindi Ngala Mwangandi [2005] eKLR** to demonstrate the point. He prays that the preliminary objection be dismissed with costs to the plaintiff.

#### Issues for determination

11. I have read the Notice of Preliminary Objection filed by the Defendant, the submissions filed by both parties and the decided case relied on. I identify the following as the issues for determination.

- a.) Whether or not there is a valid Preliminary Objection as envisaged by law.
- b.) Whether or not the Preliminary Objection has merit.
  - (i) Whether or not the suit is *res judicata*.
  - (ii) Whether or not the Originating Summons was filed prematurely.
  - (iii) Whether or not the suit is an abuse of the court process.
- c.) What orders to make on costs.

#### Analysis and determination

- a) Whether or not there is a valid Preliminary Objection.

The threshold of a preliminary objection was set in the case of **Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd [1969] E.A 696** relied on by the Respondent herein. In the case the court held that;

*“...a Preliminary Objection consists a 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 disposed of the suit.*

*Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contact giving rise to the suit to refer the dispute to arbitration.”*

The court further held that

*`` 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.”***

12. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion.

13. The Preliminary Objection raised by the Respondent herein relates to a plea of *res judicata*, premature filing of suit and abuse of court process all based on provisions of law namely Section of the Civil procedure Act, Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act. The same is raised on points of law that emerge from the pleadings filed by the parties. It satisfies the requirements for a preliminary objection to be sustainable.

b) Whether or not the preliminary objection has merit.

i) Whether the suit is *re judicata*

14. The Defendant submits that the suit is *res judicata* because the same issues it raises were the issues in Kakamega H.C Succession Cause No.134 of 2012 ( now VIHIGA SUCC. CAAUSE NO.17 OF 2021) Re- in the Estate of Mark Okwayo Meyo. The Defendant avers that the issues were decided in the Ruling of Hon. Mr Justice C. Kariuki dated 2<sup>nd</sup> November, 2017.

The Plaintiff submits that the Ruling of Hon Justice C. kariuki dated 2<sup>nd</sup> November, 2017 did not decide the issues raised in this case but instead the court held that if the Defendant had been in occupation of the land he should lodge a claim of Adverse Possession in the Environment and Land Court. That it was on the basis of that holding by the honourable Judge that he proceeded to file the present case.

15. The Civil Procedure Act defines what the component of the doctrine of *res judicata* are. it states:

***“ 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 in which such issues has been subsequently raised, and has been heard and finally decided by such court”.***

I have read the judgement of Hon Justice C. Kariuki in the succession cause. I have also read the Originating Summons herein. There is no dispute that the plaintiff was a party in the succession cause wherein he sought revocation of the grant of Letters of Administration to one Margaret Ayuko Olale and cancellation of title issued on the suit land pursuant to the grant.

16. The basis of the Plaintiff's claim in the succession cause was that he was a purchaser of the suit land. The court found that the alleged sale transaction was rendered null and void for lack of consent of the Land Control Board. The Originating summons is based on the doctrine of adverse possession.

Concerning this issue, the Hon. Judge in the succession cause held that the Plaintiff could file suit in the Environment and Land Court.

17. The doctrine of *res judicata* was discussed by the Supreme court in the case of John Florence Maritime Services Limited & Another –vs- Cabinet Secretary Transport and Infrastructure & 3 others [2021] e KLR

In paragraph 86, the court restated the elements that must be proved before a court may arrive at the conclusion that a matter is *res judicata*.

The court stated:

***“ For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:***

***a.) There is a former judgement or order which was final.***

***b.) The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and***

***c.) There must be between the first and second action identical parties, subject matter and cause of action.***

18. In the instant suit there is indeed a ruling by the High in the succession cause. However that ruling may not, in my view, be said to be final in as far as the claim based on adverse possession is concerned and in as far as the court gave the Plaintiff leeway to file a claim based on the doctrine of adverse possession in the Environment and Land Court. The subject matter herein is adverse possession of land and the court with jurisdiction being the Environment and Land Court the claim cannot be said to have been finally adjudicated and decided on by a court having jurisdiction over the subject matter.

19. For these reasons I find that the claim herein is not *res judicata*. Whether the claim has merit or not will be the subject of the main hearing and determination.

ii) Whether or not the Originating Summons was filed prematurely

20. The contention of the Defendant is that from the time he became registered owner of the suit land to the time the Originating Summons was filed, twelve (12) years had not elapsed. That a claim of adverse possession can only arise after the expiry of 12 years of occupation of land against the interest of the title holder.

21. The response of the Plaintiff is that death of a proprietor does not extinguish a claim of adverse possession. That even upon death of the title holder time still runs against that estate of the deceased and change in title to the administrator or beneficiary or to third party will not defeat the claim.

Section 16 of the Limitation of actions Act provides as follows:

***“For the purpose of the provision of this Act relating to actions for the recovery of land an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration.”***

In the case of **Joseph Kamau Gichuki (Suing as the Administrator of the Estate of Gichuki Chegeg( Deceased) vs James Gatheru Mukora & Another [2019] eKLR** the court held that:

***“Under the Limitation of Actions Act, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of adverse possession.”***

The Court of appeal in **Karuntimi Raiji vs M’Makinya M’Itunga [2013]eKLR** while addressing an argument that a claim of adverse possession does not survive a deceased person held as follows:

***“Section 30 (f) of the Registered land Act provides an answer to this issue. Section 30(f) provides that ‘unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted in the register:***

***a.....***

***b.....***

***c.....***

***d.....***

***e.....***

***f. rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.’***

***Section 30 (f) preserves rights being acquired by virtue of limitation of actions. A claim of adverse possession is a claim founded on limitation of actions. We find that as of the date the registration of the appellant as proprietor of the suit property on 22<sup>nd</sup> March 1973, the Respondents claim to adverse possession existed and time started to run.”***

Section 30(f) of the Registered land Act (repealed) is similar to section 28 (h) Land Registration Act currently applicable.

The Court in the same case also held that:

***“Section 2 (1) of the Law Reform Act stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of his estate. The proviso to the sub-section indicates the causes of action that do not survive...”***

Adverse possession is not one of the causes of action that do not survive the deceased against whose title to land it lay.

22. Guided by the above stated law, I find that the suit was not filed prematurely. The plaintiff claims to have entered the suit land in 1995 when he bought the same. That would then mean that time for the registered owner to assert his right began to run from the year 1995.

iii) Whether or not the suit is an abuse of the process of the court

23. On this point the Defendant submitted that the actions of the Plaintiff of filing a suit on issues that had already been determined and of filing the suit prematurely amounted to abuse of the court process.

On the basis of my findings herein on the issue of res judicata and filing of the originating summons prematurely, I find that there was no abuse of the court process in the filing of the originating summons.

c) Costs

24. Since this is an ongoing matter the costs of the Preliminary Objection can be in the cause of the main suit.

Conclusion

25. Having determined that the suit is not *res judicata*, that the Originating Summons was not filed prematurely and that the actions of the plaintiff do not amount to abuse of the court process, I find that the preliminary objection lacks merit and make the following orders:

**i. The preliminary objection raised vide Notice of Preliminary Objection dated 4<sup>th</sup> November 2021 is dismissed.**

**ii. Costs to be in the cause.**

**Ruling read, dated and signed in open Court at Vihiga this 7<sup>th</sup> day of December, 2021.**

**E. ASATI**

**JUDGE**

In the presence of:

Ajevi: Court Assistant.

Kundu h/b for Mukabi for the Applicant/Plaintiff

Anguba h/b for Kulecho for the Respondent/Defendant

**E. ASATI**

**JUDGE.**