



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ORIGINATING SUMMONS NO. 15 OF 2019 (O.S.)

JEDIEL M' GAITI KIBERA.....1ST PLAINTIFF/APPLICANT

PHINEAS MBAABU KIBERA.....2ND PLAINTIFF/ APPLICANT

VERSUS

MARY MUGURE.....1ST DEFENDANT/ RESPONDENT

JAMES KIRINGO I. RWITO.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs/Applicants instituted this claim through the amended Originating Summons filed on 17.4.2019 claiming entitlement to L.R. Mariene/U/Abothuguchi/205 (the suit land) through adverse possession. Their claim is that they have occupied the suit premises since the year 1959 their occupation being open, unhindered, notorious, undisturbed and uninterrupted.
2. The Plaintiffs also filed an application contemporaneously with the Originating Summons where they sought an order of temporary injunction restraining the Respondents from interfering with their peaceful occupation within the suit premises pending the hearing and determination of the Originating Summons.
3. The Defendants /Respondents opposed the application vide their Preliminary Objection, grounds of opposition and a Replying Affidavit sworn by 2nd defendant, all dated 20/5/2019. They averred that the applicants have failed to disclose that the subject matter herein, Mariene/U/Abothuguchi/205 has been the subject of long and winding litigation. That the 1st applicant (Jediel), filed **Meru HCCC 237 OF 1990** over the same subject matter, same facts and over the same parties, where the case was heard on merits before the able Judge Isaac Lenaola (as he then was) who delivered a judgement on 16/10/2007.
4. That instead of filing an appeal, the 1st applicant filed Misc. **Succession Cause No. 159 of 2007** which revived **Succession Cause No. 211 of 1989** Nairobi but which file was transferred to Meru. The respondents aver that in the succession cause, the Applicants obtained orders of stay of execution of the judgement delivered in **HCCC No. 237 of 1990**. The succession matter was eventually heard on merits by Justice Ongijo and the same was determined against the applicants in the court's **judgement dated 31/1/2019**. The Respondents opined that the matter is therefore Res judicata hence the Originating Summons and Application are bad in law and should therefore be struck out.
5. The 1st applicant Replied to the averments made by the Respondent vide Supplementary affidavit dated 21/06/2019 stating that the suit **HCCC No. 237/1990** has no connection to the present suit since the prayers are not the same hence the summons and application do not offend any provisions of the law.
6. On 8.7.2019 this court directed parties to canvass the Preliminary Objection through written submissions. Both parties have since filed their written submissions. The Plaintiff/ Applicant submitted that the matter in **HCCC No. 237 of 1990** was based on trust as opposed to adverse possession. That even after the judgement in the year 2007, the applicants continued to be in occupation of the suit premises. In this regard they relied on the cited authorities of **Kibundi v Mukobwa & Anor (1993) eKLR & AKN vrs JNM (2014) eKLR**.
7. The Respondents relied on the provisions of **Section 7 of the Civil Procedure Act** and its explanation thereof. The respondents made reference to the judgments of Judge Isaac Lenaola (as he then was) in **Meru H.C.C.C No. 237 of 1990** and **Judge A. Oginjo in Meru Succ No. 497 of 2007**. They also relied on the following authorities; **Christopher Orina Kenyariri T/A Kenyariri & Associates vs Salama Beach Hotel Limited & 3 others (2017) eKLR, Ganatra vs. Ganatra [2007] 1 EA**.

Analysis and Determination

8. The main issue for determination in the Preliminary Objection dated 20.5.2019 is whether or not the Originating summon and subsequent

Application are Res judicata.

9. Section 7 of the Civil Procedure Act provides as follows;

“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 can 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.”

10. In **A N M v P M N [2016] eKLR** the court held that a Court will as well invoke the doctrine of res judicata in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties. The Court relied on the English Case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, where it was observed that:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Also see **Bernard Mugo Ndegwa vs. James Githae & 2 others (2010) eKLR; Michael Gachokii Gicheru vs. Joseph Karobia Gicheru, Kerugoya ELC No. 783 of 2013.**

11. I have looked at the judgement in **HCCC No. 237 of 1990, M’ Kirera M’ Ikiugu & Jediel M’Gaiti Kirera versus Mary Mugure Murugu & James Kirongo Ituma**. In the suit the plaintiffs sought orders inter alia that the deceased Japheth Murugu held 1 acre of land in L.R.No. **Mariene/U/Abothuguchi/205** in trust for the 1st plaintiff, and that the 1st Defendant was entitled to one acre from Mariene/U/Abothuguchi/205 in adverse possession.

12. In his determination the learned judge Isaac Lenaola (as he then was) in **HCCC 237 of 1990** found that the question as to whether the 2nd plaintiff was adopted by the deceased ought to have been aptly dealt with in **Succession cause No. 211 of 1989**. The court moved to dismiss the plaintiff’s suit and entered judgement for the defendants as prayed in the counterclaim as follows;

“An order to evict the plaintiffs from the land, a permanent injunction restraining the plaintiffs from any interference in the suit land and a declaration that the second defendant was the legal owner of the suit land.”

13. The 1st defendant had obtained letters of administration in respect of the estate of her husband way back on 12.5.1989 in **Nairobi succession cause No. 211 of 1989** but Jediel, the 1st plaintiff herein moved the court in **Meru Succession cause No. 497 of 2007** (formerly cause no. 211 of 1989) and sought an order for revocation of the said grant. The court’s ruling thereof was delivered by Judge Oginjo on 31/01/2019 dismissing the application for revocation of the grant. The court considered the determination in **HCCC No. 237 of 1990** and held as follows;

“The court has perused the entire file which was reconstructed and established that the claim by the applicant herein Jediel M’ Gaiti Kirera and his father Kirera M’ Ikiugu for adverse possession and trust had been made in Meru HCCC No. 237 of 1990 where Mary Mugure was sued jointly with one James Kirongo Ituma as administrators of the estate.....

These claims were dismissed in Hccc No. 237 of 1990. What the applicant says in the application is what he said in the suit against the Respondent herein. They were ordered to vacate the suit land and pay mesne profit and they never appealed against the finding since 22nd October 2007.....

I do find that the application (for revocation of the grant) which has been pending in court since 26.10.2007 is without merit. The application is dismissed with costs to the respondent Mary Mugure. Order of inhibition lodged against L.R. 205 to be lifted forthwith. The respondent is at liberty to execute orders in Meru H.C.C.C NO. 237 of 1990”

14. It is clear that the applicants had the opportunity to present their claim in **HCCC No. 237 of 2009**, where the issue of adverse possession was present in that suit. I therefore align myself with the decision in **HENDERSON VS HENDERSON (supra)**, that a party has to forward its whole case and this court shall therefore not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest. Also see- **John Christopher Kamau vs. Co-operative Bank of Kenya (2014)eKLR Bernard Mugo Ndegwa vs James Githae & 2 others (2010) Eklr.**

15. An analysis of **H.C.C.C. No. 237 of 1990** and Succession Cause No. 211 of 1989 (now **Succession Cause No. 497 of 2007**) clearly shows a finality of the decision. It is not lost to this court that in **H.C.C.C.237 of 1990**, the Learned Judge Isaac Lenaola (as he then was) decried the fact that the suit had a lifespan of 17 years as at the time he was delivering his judgment on 16.10.2007, an issue which was picked up by Judge Oginjo in her ruling of 31.1.2019 in **succession cause number 497 of 2007** where she was puzzled as to how the suit had metamorphosed into an application for revocation!. Further, it is noted that due to the proceedings in the succession cause, the Judgment in case **no. 237 of 1990** was left in limbo until when Judge Oginjo delivered her ruling in the succession cause.

16. I would say that the ink had not dried from the time Judge Oginjo delivered her ruling to the time this suit was filed. It is crystal clear that the plaintiffs are making an attempt to have a third bite at the cherry. Taking cue from the observation of Judge Oginjo in her aforementioned ruling, I am also puzzled as to how the dispute has metamorphosed into a claim of adverse possession, yet the element of adverse possession was raised earlier in **H.C.C.C. No. 237 of 1990.**

17. The upshot of this Ruling is that the **Preliminary Objection dated 20.5.2019 is found to have merits. The end result is that the suit herein and the application filed by the plaintiffs are hereby struck out with costs to the defendants.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH DAY OF FEBRUARY, 2020.

IN THE PRESENCE OF: -

C.A Kananu

Aketch for plaintiff

Gikonyo holding brief for Defendant – present

Plaintiff absent

2nd Defendant – present

HON. LUCY. N. MBUGUA

ELC JUDGE