



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 64 OF 2019 (O.S)**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**AND**

**PAUL JUMA OMBIDI.....APPLICANT**

**VERSUS**

**BERNARD ODHIAMBO OMOLLO.....RESPONDENT**

**RULING**

1. This ruling is in respect of twoness matters in the instant suit namely:-

a) A preliminary objection to the instant suit dated 2<sup>nd</sup> September 2019 and filed in court on 3<sup>rd</sup> September 2019 (Hereinafter referred to as the preliminary objection) initiated by G.S. Okoth and Company Advocates learned counsel for the respondent, Bernard Odhimbo Omollo.

b) A notice of motion dated 13<sup>th</sup> September 2019 and filed in court on 16<sup>th</sup> September 2019 pursuant to **sections 1A, 1B, and 3A of the Civil Procedure Act Cap 21 laws of Kenya and Order 51 Rules 13 and 4 of the Civil Procedure Rules,2010** (Hereinafter referred to as the application) mounted by Quinter Adoyo, learned counsel for the applicant, Paul Juma Ombidi.

2. The instant suit was commenced by way of an originating summons dated 5<sup>th</sup> August 2019 and lodged in court on 25<sup>th</sup> August, 2019 pursuant to **sections 17 and 38 of Limitation of Actions Act Cap 22 Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules,2010** among other provisions of the law (the Originating summons herein). The applicant is claiming to have acquired title to the suit land, **LR NO. Gem/Kajulu/49** by way of adverse possession and for determination of the alleged adverse possession among other orders sought in the originating summons which is anchored on the grounds (a) to (j) set out on it's face and the applicant's 16-paragraphed supporting affidavit of even date together with documents marked as "PJO1 And "PJO1" namely a copy of the title deed and a copy of the green card to the suit land respectively.

3. By the preliminary objection, the respondent claims that the originating summons is improperly instituted and flouts the provisions of **section 6 of the Civil Procedure Act (supra)** in that :-

*a) " The defendant had filed Civil suit No. 23 of 2014 at Homa-Bay Chief Magistrate's Court against the plaintiff herein suing him for trespass to land parcel No. Gem/Kajulu/49.*

*b) The issue of adverse possession has been raised as a defence in the same case.*

*c) The case is still pending in court and is coming up for further hearing on the 12<sup>th</sup> September 2019.*

*d) The matter in issue in the suit pending at Homa-Bay is directly and substantially in issue in the above suit in the High Court.*

*e) The suit involve same parties.*

*f) All issues in this suit can be determined in the pending case."*

4. The respondent further claims therein as follows:-

***“ The filling of the instant suit through another lawyer is an abuse of the court”***

5. In a reply to the preliminary objection dated 13<sup>th</sup> September 2019 and filed in court on 16<sup>th</sup> September 2019, the applicant stated inter alia, that the preliminary objection does not raise clear points of law. That whereas the instant suit and Homa-Bay CMC Land case number 23 of 2014 involve the same parties, the Senior Principal Magistrate’s court at Homa-Bay is devoid of jurisdiction over the issue of adverse possession. That the preliminary objection is incompetent, misconceived in law, a waste of the court’s time and process, vexatious, scandalous and an abuse of the court process hence urged this court to overrule the same to pave way for the hearing of the originating summons.

6. In the application, the orders sought are :-

***a) Spent***

***b) That upon hearing of this application inter parte, an order do issue staying the proceedings in Homa-Bay CMC land case No. 23 of 2014, pending the hearing and final determination of this suit.***

***c) That the costs of this application be provided for.***

7. The application is premised on grounds (i) to (vii) set out on its face and the applicant’s 14-paragraphed replying affidavit sworn on 13<sup>th</sup> September 2019 to which is an annexed copy of the plaint in respect of Homa-Bay CMC land case number 23 of 2014 marked as “PJO1”. The applicant stated inter alia, that Homa-Bay CMC land case No. 23 of 2014 is partly heard and may be finalized before the instant suit. That he stands to suffer prejudice thereby and in the interest of justice, the orders sought in the application be granted.

8. The respondent opposed the application by way of grounds of opposition dated 4<sup>th</sup> October 2019 and filed in court on 7<sup>th</sup> October 2019. He termed the application incompetent, misconceived and that this court lacks jurisdiction over the same on the ground that:-

***i. The application for stay of a suit can only be entertained by the court hearing the suit to be stayed and not another superior court.***

***ii. The High Court can only transfer the suit pending before the lower court and bring the same before it for consolidation but that cannot be done in the instant circumstance.***

***iii. The institution of the instant suit has been objected to by the respondent and the instant application is mischievous.***

9. On 7<sup>th</sup> October 2019, by consent of counsel for the respective parties, this court directed that the preliminary objection and the application be argued by written submissions; see also **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction 33 (a) of the Environment and Land Court Practice Directions, 2014.**

10. Learned counsel for the applicant filed submissions dated 23<sup>rd</sup> October 2019 and filed on 25<sup>th</sup> October 2019 in respect of the preliminary objection. Counsel gave brief facts of the preliminary objection and analysed two (2) issues for determination in favour of the applicant. Counsel cited **sections 6 of the Civil Procedure Act (supra). Sections 38 (1) of the Limitation of Actions Act Cap 22 Laws of Kenya**, the Court of Appeal decision in **Christopher Kioi and another –vs- Winnie Mukolwe and 4 others (2018) eKLR** and the decision in **Mukisa Biscuit Manufacturing Company Limited (1969) EA 696**, to buttress her submissions.

11. Regarding the application, counsel for the applicant filed submissions dated evenly giving brief facts of the application, framed and analysed issues as to whether this court has the jurisdiction to grant the prayers sought therein and whether the prayer should be granted. Counsel relied on **section 3A (supra)** and submitted in favour of the applicant in the interest of justice.

12. Learned counsel for the respondent were duly served with the submissions as per affidavit of service sworn and filed on 4<sup>th</sup> December 2019. However, counsel failed to file their submissions as directed by this court on 7<sup>th</sup> October 2019.

13. I have duly considered the originating summons, the preliminary objection, the application and the applicant’s submission including issues framed and authorities cited therein. Therefore, the issues for determination are:-

***a) Whether the preliminary objection and the application are merited herein.***

***b) What appropriate orders should this court grant in the circumstances?***

14. It is common baseline that Homa-Bay CMC Land case No. 23 of 2014 is pending hearing and determination as clearly shown in grounds (a) to (c) of the preliminary objection. The same is further revealed at paragraph 2 of the applicant’s replying affidavit to the preliminary objection.

15. In view of the foregoing observation, are the parties in Homa-Bay CMC land case No. 23 of 2014 the same as the parties in this suit? The answer therefore is in the affirmative in view of grounds (d) (e) and (f) of the preliminary objection as read with paragraphs 2 and 3 of the replying affidavit to the preliminary objection and the applicant’s submissions.

16. On that score, is the instant suit subjudice? The **Black's Law Dictionary 10<sup>th</sup> Edition** has fashioned the defamation of the term "Subjudice" thus:-

*"(Latin "under a Judge") Before the Court or Judge for determination."*

17. Moreover, **Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya** provides:-

*"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed." (Emphasis added)*

18. The defendant has raised the preliminary objection herein on the grounds including subjudice. Therefore the said objection calls for a definitive, determinative and prompt pronouncement.

19. It is trite law that a preliminary objection is a threshold question and best taken at its inception; see **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko and 2 others (2013) eKLR**.

20. In the **Mukisa Biscuits case (supra)** the court held that :-

*" ..... a preliminary objection consists of a point of law which has been pleaded or ..... by clear implication out of pleadings and if argued as a preliminary objection ,will dispose of the suit. Examples are an objection to jurisdiction on the court, a plea of limitation or submission....."*

21. Similarly, in **Oraro –vs- Mbeja (2005) KLR 141**, Ojwang , J (as he then was) applied the **Mukisa Biscuits case (supra)** and held, inter alia:-

*" A preliminary objection ..... a point of law which must not be blurred by factual details liable to be contested."*

22. I note from the originating summons and the grounds of the preliminary objection that adverse possession is the central claim and it is raised as defence in Homa-Bay CMC land case No. 23 of 2014 respectively. I take into account **sections 37 and 38 of the Limitation of Actions Act Cap 22 as read with Order 37 Rule 7 of the Civil Procedure Rules 2010**. It then follows that the claim for adverse possession is a preserve of this court and accordingly Homa-Bay Chief Magistrate's court is devoid of jurisdiction. Thus, the provisions of **section 6 of the Civil Procedure Act Cap 21** are not completely flouted in the present scenario.

23. It has emerged from the arguments herein that Homa-Bay CMC Land case No. 23 of 2014 is partly heard. I also consider the reliefs sought therein as well as the adverse possession claim in the instant suit which features in the other said suit.

24. This court is guided by the overriding objective under **section 3 of the Environment and Land Court Act 2015 (2011)** and the sections cited in the application. **Section 3A of the (supra)** provides for the court's discretion evermore for the purposes of upholding the law as far as possible and this would require preserving the claims of the parties so that they may be heard and determined according to the law. Furthermore, the court's discretion is never exercised just on the basis of proportions of law; there must be a factual situation of which the court takes cognizance in relation to which its equitable conscience is exercised; see **Oraro case (supra)**.

25. From the foregoing discourse, I find that in the interest of justice to both parties the instant suit be heard and determined as the parties' respective claims in the Homa-Bay CMC land case are preserved worthwhile. The scales of Justice pointedly tilt in favour of the application against the respondent in the obtaining circumstances. To that end, the application is merited as the Preliminary Objection considerably fails.

26. A fortiori, it is hereby ordered as follows:-

*a) The preliminary objection dated 2<sup>nd</sup> September 2019 and filed in court on 3<sup>rd</sup> September 2019 is hereby disallowed.*

*b) The application dated 13<sup>th</sup> September 2019 and filed in court on 16<sup>th</sup> September 2019 be and is hereby allowed in terms of order No. 2 sought therein.*

*c) Costs be in the cause.*

DATED, SIGNED and DELIVERED at MIGORI this 5<sup>th</sup> day of FEBRUARY 2020.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Odoni Awino holding brief for Nancy Nyarige for the respondent.

Mr. Singei holding brief for Migele learned counsel for applicant.

Court Assistant – Tom Maurice