



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 44 OF 2019 (O.S)

WILLIAM NGETHE WAWERU.....1ST PLAINTIFF
SAMUEL NJOROGE MUCHANE.....2ND PLAINTIFF
TITUS MWANGI KARANJA.....3RD PLAINTIFF
MARGARET NYAMBURA KURIA.....4TH PLAINTIFF
JOHN MUNGE GIKONYO.....5TH PLAINTIFF
JOSEPH MWANGI KIRARI.....6TH PLAINTIFF
MARGARET NJAMBI MACHARIA.....7TH PLAINTIFF
MARY WANJIRU WANGARI.....8TH PLAINTIFF
TIMOTHY NJOROGE WAWERU.....9TH PLAINTIFF
JAMES MWANGI NJOROGE.....10TH PLAINTIFF
DAVID MUYA GITITI.....11TH PLAINTIFF
ELIZABETH MUTHONI.....12TH PLAINTIFF
GEORGE KINUTHIA.....13TH PLAINTIFF
PETERSON MWANGI KAKA.....14TH PLAINTIFF

VERSUS

KANYAMWI TRADING COMPANY LIMITED.....DEFENDANT

RULING

1. This ruling is in respect of two applications: plaintiffs' Notice of Motion dated 19th June 2019 and defendant's Notice of Motion dated 28th June 2019. The following orders are sought in the former application:

1. ...

2. *THAT this Honourable Court be pleased to remove and transfer the suit NAKURU CMCC ELC NO. 69 OF 2019 from the Chief Magistrate's Court to the Environment and Land Court and the same be consolidated with NAKURU ELC CASE NO 44 OF 2019 (OS) for hearing and determination.*

3. *THAT in the alternative this Honourable Court be pleased to issue an order of stay of the proceedings in NAKURU CMCC ELC NO. 69 OF 2019 pending the hearing and determination of this suit.*

4. *THAT costs of this application be borne by the Defendant.*

2. On the other hand, the defendant seeks the following orders in Notice of Motion dated 28th June 2019:

a) ...

b) ...

c) *THAT pending hearing of this application inter-parties this Honourable Court stays ELC NO. 44 OF 2019 (O.S) being the suit before this Honourable court filed on the 15th May 2019 being substantially in issue with the suit pending before the Chief Magistrates' Court Case no ELC 69/2019 filed on the 29th of March 2019 against the same parties and over the same subject matter and they had entered appearance including filing responses.*

d) *THAT this Honourable Court orders the suit before it offends the provisions of section 7 of the Civil Procedure Act as it contradicts the principle of sub judice hence issue a setting aside order.*

e) *THAT the costs of this suit be provided for.*

3. Notice of Motion dated 19th June 2019 is supported by an affidavit sworn by John Munge Gikonyo, the 5th plaintiff. He deposed that the defendant filed Nakuru CMCC ELC NO. 69 of 2019 against the plaintiffs herein seeking orders that it be declared as the rightful owner of the properties known as Gilgil/Karunga Block 12 (Uikaro Kanyamwi Farm)/275, 280, 282, 344, 369, 379, 384, 403, 441, 390, 35, 407 & 308; demolition of structures and eviction of the plaintiffs. He added that the main issue in Nakuru CMCC ELC NO. 69 of 2019 is ownership of the suit properties which is the same question in this suit and that proceedings in the said matter may be prejudicial to proceedings before this court. The defendant opposed the application through Grounds of Opposition dated 12th July 2019 in which it took the position that the application is filed in bad faith and that it offends **Section 6** of the **Civil Procedure Act**.

4. The defendant's Notice of Motion dated 28th June 2019 is supported by an affidavit sworn by its director Doris Nyambura Kariuki. She deposed that the defendant is the registered proprietor of the parcels of land known as Gilgil/Karunga Block 12 (Uikaro Kanyamwi Farm)/275, 280, 282, 344, 369, 379, 384, 403, 441, 390, 35, 407 & 308; that the defendant filed Nakuru CMCC ELC NO. 69 of 2019 against the plaintiffs herein on 29th March 2019; that the plaintiffs were served and duly entered appearance in the said matter and filed other pleadings; that the defendant was thus shocked when served with pleadings in this case as well as the order issued on 29th May 2019. He added that the plaintiffs concealed information from the court and urged the court to grant the orders sought.

5. The plaintiffs opposed Notice of Motion dated 28th June 2019 through a replying affidavit sworn by John Munge Gikonyo, the 5th plaintiff. He deposed that the defendant was duly served prior to the orders of 29th May 2019 being issued, that the plaintiff filed a replying affidavit in Nakuru CMCC ELC NO. 69 of 2019 in which they made it clear that they intended to file an adverse possession claim. He added that they filed this case because the Chief Magistrate's Court lacks jurisdiction to hear adverse possession claims.

6. Both applications were canvassed together through written submissions. Citing **Jesee Njoroge Gitau v Kibuthu Macharia & another [2019] eKLR**, the plaintiffs restated that they filed this case because the Chief Magistrate's Court lacks jurisdiction to hear adverse possession claims. They added that this suit is not subjudice since the subordinate court lacks jurisdiction to hear adverse possession claims. Regarding the issue of setting aside, they argued that the order of 29th May 2019 was issued regularly after service and therefore ought not to be set aside.

7. On its part, the defendant argued that the plaintiffs knew about the existence of Nakuru CMCC ELC NO. 69 of 2019 yet failed to disclose that fact when they sought the order of 29th May 2019 and that this suit therefore offends **Section 6** of the **Civil Procedure Act**. It therefore relied on **Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR** and urged the court to set aside the said orders and to dismiss Notice of Motion dated 19th June 2019.

8. I have considered the applications, the affidavits filed, the grounds of opposition and submissions of parties. There is no dispute that the plaintiffs herein are the defendants in Nakuru CMCC ELC NO. 69 of 2019. In that case, the plaintiff seeks judgments against the defendants for a declaration that it is the owner of the parcels of land known as Gilgil/Karunga Block 12 (Uikaro Kanyamwi Farm)/275, 280, 282, 344, 369, 379, 384, 403, 441, 390, 35, 407 & 308; a permanent injunction restraining the defendants from trespassing onto the properties as well as eviction of the defendants therefrom. On the other hand, the plaintiffs herein seek determination of the question whether the defendant's title to the said properties has become extinguished by adverse possession. Either way, the issues of possession and ownership of the suit properties cut across both cases. Nakuru CMCC ELC NO. 69 of 2019 was filed on 29th March 2019 while this suit was filed later on 15th May 2019.

9. Among the materials placed on record by the defendant is a replying affidavit sworn by John Munge Gikonyo and filed by the plaintiffs herein in Nakuru CMCC ELC NO. 69 of 2019 on 8th May 2019. Thus, when the plaintiffs herein were filing this suit on 15th May 2019, they were well aware of the existence of Nakuru CMCC ELC NO. 69 of 2019. As a party seeking ex parte orders under a certificate of urgency, they ought to have made that disclosure. Nevertheless, I note that the order of 29th May 2019 was made after a scheduled inter parte hearing in respect of which the defendant was duly served.

10. When dealing with an application for setting aside, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyिता Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.

11. Since the defendant herein was served, the court has discretion whether or not to set aside the order of 29th May 2019. The defendant having been served, it ought to have responded to the application and raised any arguments against it, including the issue of sub-judice. Considering that one of the prayers that the defendant is seeking in its plaint in the subordinate court is eviction of the plaintiffs from the suit property, a prayer which ordinarily would only be granted upon hearing of the main suit, I see no prejudice that the defendant would suffer if the orders remain in place. In the circumstances, I am not persuaded that setting aside is appropriate herein.

12. The other issue for determination is whether this suit should be stayed in view of the provisions of **Section 6** of the **Civil Procedure Act** or whether Nakuru CMCC ELC NO. 69 of 2019 should be transferred to this court for consolidation with this case. The whole argument about this issue revolves around the perception that the subordinate court lacks jurisdiction to hear and determine claims of adverse possession in view of the provisions of **Section 38** of the **Limitation of Actions Act** which provides as follows:

38. Registration of title to land or easement acquired under Act.

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3)

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) ... [Emphasis supplied]

13. The plaintiffs herein strongly argue that the said section deprives the subordinate court jurisdiction to hear and determine claims of adverse possession. While I note the position taken in **Jesee Njoroge Gitau v Kibuthu Macharia & another** (supra), I am of a different opinion. I had occasion to consider the issue recently in the case of **Nakuru ELC No. 2 of 2019 Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another** where I stated as follows:

12. The judicial system in Kenya also includes the magistrates' courts as established under Article 169 of the Constitution of Kenya, 2010. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates' courts. In that regard parliament legislated the following provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011:

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

13. Indeed, the Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the Environment and Land Court Act, 2011.

14. Some four years after enactment of the Environment and Land Court Act, 2011, parliament also enacted the Magistrates' Courts Act, 2015 so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of the Constitution and to confer jurisdiction, functions and powers on the magistrates' courts. The Act came into operation on 2nd January, 2016 and its Section 9 (a) provides:

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (ii) compulsory acquisition of land;
- (iii) land administration and management;
- (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (v) environment and land generally.

15. The upshot of the provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of, and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land. ...

16. Although Section 38 (1) of the Limitation of Actions Act specifically refers to the High Court without mention of the magistrates' courts, it must be remembered that is an old statute that came into operation way back on 1st December 1967 compared to the more recent Environment and Land Court Act, 2011 and the Magistrates' Courts Act, 2015, both of which were enacted after promulgation of the Constitution of Kenya, 2010. ...

17. Since Section 38 (1) of the Limitation of Actions Act predated the Constitution of Kenya, 2010, its interpretation must be guided by Section 7 (1) of the Sixth Schedule of the Constitution of Kenya titled Transitional and Consequential Provisions which provides:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

18. The alterations, adaptations, qualifications and exceptions referred to above must give Section 38 (1) of the Limitation of Actions Act conformity to Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 both of which were enacted to give effect Article 162(2) (b) and Article 169(1) (a) and (2) of the Constitution. So as attain that conformity, Section 38 (1) of the Limitation of Actions Act must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction of the jurisdiction and power to handle cases involving occupation of, and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with Article 259 which enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles.

19. Among the principles of the constitution is devolution and access to services. Articles 6(3) and 48 of the Constitution have the combined effect of requiring devolution of and access to judicial services as well as access to justice for all persons. Allowing magistrates' courts to handle adverse possession claims will certainly make it possible for more litigants to access justice since magistrates' courts are more widely distributed in most parts of the country as opposed to this court which is yet to be stationed in all the counties. ...

....

21. Even if one were to argue that the procedure for commencing and prosecuting adverse possession claims as provided for under Order 37 Rules 7, 16, 17 and 18 of the Civil Procedure Rules requires that such proceedings be commenced and prosecuted before a "judge", I note that the word "judge" is defined at Section 2 of the Civil Procedure Act to mean "the presiding officer of a court". Thus as used in the Civil Procedure Act and the rules thereunder, "judge" does not exclusively refer to judges of the High Court or the Environment and Land Court as established under Article 162 of the Constitution. It includes a magistrate.

....

24. In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015, the principles of interpretation of the constitution as well as the principles of the constitution such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the Environment and Land Court Act, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession.

14. If Section 38 (1) of the Limitation of Actions Act does not bar this court from handling adverse possession claims, and I agree it doesn't, why would it bar the magistrates' courts whose jurisdiction on issues of title to land is expressly provided for under Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 both of which were enacted to give effect Article 162(2) (b) and Article 169(1) (a) and (2) of the Constitution? I see no reason why it should.

15. I still maintain the persuasion that so long as presided over by a magistrate who is duly gazetted under **Section 26 (3)** of the **Environment and Land Court Act, 2011** and has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession. In this particular case, the defendant which is the registered proprietor of the suit properties filed Nakuru CMCC ELC NO. 69 of 2019 in the subordinate court. In choosing that court he must have satisfied himself that the value of the suit properties is within the pecuniary jurisdiction of the said court. I am not aware of any contention to the contrary. In fact, the sole reason cited by the plaintiffs for filing this case in this court is the perception that the subordinate court lacks jurisdiction to hear and determine claims of adverse possession in view of the provisions of **Section 38** of the **Limitation of Actions Act**. Thus, if this matter is transferred to the subordinate court, the said court will deal with all aspects of the dispute as disclosed in this case and in Nakuru CMCC ELC NO. 69 of 2019.

16. Section provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously 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.

17. The issue of adverse possession is not pending in Nakuru CMCC ELC NO. 69 of 2019. Nevertheless, I appreciate that the fact that the defendant herein has filed a suit i.e. Nakuru CMCC ELC NO. 69 of 2019 in which it seeks to evict the plaintiffs herein is a material consideration when dealing with the claim for adverse possession. In these circumstances, I see no valid reason to stay this suit or Nakuru CMCC ELC NO. 69 of 2019 at this point or to order transfer of Nakuru CMCC ELC NO. 69 of 2019 to this court. The real solution lies in transferring this case to the subordinate court for hearing and determination. Parties should consider consolidation of the two suits once both are in the subordinate court so that all issues are determined once and for all.

18. In view of the foregoing discourse, I make the following orders:

i) This matter (ELC No. 44 of 2019 William Ngethe Waweru & 13 Others v Kanyamwi Trading Company Ltd (Nakuru)) is hereby transferred to Chief Magistrates Court Nakuru for hearing and determination. The said court is at liberty to make any further or other orders as regards the orders made by this court on 29th May 2019.

ii) Parties are at liberty to make an appropriate application before the subordinate court for consolidation of this matter with Nakuru CMCC ELC NO. 69 of 2019 Kanyamwi Trading Company Ltd v William Ngethe Waweru & 13 Others.

iii) If parties are unable to agree on consolidation or if consolidation is not ordered, the subordinate court shall be at liberty to make appropriate orders as to whether ELC No. 44 of 2019 William Ngethe Waweru & 13 Others v Kanyamwi Trading Company Ltd (Nakuru) will be stayed pending hearing and determination of Nakuru CMCC ELC NO. 69 of 2019 Kanyamwi Trading Company Ltd v William Ngethe Waweru & 13 Others.

iv) Costs of Notice of Motion dated 19th June 2019 and Notice of Motion dated 28th June 2019 shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 4th day of February 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Wangari holding brief for Mr Kahiga for the plaintiffs

No appearance for the defendant

Court Assistants: Beatrice & Lotkomo