



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 145 OF 2018 (OS)**

**JONES WAISIKU RIOBA.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEORGE MUTUNDI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of a preliminary objection dated 16<sup>th</sup> April, 2019 and filed in court on 23<sup>rd</sup> April, 2019 whereby the defendant through M/s Kerario Marwa and Company Advocates complains that the instant suit offends the provisions of section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya. Thus, he is seeking that the suit be struck out.

2. The instant suit was commenced by way of an originating summons dated 27<sup>th</sup> November 2018 and filed in court on 10<sup>th</sup> January 2019 under Order 37 Rule 7 (1) (2) Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 as read with section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya, the Land Registration Act, Land Act and Article 60 (1) of the Constitution of Kenya, 2010. The plaintiff, Jones Waisiku Rioba through Ms. Abisai and Company Advocates is seeking inter alia, a declaration that he has acquired adverse possession of part of the suit land, LR NO. BUKIRA/BWISABOKA/131 measuring approximately 16.0 hectares now registered as LR NO. Bukira/Bwisaboka/4629 measuring 8.611 hectares. Moreover, he is seeking an order for excision of the portion measuring 1.4 acres thereof and the same be transferred to him accordingly.

3. The originating summons is anchored on :-

a) Grounds 1 to 11 set out on it's face which I take into account in this application.

b) A 20 –paragraphed supporting affidavit sworn on even date by the plaintiff and annexed documents marked as “WR1” and “WR2” namely a certified true copy of the suit land register and photographs of developments carried out by the plaintiff on the suit land.

4. In his 11 paragraphed replying affidavit sworn on 11<sup>th</sup> February 2019 and filed in court on even date, the defendant opposed the originating summons. He deposed inter alia, that he became the registered owner of the suit land now registered as LR NO. BUKIRA/BWISABOKA/4629 in May 2014. That he is a beneficiary of a settlement that was recorded in court involving the original owner of LR NO. BUKIRA/BWISABOKA/131 one Magabe Mwita Ngoina and Jackson Gimonge Nyagimwisa in Kisii HCC No. 48 of 1991. That the plaintiff was not part of the said suit.

5. The defendant further deposed that LR NO. BUKIRA/BWISABOKA/131 was subdivided in the year 1999 and several portions transferred to new owners and beneficiaries. As such, if the plaintiff was residing thereon he would have taken up the issue. That immediately the plaintiff trespassed onto the defendant's land hence precipitating a new case namely Kehancha SPMCC NO. 22 of 2014 which is still pending determination.

6. On 3<sup>rd</sup> December 2019, this court directed that the preliminary objection be heard by way of written submissions. Accordingly, on 9<sup>th</sup> January 2020 and 22<sup>nd</sup> January 2020 learned counsel for the plaintiff and learned counsel for the defendant filed their submissions dated 16<sup>th</sup> December 2019 and 22<sup>nd</sup> January 2020 respectively.

7. In his submissions, counsel for the plaintiff urged this court to dismiss the preliminary objection with costs. He gave brief facts of the pending suit namely Kehancha SPM CC No. 32 of 2014 (Kehancha Magistrate's suit herein) which was stayed by the order of this court on 8<sup>th</sup> April, 2019. He further framed and analysed two issues for determination namely whether this suit is subjudice and whether the same should be struck out in favour of the plaintiff.

8. To buttress his submissions, counsel relied on the following authorities:-

a) *Thiba Min Hydro Company Ltd –vs- Josphat Karu Nduiga (2013) eKLR regarding substance of a suit.*

b) *Public Trustee –vs- Wanduru Ndegwa (1984) eKLR on adverse possession.*

9. On the other hand, the defendant’s counsel submitted regarding the plaintiff’s application by way of a notice of motion dated 14<sup>th</sup> March 2019. I note from the proceedings herein that the said application was determined by this court on 8<sup>th</sup> April, 2019.

10. Be that as it may, I consider the submissions since counsel cited **section 6 (supra)** regarding stay of suits. He also relied on the case of **Kenya Wildlife Service -vs- James Mutembei (2019) eKLR** and **Halsbury’s Laws of England, 4<sup>th</sup> Edition volume 37 page 330 at 322** on the threshold for stay of proceedings or suit.

11. I have thoroughly considered the preliminary objection, the originating summons, the replying affidavit and rival submission including authorities cited therein. The issues for determination herein boil down to whether the instant suit is subjudice and whether it is bound to be struck out.

12. At the outset, I must point out that in Black’s Law Dictionary 10<sup>th</sup> Edition at page 1652, the term “**subjudice**” means;-

**“Before the court or Judge for determination”**

13. Similarly, the concise Oxford English Dictionary 12<sup>th</sup> Edition at page 1436, the term “**subjudice**” is defined thus:-

**“Under judicial consideration and therefore prohibited from Public discussion elsewhere.”**

14. It is the defendant’s contention that this suit offends the provisions of **section 6 (supra)** which reads:-

**“ 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 previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

15. The defendant also contended that he filed Kehancha Magistrate’s suit way back in the year 2014. That the plaintiff filed the instant suit in the year 2018. That as such, the 1<sup>st</sup> suit in time should not be stayed as per **section 6 (supra)**.

16. The plaintiff asserted that Kehancha Magistrate’s suit has been stayed by this court’s order of 8<sup>th</sup> April, 2019. The stay was granted due to the fact that a determination of this suit would ultimately address the issues in the Kehancha Magistrate’s suit.

17. The plaintiff further asserted that the defendant filed Kehancha Magistrate’s court suit for trespass in abid to extinguished the plaintiffs occupation of the suit land based on mala fides. That he has stayed on part of the suit land which he bought in 1984. Thus, he has laid a claim of adverse possession over the portion of the suit land.

18. On 8<sup>th</sup> April, 2019, this court found that the plaintiff’s application by way of a notice of motion dated 14<sup>th</sup> March 2019 was duly served on the defendant. The application was not opposed. Wherefore, Kehancha Magistrate’s court suit was ordered stayed pending the hearing and determination of this suit with costs in the cause.

19. The import of the orders of this court granted on 8<sup>th</sup> April, 2019 was that it is Kehancha Magistrate’s court suit which is hereby stayed; see **section 6 (supra)**.

20. This court is very conscious of it’s original and appellate jurisdiction as stipulated under section 13 (1) of the Environment and Land Court Act 2015 (2011). Admittedly, this court has the relevant powers and is guided by principles are provided for under **sections 13 (2) and 15 of the same Act** respectively.

21. The defendant has raised a preliminary objection on a point of law anchored on **section 6 (supra)**. In that respect, I subscribe to the case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributions (1969) EA 696** whereby Law, JA expressed himself thus;-

**“A preliminary objection consists of point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as preliminary objection with dispose of the suit.....”**

22. It is trite law that a preliminary objection is a threshold question and best taken at reception. That the same calls for a definitive, determinative and prompt pronouncement; see **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko and 2 others (2013) eKLR**.

23. Be that as it may, the point of law raised herein has been determined by this court by virtue of orders rendered on 8<sup>th</sup> April, 2019. To that end, the purpose of the instant preliminary objection has been spent.

24. A fortiori, the defendant’s preliminary objection dated 16<sup>th</sup> April, 2019 and filed in court on 23<sup>rd</sup> April, 2019 is devoid of merits. I

proceed to dismiss the same with costs in the cause.

**DATED, SIGNED and DELIVERED at MIGORI this 3<sup>rd</sup> day of March 2020.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Ms. Okota learned counsel for the plaintiff/respondent

Mr. Mwita Kerario learned counsel for the defendant/applicant

Court Assistant – Tom Maurice