



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**HC ELC NO. 35 OF 2018 (OS)**

**IN THE MATTER OF A CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION OVER THE PARCEL OF LAND KNOWN AS KERICHO/EAST SOTIK NUMBER 203**

**WESLEY KIPYEGON BOR .....1<sup>ST</sup> PLAINTIFF**

**GLADYS CHEROP SIGEI ..... 2<sup>ND</sup> PLAINTIFF**

**NANCY CHEPKOECH RONO .....3<sup>RD</sup> PLAINTIFF**

**WILLIAM KIPLANGAT TORONGEI .....4<sup>TH</sup> PLAINTIFF**

**MITEI CHERUIYOT JOSEPH.....5<sup>TH</sup> PLAINTIFF**

**RICHARD ARAP MUTAI .....6<sup>TH</sup> PLAINTIFF**

**NAUMY CHELANGAT BIRIR.....7<sup>TH</sup> PLAINTIFF**

**PETER KIPKORIR NGENO .....8<sup>TH</sup> PLAINTIFF**

**JULIUS CHERUIYOT RONO..... 9<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**RICHARD PARES (Being sued as the Administrator of the estate of the late**

**KIPKORIR ARAP CHEBOGOIYO) .....1<sup>ST</sup> DEFENDANT**

**MUTAI PARES (Being sued as the Administrator of the estate of the late**

**KIPKORIR ARAP (CHEBOGOIYO) .....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR BOMET .....3<sup>RD</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is before me for determination is a preliminary objection raised by 1<sup>st</sup> and 2<sup>nd</sup> defendants – **RICHARD PARES** and **MUTAI PARES** – vide a notice to raise it dated 11<sup>th</sup> July, 2019 and filed on the same date. The objection is essentially based on two (2) propositions, with what may appear to be the third one being the desired result if the two propositions are successful. The two propositions are:

1. That the plaintiff failed to annex to the affidavit of 3/5/2018 sworn on the same date an abstract of title of the land they adversely claim contrary to mandatory provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules.

2. That the title to land known as KERICHO/EAST SOTIK SS/203 is non-existent and therefore there is no title in place in the defendant's name to be cancelled and registered in the name of the plaintiff's in substitution thereof.

2. There is the third limb of the objection, which may appear to some as a proposition, but it is actually a prayer. It is as follows:

3. That consequently the defendants pray that the originating summons dated 3/5/2018 be struck out with costs.

3. In order to appreciate and contextualise the objection, an understanding of the background is pertinent. The plaintiffs – **WESLEY KIPYEGON BOR, GLADYS CHEROP SIGEI, NANCY CHEPKOECH RONO, WILLIAM KIPLANGAT TORONGEI, MITEI CHERUIYOT JOSEPH, RICHARD ARAP MUTAI, NAUMY CHELANGAT BIRIR, PETER KIPKORIR NGENO** and **JULIUS CHERUIYOT RONO** – instituted their suit here vide an originating summons dated 3<sup>rd</sup> May, 2018 filed in court on 7<sup>th</sup> May, 2018. All of them are claiming portions of land parcel **NO KERICHO/ EAST SOTIK SS/203** as adverse possessors. The land was registered in the name of the late **KIPKORIR ARAP CHEBOGOIYO** and the plaintiffs claim that they bought their portions from the 1<sup>st</sup> and 2<sup>nd</sup> defendants and/or their siblings. They later went into occupancy and/or possession and according to them, they have now become adverse possessors. They pray for various orders, the main one being that they be declared as adverse possessors.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants responded vide a replying affidavit dated 15<sup>th</sup> May, 2018 filed in court on the same date. They denied the plaintiffs claim and deposed, inter alia, that the estate of the late owner – **KIPKORIR ARAP CHEBOGOIYO** – has been distributed to its beneficiaries.

5. It may be useful to add that contemporaneously with the originating summons was also filed an application for restraining orders which the court heard and dismissed. The plaintiffs later applied for its review and that was done, with an order for maintenance of status quo granted to run until the suit is determined. In the 1<sup>st</sup> and 2<sup>nd</sup> defendants' response to the application that was dismissed, they raised the issue of failure or omission by the plaintiff to attach title to the originating summons and the court largely agreed with them in its ruling.

#### SUBMISSIONS

6. It is against the above background that the objection now under consideration was raised. The objection was canvassed by way of written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' submissions were filed on 25<sup>th</sup> November, 2019. They submitted, inter alia, that order 37 rule 7 (2) of Civil Procedure Rules, 2010, make it a mandatory requirement to annex an extract of title of the registered owner of the land to any originating summons filed. The plaintiffs were said to have failed to do so, thus making their suit fatally defective.

7. On the issue of non-existence of title, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' submitted that the original title to the land no longer exists. There were probate and administration proceedings that led to issuance of the requisite grant and that was followed by distribution of the estate of the deceased original owner. The land was subdivided and distributed to several beneficiaries and that is the state of affairs that obtained even at the time suit was filed. The land therefore is no longer in existence as a legal entity and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are certainly not its registered owners.

8. The submissions of the plaintiffs were filed on 30<sup>th</sup> January, 2020. According to the plaintiffs, the court has to decide whether the objection raised is *res-judicata*, whether failure by the plaintiff to annex title as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> defendants can be dispensed with by way of a preliminary objection, and whether the preliminary objection raises a pure point of law, especially as regards the issue of failure to annex title.

9. As regards whether the issue of not annexing title is *res-judicata*, the plaintiffs submitted that it is. The issue was said to have been raised and addressed vide a ruling dated 30<sup>th</sup> August, 2018. That ruling was later challenged and set aside and/or reviewed by yet another ruling. That being the position, it was wrong, the plaintiffs submitted, to raise the issue yet again by way of a preliminary objection.

10. The issue of the non-existence of the title to the land was equally said to be *res-judicata* for exactly the same reasons given regarding failure to annex the title. According to the plaintiff, the two issues were handled together by the court.

11. As to whether the preliminary objection raises a pure point of law, the plaintiff submitted it does not. According to the plaintiffs the facts surrounding the whole issues are disputed and it is trite that a preliminary objection cannot be raised where facts have to be ascertained. This is said to relate more to the second proposition or ground in the preliminary objection. Ultimately, the plaintiff submitted that the objection raised is bad in law, incompetent and misconceived. The court was asked to dismiss it.

12. To reinforce their arguments the plaintiffs cited such decided cases as **MUKHISA BISCUIT COMPANY VS WEST END DISTRIBUTORS LIMITED (1969) EA 696, IN THE MATTER OF THE ESTATE PAULINE MUTHONI NYAGA (deceased): HCC SUCCESSION CAUSE NO. 729 OF 2013, KERUGOYA, PHILES NYOKABI KAMAU VS INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION CA NO. 263 OF 2014, NAIROBI, REPUBLIC VS ELDORET WATER & SANITATION COMPANY LIMITED EXPARTE BOOKER ONYANGO & 2 OTHERS: HCC Misc. Application No. 97 of 2003, ELDORET AND NATIONAL BANK OF KENYA LIMITED VS JOSEPH SERONEI: HCC NO 77 OF 1997, ELDORET**. The first three cases were focused on the issue of *res-judicata* and the plaintiffs were trying to delineate the parameters and ingredients of *res-judicata* and showing how they are aligned or applicable to the issue at hand. The other two cases focused on whether the un-ascertained facts can form a basis of raising a preliminary objection.

## ANALYSIS

13. I have had a look at the suit as filed, the various rulings that preceded the filing of the preliminary objection and the rival submissions by both sides. It appears clear to me that the plaintiffs are evading to answer the simple question: Have they annexed the 1<sup>st</sup> and 2<sup>nd</sup> defendants title to the originating summons? Instead of answering, they submit that it should not be raised in the first place. To them, it is *res-judicata*. It is true that the issue was raised in the canvassing of the applications previously before court. It was in the context of the determination of the applications that it was raised. The issue was not raised as a preliminary objection. It was raised as a response to an application and for purposes of determining that application. It is in that context that the raising of that issue should be seen.

14. The question to ask now is: Is the issue now raised in that same context and for the same purpose? And the answer to this is No. As raised now, the context is different. The issue is first and foremost raised as a preliminary objection. It is addressing the suit, not an application. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are raising it as an issue that can determine the suit in limine. The purpose is different. The context is different. And so also is the intended outcome. **RESJUDICATA** therefore does not apply.

15. This being the position, the plaintiffs cannot evade the need to explain to the court why they have not annexed extracts of 1<sup>st</sup> and 2<sup>nd</sup> defendants title, if any, to the originating summons. The fact of failure to annex that title is not one to be ascertained. It is clear that no such extract of title is annexed and that fact is not contestable. The extract is simply not there.

16. Are the plaintiffs mandatorily required to annex extract of title? The answer is YES. Order 37 rule 7 (2) reads as follows:

### Order 37 rule 7 (2)

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

17. I need to explain why it becomes necessary for such extract to be annexed and why our courts take it seriously if it is not. First, an adverse possessor is challenging the title of a registered owner. The court is interested to know whether the person sued is really the title holder. If the right person is not sued, the proceedings relating to adverse possession become an exercise in futility. And this is so because you are seeking to dispossess the wrong person.

18. Secondly, it is crucial to know whether the land exists as the legal entity that the adverse possessor purports it to be. Sometimes, the land may have ceased to exist and several owners, some of them not parties to the suit, may already be in possession. What happens in a scenario like that? Is the court going to condemn such owners unheard? The answer is obviously no.

19. I need to drive home my points. In **KWEYU VS OMUTO: CA NO 8 OF (1990) KLR 709, NAIROBI**, the court expressed itself as follows:

“... the appellants supporting affidavit to the originating summons did not have annexed to it a certified extract of title to the parcel of land out of which the suit land was claimed. Save what the parties deponed to in their respective affidavits and the oral evidence before the superior court, the certainty of the existence and proprietorship of the suit land could not otherwise be guaranteed. An order under Section 38 (1) of the Act was not therefore capable of being made. It is for this reason only that I would dismiss the appellants appeal with costs to the respondent.”

20. The same position can be gleaned from the case of **GEORGE KAMAU MACHARIA VS MARY GATHONI KAMAU: ELC NO. 89 OF 2012, NAKURU**, where the court observed thus:

“The main reason for the requirement is because the proceedings for adverse possession can only be maintained against the title holder or current registered owner of the suit land. The purpose of the certified extract of the title is to show the status of the title and the registration details as at the time of its extraction.”

21. And in **SYMON GATUTU & 587 OTHERS VS EAST AFRICAN PORTLAND CEMENT (2011) eKLR, Dulu J** expressed himself in a rather graphic and picturesque language on the same issue. He observed:

“requiring a certified extract is not a talismanic hoop to be jumped by an intended disseisor but the objective is to provide a means to the court to ascertain the existence and proprietorship of the suit land.”

22. I have dwelt at length on this first proposition because I have already made my finding that it is not *res-judicata* and it is obviously a point of law. Alone, even without the second proposition, it is enough to dispose of the suit.

23. But I now come to the second proposition. The plaintiffs aver that it is not a point of law. I would wish to state that I do not see it that way. It is very much tied to the first point. Failure to annex the extract of title is, from what is on record, tied to the non-existence of the title. The plaintiffs want to evade the issue because in my view, the can't demonstrate that the title exist. The creation of that title, its existence, and/or non-existence, are in my view matters of law. The title itself is a legal document. It is created through a legal process. And it ceases to exist also through a legal process. How then can you divorce it from law and treat it as a matter of fact. And if, for the sake of argument, you want to treat it as matter of fact, what have you availed on record to show that the title possibly exists? I have looked through the record. The plaintiffs have availed nothing. They merely deny it with no tangible evidence of that denial. And they want to use that as a basis for arguing in court that it is a disputed fact even when the substance of disputing is lacking.

**DECISION**

24. In my view, the plaintiffs are being too clever by half. The court has to be careful not to accept blinkered arguments which, if accepted, may only serve to limit its appreciation of the whole picture. The plaintiffs' arguments are largely clothed in legalese. They evade to give simple answers to simple questions. Such arguments cannot be allowed to sneak through the net of judicial vigilance. They cannot be allowed to legitimize a decidedly fatal approach to a serious judicial exercise. The plaintiffs summons is fatally flawed.

25. The upshot, in light of the foregoing, is that the preliminary objection raised has to be upheld. I am in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> defendant and I hereby strike out the suit herein with costs.

**Dated, signed and delivered at Kericho this 29<sup>th</sup> day of April, 2020.**

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**A. K. KANIARU**

**JUDGE**