



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 3 OF 2020

JOSEPH NAMAFUNDO.....APPLICANT

VERSUS

ALPHONCE SIMIYU NABIBIA.....RESPONDENT

R U L I N G

JOSEPH NAMAFUNDO (the Applicant herein) is the defendant in **KIMILILI SPMCC ELC CASE NO 31 OF 2012** in which **ALPHONCE SIMIYU NABIBIA** (the Respondent herein) is the plaintiff. In that suit, the Respondent seeks the eviction of the Applicant from the land parcel **NO KIMILILI/KIBINGEI/600** (the suit land).

On the other hand, the Applicant has filed **BUNGOMA ELC CASE NO 2 OF 2020 (O.S)** by way of Originating Summons against the Respondent seeking orders that he is entitled to orders that he be registered as the proprietor of suit land by way of adverse possession because his late father **IDD NANAMAFUNDO KINYURUS** stayed on the suit land since 1966 and passed away in 1976 leaving the Applicant thereon and that the Applicant has continued to utilize the same un – interrupted till the time this suit was filed.

The Applicant has now moved this Court by his Notice of Motion dated 5th February 2002 seeking the main prayer that **KIMILILI SPMCC ELC CASE NO 31 OF 2019** be transferred to this Court for consolidation with **BUNGOMA ELC CASE NO 2 OF 2020 (OS)** because the Magistrate’s Court has no jurisdiction to entertain a claim for adverse possession.

The Respondent who is acting in person has filed a replying affidavit describing the application as frivolous, vexatious and an abuse of the process of the law. From his replying affidavit, the Respondent appears to be responding to the substantive Originating Summons filed in **BUNGOMA ELC CASE NO 2 OF 2020 (O.S)**. He however confirms having filed **KIMILILI SPMCC ELC CASE NO 31 OF 2019** and adds that the said case is still pending and that the Applicant has now realized that he stands the risk of being evicted hence the filing of this application.

When the parties appeared before me on 27th February 2020, it was agreed that this Court determines the application on the basis of the parties’ respective affidavits.

I have considered the application dated 5th February 2020 and the parties’ rival affidavits.

It is common ground that the Respondent has filed **KIMILILI SPMCC ELC CASE NO 31 OF 2019** seeking the eviction of the Applicant from the suit land. That case is still pending. It is also common ground that the Applicant has filed an Originating Summons in **BUNGOMA ELC CASE NO 2 OF 2020 (O.S)** seeking against the Respondent the main order that he has acquired the suit land by way of adverse possession. Among the reasons given by the Applicant for the transfer of **KIMILILI SPMCC ELC CASE NO 31 OF 2019** is that the Subordinate Court at **KIMILILI** has no jurisdiction to entertain a claim for adverse possession. However, the claim for adverse possession has infact been filed in this Court and not at the **KIMILILI** Court. The case that has been filed at **KIMILILI** Court does not seek any orders in adverse possession. It only seeks orders for the eviction of the Applicant from the suit land. That suit is within the jurisdiction of the Subordinate Court and nothing has been placed before me to prove the contrary. And it is the case at **KIMILILI** Court that the Applicant seeks to transfer to this Court.

Having said so, I am aware that **OHUNGO J** has recently delivered a ruling in **PATRICK NDEGWA MUNYUA .V. BENJAMIN KIIRU MWANGI & ANOTHER ELC CASE NO 2 OF 2019 NKU [2020 eKLR]**, in which the Judge made a finding that notwithstanding the provisions of **Section 38(1) of the Limitation of Actions Act** which refers to the High Court as the forum that can determine cases of adverse possession, **Section 9(a) of the Magistrate’s Court Act** as read together with **Section 26(3) or (4) of the Environment and Land Court Act** which are more recent legislations confer upon the Magistrates Courts the jurisdiction to determine claims based on adverse possessions so long as the value of the land is within the pecuniary jurisdiction of those Courts. That ruling was delivered on 30th January 2020 and is of course binding on Subordinate Courts but is of only persuasive value to this Court. It is not relevant however for purposes of this application because the claim for adverse possession has been filed in this Court and not in the Subordinate Court. I have however found it necessary to mention it because as far as I am aware, it is the only decision that has, so far, addressed the issue of the jurisdiction of

Magistrates Court to handle cases of adverse possession following the enactment of the new laws.

Back to the application at hand, since **KIMILILI SPMCC ELC CASE NO 31 OF 2019** and **BUNGOMA ELC CASE NO 2 OF 2020 (O.S)** both involve the same suit land and the parties herein and in order to avoid a multiplicity of suits, it is prudent that **KIMILILI SPMCC ELC CASE NO 31 OF 2019** be transferred to this Court so that the two cases can be consolidated and heard together.

Ultimately therefore the application dated 5th March 2020 is allowed in the following terms: -

- 1. KIMILILI SPMCC ELC CASE NO 31 OF 2019 be and is hereby transferred to this Court.**
- 2. Both KIMILILI SPMCC ELC CASE NO 31 OF 2019 and BUNGOMA ELC CASE NO 2 OF 2020 (O.S) be mentioned on 15th June 2020 for purposes of consolidation and further directions.**
- 3. No orders as to costs.**

Boaz N. Olao.

J U D G E

27th May 2020.

Ruling dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Ruling was due on 4th June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th May 2020.