



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 12 OF 2019 (O.S)

FRANCIS KARANI GATEI.....APPLICANT

VERSUS

PERIS WAINOI GATEI.....RESPONDENT

RULING

The Plaintiff/Applicant filed this suit by way of an omnibus application dated 19th February 2019 under **Order 40 Rule 1 CPR and Section 1A, 1B and 3A CPA**. The applicant sought the following orders:

- (1) That the Honourable Court be pleased to certify this matter urgent and hear it ex-parte in the first instance.***
- (2) That the Honourable Court be pleased to issue a temporary injunction restraining the respondent from evicting the applicant, selling, transferring and dealing in any way with land parcel No. INOI/KAITHERI/396 pending the hearing and determination of prayer 3 and 4.***
- (3) That the Honourable Court be pleased to issue an injunction restraining the respondent from evicting the applicant, selling, transferring and dealing in any way with land parcel No. INOI/KAITHERI/396 pending the hearing and determination of the suit.***
- (4) That the costs of this application be provided for.***

That application is supported by six grounds shown on the face thereof and an affidavit of the applicant sworn the same date. On 14/3/2019, the respondent filed a replying affidavit opposing the said application. The respondent annexed numerous documents in further opposing to the said application. On 15/3/2019, the said application came up for interparties hearing and the parties agreed by consent to canvass the application by affidavit evidence and written submissions. On 14/6/2019, this Court rendered itself on that application. On 1/10/2019, this Court came up for pre-trial directions and the parties agreed to file their respective compliance documents and come back on 24/10/2019 for further directions. On the said date, the matter came up for mention whereby the parties agreed by consent to have this suit heard first by way of Notice of Preliminary Objection dated 8/10/2019 which reads as follows:

“TAKE NOTICE that the Respondent herein shall raise a Preliminary Objection to the hearing of this suit and the same be dismissed with costs on the following grounds:

- 1. That the suit is RES-JUDICATA as the matter was heard and determined in Kerugoya High Court Succession Cause No. 350 of 2012 where the Applicant herein was also an applicant and the Respondent as respondent.***

2. That the issue of Adverse possession claimed by the Applicant herein cannot arise as the title to the respondent over land parcel No. INOI/KAITHERI/396 was transferred to her on 26th May 2011 and letter of consent and title deed issued.

3. The Applicant herein was a licensee and cannot claim adverse possession who is not entitled to any portion of the land and further more the applicant is lying to the Court that he had been on the land since the year 2002 but the evidence on record is that he came on the land in the year 2011.

4. The Respondent prays that the entire suit herein be dismissed with costs.

The Respondent filed grounds of opposition to the Preliminary Objection dated 14th October 2019.

RESPONDENT'S SUBMISSIONS

According to the respondent, the issues herein were canvassed in Kerugoya High Court Succession Cause No. 350 of 2012 where the Applicant was the applicant while the Respondent was still the respondent. He submitted that the Applicant in this case had applied for revocation of grant in the above mentioned succession cause where the same was dismissed. He submitted that the claim by the Applicant herein was an issue in the succession cause and that the issue is now Res-judicata. He therefore sought to have this suit dismissed with costs.

APPLICANT'S SUBMISSIONS

The applicant submitted that the ingredients of res-judicata must be given a liberal interpretation in that the issue in dispute in the current case must be the same or substantially the same as in the previous case. The parties to the suits should be the same or parties under whom they or any of them is claiming litigation under the same title and lastly the earlier claim must have been determined. He cited *Section 7 of the Civil Procedure Act* where the doctrine is anchored and submitted that in the instant case, the parties are different from the succession cause which had many respondents. The applicants also stated that the issue in the succession cause was on the revocation of a grant while the issue in the current suit is about adverse possession and that the issue being canvassed in present suit was never in issue in the previous case. In conclusion, the Applicant stated that a Preliminary Objection defined in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696* was as follows:

“Is in the nature of what used to be a demurrer. It raises a pure point of law which is argued in the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

The Applicant stated that what is being raised as a Preliminary Objection is not since all the issues raised have to be ascertained. He stated that the Respondent needs to provide the judgment and proceedings in the Succession Cause No. 350/2012 to enable the Court to clearly have a look at it and ascertain whether the facts being stated are correct.

ANALYSIS AND DETERMINATION

I have considered the affidavit evidence and the annexures thereto. I have also considered the applicable law. *Section 7 of the Civil Procedure Act* provides as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or in the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

A Preliminary Objection was defined in the case of *Mukhisa Biscuits Manufacturing Co. Ltd Vs Westend Distributors Ltd (1969) E.A. 696* as follows:

“Is in the nature of what used to be a demurrer. It raises pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

The Respondent in this case has raised a Preliminary Objection stating that this suit is res-judicata as the matter was heard and determined in Succession Cause No. 350 of 2012 (Kerugoya) where the Applicant herein was also a party. He annexed a copy of the judgment in Succession Cause No. 61 of 2010 before the Senior Principal Magistrate’s Court in Kerugoya and Kerugoya High Court Succession Cause No. 350 of 2012. The issue of Adverse possession is a claim based on facts which has been denied by the Respondent. As such, the same ought to be determined at the main trial. The other ingredients for adverse possession such as whether the possession has been open, quiet, exclusive and continuous must be proved. Since these issues have been denied by the opposite party, it is therefore imperative that the issues be determined at the main trial.

In the result, I find that the Preliminary Objection dated 8th October 2019 is not upheld and the same is hereby dismissed with costs to be in the cause. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th Day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Igati Mwai for Applicant
2. Mrs. Makazi for Respondent
3. Mr. Mbogo – Court clerk