



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC SUIT NO. 59 OF 2019 (OS)

JULIUS KATHURIMA M'IGWETA PLAINTIFF/APPLICANT

VERSUS

CHARLES GIKUNDI DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the applications dated 4/2/2020 filed by the plaintiff as well as the Preliminary Objection filed on the 15.1.2020 by the defendant.

Application dated 4/2/2020

2. The application is brought pursuant to order 11 rule 3 (1)(h) of the Civil Procedure Rules and Section 6 of the Civil Procedure Act seeking the following orders;

- a. That ELC Case No. 204 of 2018 which is currently pending before the Chief Magistrates Court at Meru be consolidated with this suit and heard together.
- b. That alternatively, ELC case No. 204 of 2018 which is currently pending before the Chief Magistrates Court at Meru, be stayed pending the hearing and determination of this suit.
- c. That costs of the application be in the cause.

3. The application was based on the grounds on the face of it and in the supporting affidavit of Julius Kathurima M'Igweta who averred that he is the 2nd defendant in Meru Chief Magistrates Court ELC Case No. 204 of 2018 which was filed by the respondent, seeking an order to evict him and demolish his permanent house which sits on a portion of land measuring 0.24 ha in LR No. Nyaki/Mulathankari/635 registered in the name of the respondent. He has raised a counter claim in the said suit seeking a declaration that he has acquired a portion of the land measuring 0.24 Ha in LR No. Nyaji/Mulanthakari/635 by virtue of adverse possession. He contends that the subordinate court does not have the jurisdiction to determine a claim for adverse possession and that is why he filed this suit.

Preliminary Objection dated 15.1.2020

4. The defendant responded to the above mentioned application by relying on his preliminary objection dated 15/1/2020 where he sought to have the entire suit struck out as it was res judicata by dint of section 7 of the Civil Procedure Act, since there was a previous suit involving the same parties and over the same subject matter vide Meru OS (Civil) case no. 152 of 2009 which was determined by a judgement delivered on 23/5/2018.

5. On 23/6/2020 this court gave orders that the application and the preliminary objection be heard by way of written submissions. The plaintiff submitted that together with his brother Justus Manyara M'Igweta, they had instituted a case Meru HC No. 152 of 2009 against the current respondent and Barclays bank of Kenya seeking a determination on whether the portion of land developed by the current plaintiff on LR No. Nyaki/Mulathankari/635 (which is registered to the respondent herein and was charged by Barclays bank by then) was distinguishable and therefore acquired by prescription, since the plaintiff had occupied the said portion of land for more than 12 years. However, vide a ruling delivered on 15/2/2012 the suit was dismissed for want of prosecution as against the current respondent. The plaintiff has argued that HCCC No. 152 of 2009 was dismissed on a technicality and therefore was never determined on its merits. Therefore, the defendant's preliminary objection should be dismissed with costs. To this end, the plaintiff has relied on the case of **Cosmas Mrombo Moka v. Co-operative Bank Limited & Another, (2018) eKLR**.

6. On the notice of motion the plaintiffs argued that they raised a counter claim of adverse possession in Meru CM ELC case No. 204 of 2018, which suit is currently on going but the magistrate's court has no jurisdiction to determine the claim of adverse possession.

7. The defendant on the other hand submitted that in the suit Hccc (OS) no. 152 of 2009 the parties, prayers and subject matter were similar. The plaintiff never pursued the issue of setting aside the orders in the earlier suit but chose to file a similar suit eliminating some parties. He further states that ELC Case No. 204 of 2018 is partly heard, where the plaintiff's case has been closed and the only witness remaining are those of the defendant. The plaintiff's instant suit is therefore an afterthought, unmerited and an abuse of the court and should be dismissed with costs.

8. I have carefully perused through the applications, affidavits, submissions and the record in its entirety and the issues to be determined are;

-Whether the suit herein is res judicata?

-Whether ELC Case No. 204 of 2018 should be consolidated with the suit herein?

9. On the issue of res-judicata, the applicable law is Section 7 of the **Civil Procedure Act** 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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

10. In the case of **MICHAEL BETT SIBOR .V. JACKSON KOECH C.A CIVIL APPEAL NO 83 OF 2016 [2019 eKLR]**, the court held as follows: -

“We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a Judgment, however, such a Judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the Court, but the Judgment is the result of what may be described as a technical knockout.”

11. In the case of **Cosmas Mrombo Moka (supra)**, the court stated as follows;

“Fair determination connote that the thrust of the dispute has been placed before the court and a determination on the merits rendered. Here determination on the merits need not mean having oral evidence only. It includes consideration of merits even in applications like striking out and summary judgment where the merit of the case or defense is considered, tested and a determination rendered. Where however, the final determination is grounded on lapses like failure to attend court or take steps in prosecuting the case, the court would not have gone into the merits”.

12. Similarly, I align myself with the above authorities as it is not denied that Meru HC Case No. 152 of 2009 was dismissed for want of prosecution in so far as the case of the current respondent is concerned. I therefore find that the plea of res-judicata is not applicable herein, **hence the preliminary objection is not merited and the same is dismissed with no orders as to costs.**

13. On the second issue, it is not disputed that the respondent herein filed Meru CM ELC case No. 204 of 2018 seeking to have the plaintiff herein evicted from the suit property whereby the plaintiff raised a counter claim that he had acquired an interest in the suit land through the doctrine of adverse possession. The Respondent avers that the matter before the magistrates court is partly heard where his case has been closed. Why then would the current plaintiff sit pretty and file this suit at the stage of defence case in the other suit. The logical conclusion to make is that the applicant is out to steal a match and he has therefore not approached this court with clean hands. He finds no favour before this court.

14. I am in agreement with the averments of the Respondent that the application is an abuse of the courts process. **In the circumstances the application dated 4.2.2020 is hereby dismissed with costs to the Respondent.**

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 14.10.2020. In light of the declaration of measures restricting court operations due to the COVID-19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE