



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 61 OF 2019 (OS)

PETER KIRUKI M'NKANATA.....PLAINTIFF

VERSUS

SABELA NCKEKEI KIRIMA

(Being sued as the Legal Representative of RIRIA MBOROKI – DECEASED....DEFENDANT

RULING

Background

1. The uncontroverted facts are that the plaintiff is a son of one M’Nkanata Mbogori deceased, while the defendant is the daughter of M’Riria M’Mbogori also deceased. M’Nkanata M’Mbogori was a brother to M’Riria M’Mbogori hence the current parties are cousins.
2. M’Nkanata M’Mbogori had filed a case Meru HCC 184/1988 against M’Riria Mbogori claiming that M’Riria held the suit land Ntima/Ntakira/763 in trust for him (M’Nkanata) to the tune of a half share (0.752 acres). The case was decided in favour of M’Nkanata M’Mbogori vide the judgment delivered on 15/6/1989.
3. The aforementioned judgment was not executed. Thus, years later on 5/4/2004 M’Riria M’Mbogori filed an application seeking orders inter-alia, for the court to declare that the judgment given on 15.6.1989 was spent and therefore unforeseeable. In a ruling delivered on 30.6.2004, the application was allowed.
4. Somewhere down the line of litigation, both M’Nkanata M’Mbogori and M’Riria M’Mbogori passed on. On 3.2.2004 orders were granted by consent for Peter Kiruki M’Nkanata (current plaintiff) to be appointed as the legal representative of M’Nkanata M’Mbogori, while Sabella Nckeki Kirima (current defendant) was appointed as the legal representative of M’Riria M’Mbogori. The said orders were issued in Meru HCCC 184/1988.
5. The current plaintiff had instituted a suit before the Chief Magistrate’s court in succession case no. 22 of 2016 as against the current defendant but the same was withdrawn on 9.7.2018 in view of the fact that there was another succession cause at Meru High Court no. 423 of 2004.
6. The current defendant is the one who had filed the case Meru HC. Succession cause no. 423 of 2004 and she obtained a grant thereof to administer her father’s estate. The current plaintiff filed an application in that succession cause seeking to have the grant annulled, but in a ruling delivered on 4.11.2019 the application was dismissed. 8 days later, the plaintiff filed the current suit on 12.11.2019 triggering the dispute herein.
7. The plaintiff also filed an application contemporaneously with the Originating Summon seeking injunctive orders against the defendant. The defendant on the other hand filed a preliminary objection on 26.11.2019 seeking orders inter-alia to have the suit dismissed. This ruling is in respect of the aforementioned application as well as the preliminary objection.

Application dated 12.11.2019

8. The plaintiff/applicant is seeking an order of temporary injunction restraining the defendant and his agents from entering occupying or dealing in any manner whatsoever with plaintiff’s occupation of land parcel no. Ntima/Ntakira/763 until this suit is heard and determined.
9. The plaintiff avers that he has occupied this land for the last 27 years but the respondent has threatened to forcibly evict him. His claim is anchored on the doctrine of adverse possession to the tune of half share of the suit land.

Preliminary Objection dated 26.11.2019

10. Defendant filed the notice of preliminary objection on the grounds that the representation of the plaintiff by the firm of Mutegi Mugambi and Co. advocates contravenes rule 9 of the Advocates Practice Rules since the said counsel was representing the respondent in two other matters namely; Meru High Court succession cause no.423 of 2004 and Meru Chief magistrate succession cause no. 22 of 2016. She also contends that the current suit is res judicata to case no. Meru HCCC 184/1988 hence this court is functus officio and has no jurisdiction to hear and determine the plaintiff's suit. Further, defendant avers that there is a valid order of the court dated 30/6/2004 which has not been reviewed, set aside or discharged and that the plaintiff's suit is frivolous, vexatious, bad in law, fatally and incurably defective and the same is an abuse of the process of the court. She therefore prays for the dismissal of the suit.

11. On 27.11.2019, I gave directions for both the plaintiff's application of 12.11.2019 and defendant's preliminary objection of 26.11.2019 to be heard simultaneously by way of written submissions.

Case for the applicant/plaintiff

12. Plaintiff's arguments are anchored on his application dated 12.11.2019 and the supporting affidavit thereof, the further supporting affidavit filed on 27.11.2019 and his submissions filed on 29.9.2020. The applicant contends that he has been in exclusive uninterrupted occupation of the suit land for a period of over 30 years and that he is claiming half a portion thereof.

13. He contends that this court is not functus officio and that he is not seeking to enforce the judgment delivered in Meru HCCC 184/1988. Rather he is seeking for a declaration that he has acquired proprietary rights over half the suit land by way of adverse possession. He avers that Meru HCCC No. 184/1988 is based on trust and not adverse possession, that he was not the plaintiff in that suit, and that it has been 15 years from the time a ruling declaring the judgment in 184/1988 as unforeseeable was delivered.

14. Plaintiff also avers that Mr. Mutegi advocate has never acted against him or the defendant in any matter. He states that the cases being mentioned by the respondent were heard long before Mr. Mutegi was admitted to the bar in year 2015.

15. In support of his arguments the plaintiff has relied on the following authorities:

(i) **Giella vs Cassman Brown (1973) E.A 358**

(ii) **Mrao vs Frist American Bank of Kenya Limited and 2 others (2003) KLR.**

(iii) **Mtana Lewa vs Kahindi Ngara Mwangandi (2015)eKLR.**

(iv) **Kenya ports authority & another vs Kaba investment limited & 8 others (2019) eKLR.**

(v) **Mukisa Biscuit company vs Westend Distributors Limited (1969) EA 696 at page 701.**

(vi) **Delphis Bank vs Channan Singh Chatthe & 6 others (2005) eKLR: Riley Falcon Security Services Limited vs Samuel Michael Ongango & 5 others (2017) eKLR.**

(vii) **British American investments company (K) Limited vs Njomaita investments Limited & another (2014) eKLR: Riley Falcon Security services limited vs Samuel Michel Onyango & 5 others (2017) eKLR.**

(viii) **Rakusen v Sellis Munday and Clerke (1912) 1 CH.83 Cozens – Hardy M.R: Riley Falcon Security Services Limited vs Samuel Michael Onyango & 5 others (2017) eKLR.**

(ix) **National bank of Kenya Limited vs Peter Kipkoech Korat (2005) eKLR.**

(x) **William Audi Ododa & another vs John Yier & another CA No. Nai 360 of 2004 (UR).**

The case for the defendants

16. The case for the defendant is contained in her notice of preliminary objection dated 26.11.2019 as well as the replying affidavit thereof, a further affidavit filed on 20.12.2019 and a 2nd further affidavit along with submissions filed on 29.9.2020. On the issue of representation, defendant avers that she was represented by advocate Mutegi in Meru CM succession cause no.22 of 2016 and in Meru High court succession 423/2004. She has availed proceedings in the case before the CM's court as well as a ruling in the high court succession matter.

17. On the issue of res judicata, defendant has given a chronology of events captured in her replying affidavit dated 26.11.2019. In summary she contends that though plaintiff's father had succeeded to claim half a share of the suit land in Meru HCCC 184/1988, the judgment thereof was declared un-enforceable by Judge Sitati in her ruling delivered on 30.6.2004. She further contends that the plaintiff has been occupying a portion of the suit land illegally and in contravention of existing injunctive orders issued by Judge Sitati on 30.6.2004. Defendant therefore contends that the current suit is spent and ought to be dismissed.

18. In support of her case, defendant has relied on the following authorities:

- (i) Mukisa Biscuit Co. LTD vs West End Distributors Ltd (1969) EA 696.
- (ii) Avtar Singh Bhamra & another vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004.
- (iii) Raila odinga & othes vs IEBC & others (2013) eKLR.
- (iv) Menginya Salim Murgani vs Kenya Revenue Authority (2014) eKLR.
- (v) M.V Lilian's vs Caltex oil (Kenya) Ltd (1989) KLR 1.
- (vi) Hernderson vs Hernderson (1843 – 60) all E.R. 378.
- (vii) Bedford Mutegi Mboani & 4 others vs James Mbaka (2019) eKLR.
- (viii) Mbeyu Wang'ombe & another vs Patani virpal & 2 others (2015) eKLR.
- (ix) Godfrey Shimonya Peter & 3 others vs Mary Anyango Ameka & Another (2018) eKLR.
- (x) Mary Igandu Kigotho vs Michel Wang'ombe Gatitu (2018) eKLR.
- (xi) Uhuru Highway Development Limited vs Central Bank of Kenya (2002) 2 E.A 654.
- (xii) Giella vs Cassman Brown Company Limited (1973) E.A 358.
- (xiii) R.J.R Macdonald vs Canada (Attorney General: Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others (2016) eKLR.
- (xiv) Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR.
- (xv) Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125.
- (xvi) Jacob Mwanto Wangora vs Mary Waruga Wokabi & 3 others (2018) eKLR.
- (xvii) Stellah Nduru Ichunge & another vs Ezekiel Nkamani M'Ichunge & another (2019) eKLR.

Determination

19. This court has considered all the arguments brought forth by the parties as captured in their various affidavits and in their submissions. I deem it fit to frame the issues for determination as follows:

- (i) *Whether the firm of Mutegi Mugambi Advocates should represent the plaintiff in this matter.*
- (ii) *Whether this suit is res judicata to Meru HCCC 184/1988.*
- (iii) *Whether the court should grant injunctive orders sought by the plaintiff in the application of 12.11.2019.*

Legal representation

20. **Rule 9 of the Advocates (Practice) Rules** provides as follows:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give whether verbally or by declaration of affidavit, he shall not continue to appear. Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal and non-contentious matter of fact in any matter in which he acts or appears.”

21. The plaintiff has denied having ever been represented by Mr. Mutegi in matters pertaining the dispute between him and the defendant. A perusal of the proceedings availed by the defendant as annexure “SNK 1” in CM succession cause no. 22 of 2016 indicates that Mr. Mutegi appeared for Sabella Ncekei Kirima on 23.5.2017 and again on 21.1.2018. The court is not able to discern the issue of representation in Meru HCCC 423 of 2004. However it is quite apparent that the case before the chief magistrates court no. 22/2016 was withdrawn on 9.7.2018 in view of the fact that there was a succession cause going on in Meru High Court cause no. 423 of 2004. I believe the proceedings referred to are the ones which culminated in a ruling delivered in 4.11.2019 in Meru High court cause no. 423 of 2004. I have no doubts that Mr. Mutegi had to some extent represented the current defendant in those previous suits.

22. Defendant has argued that there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship

with the opposing client. This is because Mr. Mutegi had represented the current defendant in the two succession matters.

23. In the Court of Appeal case of **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR**, the court had stated thus;

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation (emphasize added). The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result”

24. In the case of **British-American Investments Company (K) Limited v Njomaita Investments Limited & another [2014] eKLR**, the court stated that;

It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party (emphasize added).

25. What resonates from the above authorities and the case law on the subject availed by the plaintiff is that a claimant must demonstrate that there is real mischief or prejudice. In the present matter, all that defendant says is that Mr. Mutegi had represented him in two previous matter. She has not given an account of how she stands to be adversely affected by the fact that the said counsel has crossed rank with her opponent.

26. I find no tangible justification to order disqualification of Mr. Mutegi from acting in this matter for the plaintiff.

Res-judicata

27. **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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

28. In the case of **John Florence Maritime services Limited and another vs Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR**, it was held as follows:

“...Res Judicata is a subject which is not at all novel. It is a discourse on which a lot of ink has been spilt and is now sufficiently settled. We therefore do not intend to reinvent any wheel. We can, however, do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson vs Henderson (1943) 67 ER 313: ...where a given matter becomes a subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but reasonable diligence, might have brought forward at the time...”.

29. The question to interrogate in this case is whether the current case is res judicata to Meru HCCC 184/1988. The pleadings and the proceedings in the aforementioned case have not been availed herein save the decree and the ruling of Judge Sitati. The said decree which is annexure “SNK 2” states as follows:

“CLAIM

The court to declare that the defendant hold title Ntima/Ntakira/763 in trust for the plaintiff and the defendant be ordered to sub divide and transfer a portion of 0.752 acres which is half ½ share of the said land to the plaintiff.

That the court to order the executive officer of the court to sign all the necessary documents for the purpose of sub-division and transfer of the said land in case of the defendant failing to sign the same.

Cost of this suit and any other or better relief the court may grant”.

30. All that I can discern from this decree is that the determination in case no. 184/1988 was anchored on trust. In the case of **Fatuma Gatitu Muhamudo and another vs Yussuf Juma Meru ELC 35/2019**, I stated that:

“A Preliminary Objection must not be blurred by factual details calling for evidence”.

Also see **Hesbon Wrace Ogoni vs. Priscilla Muhonja Adulu (2019) eKLR.**

31. I find that there is no sufficient material placed before this court to ascertain that this suit is res judicata to Meru HCC 184 of 1989.

32. The second issue to consider on the point of resjudicata is that plaintiff has averred that he is not in any way trying to enforce the Judgment in Meru HCC 184 of 1989. He contends that he has continued to occupy the suit land even after the ruling of 30.6.2004 was delivered. Defendant appears to admit these averments as indicated in paragraph 22 of her replying affidavit filed on 26.11.2019. Her only contention was that the plaintiff has been occupying the suit land illegally and in contravention of the existing injunctive orders issued by Judge Sitati on 30.6.2004. Thus the question as to whether the plaintiff meets the criteria of an adverse possessor is one to be subjected to a full trial.

33. My conclusion on this issue is that the current case is not res judicata to Meru HCC 184 of 1988. The court therefore has jurisdiction to hear the matter.

Injunction

34. Injunction orders are issued under the provisions of order 40 of the civil procedure rules generally to preserve the subject matter. In paragraph 5 of defendant’s 2nd further affidavit of 29.9.2020, she claims that the plaintiff started interfering with her possession and use of the suit land in April 2014. However, in paragraph 22 of her replying affidavit of 26.11.2019, she admits that the plaintiff is occupying a portion of the suit land albeit illegally and in contravention of the orders of Judge Sitati issued on 30.6.2004. Even though defendant is not consistent as to when plaintiff commenced occupation of the suit land, the fact remains that plaintiff is occupying a portion of the suit land. The circumstances surrounding such occupation ought to be challenged during the trial. Thus the issue as to whether the plaintiff violated injunctive orders given on 30.6.2004 is one to be determined at the trial.

35. In the circumstances I find that the orders sought by the plaintiff in the application dated 12.11.2019 are merited.

Final orders

(1) The notice of preliminary objection dated 26.11.2019 is found to have no merits and is hereby dismissed.

(2) The application dated 12.11.2019 is allowed.

(3) Each party to bear their own costs of the application dated 12.11.2019 as well as the preliminary objection dated 26.11.2019.

(4) In light of the history of the litigation herein as captured in the content “background”, I direct that this matter be heard on priority basis.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH 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 29.9.2020. 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