



REPUBLIC OF KENYA

IN THE LAND AND ENVIROMENT COURT OF KENYA

AT NYAHURURU

ELC NO 81 OF 2017

(FORMERLY NAKURU ELC NO 106 OF 2013)

JESEE NJOROGE GITAU.....PLAINTIFF

VERSUS

KIBUTHU MACHARIA.....1st DEFENDANT

PETER K. TURUTHI.....2nd DEFENDANT

RULING

1. An Originating summons vide Nakuru ELC No 106 of 2013, was filed on the 9th March 2009. Pursuant to the filing of the said suit, the 2nd Defendant herein entered his Memorandum of appearance on the 7th April 2009 and their replying affidavit on the 22nd April 2009 wherein at paragraph 4 of the said affidavit, the 2nd Defendant raised the issue that the present suit was a replica of the PMCC No 144 of 2008 pending before the Magistrates' Court.
2. On the 6th April 2009, the 1st Defendant herein entered his Memorandum of Appearance and filed his replying affidavit dated the 22nd April 2009 on the 24th April 2009. He, like the 2nd Defendant, he raised the same issue at his paragraph 3, that a similar case was pending before the Nyahururu Magistrate's court.
3. Alongside the replying affidavit, the Defendants herein filed their Grounds of Opposition dated the 21st April 2009 on the 24th April 2009 in which they raised the following grounds';
 - i. That the suit was Res judicata by virtue of the pendency of Nyahururu PMCC No. 144 of 2008 which was yet to be heard or determined and whose subject matter and issues for determination were substantially in issue in the present suit.
 - ii. That the suit was therefore frivolous vexatious and abuse of the court process and is prejudicial to the said PMCC No.144 of 2008
 - iii. That the Plaintiff herein did not disclose any cause of action against the 1st and 2nd Defendants.
 - iv. That the orders sought in this suit were incapable of being granted.
4. That the Plaintiff had not come to court with clean hands hence the suit be struck out and/or dismissed.
5. It is worth noting that this matter has never take off since its inception on the 9th March 2009 and the order of status quo was issued on the 16th September 2009.
6. On the 2nd June 2011 directions were issued to the effect that the Originating summons to proceed by way of viva voice evidence wherein Parties were directed to take a date for hearing in the registry.
7. On the 15th May 2017, the court set a hearing date for the suit with further orders that the Plaintiff files their further affidavit and annexures.
8. On the 20th November 2017, whereas the Plaintiff was ready to proceed with the hearing, the Defendant's Counsel were not ready to

proceed with the hearing and sought for another date. The matter was adjourned for hearing on the 12th February 2018 on which day the same did not proceed at the behest of the Defendants' Counsel.

9. A hearing date was then rescheduled for the 24th April 2018 pending which on the 23rd April 2018, the Defendants filed another Notice of Preliminary Objection dated the same date to which they raised the following grounds.

i. That the Plaintiff lacked the locus standi to commence, institute and sustain the entire suit.

ii. That the Plaintiff's suit is incurably defective, bad in law and unmerited.

iii. That the Plaintiff's entire suit is sub judice, is not justifiable and is an abuse of the court process hence the same should be dismissed.

10. On the 24th April 2018, Counsel for the Defendants informed the court that they had filed a Preliminary Objection the previous day the 23rd April 2018 wherein they had raised the fact the present suit was sub judice in light of the fact that there was another matter pending that involves the same parties on the same subject matter being Nyahururu CMC ELC No. 21 of 2018 formerly PMCC 144 of 2008. He therefore prayed that in light of the above, the present matter be stayed pending the hearing and determination of the subsequent suit before the Chief Magistrate's Court.

11. Counsel for the Plaintiff objected to the said application in his submission, to the effect that the Preliminary Objection raised by the Defendants was not a Preliminary Objection per-se in line to the **Mukisa biscuits Case** to the effect that it had not raised a matter of law. Further it ought to have been raised in the first instance and that the same ought to have been served three clear days to the hearing.

12. The court thus overruled the Plaintiff Counsel's objection and stating that when a Preliminary Objection, that seeks to have a suit struck out is raised, the same must be disposed of in the first instance. Parties were directed to dispose of the application by way of written submissions.

13. While the Defendant filed their written submissions on the 18th May 2018, the Plaintiff filed theirs on the 6th June 2018.

14. The gist of the Defendants submissions in support of the Preliminary Objection is that on the 14th August 2008, the 2nd Defendant had instituted suit against the Plaintiff herein before the Nyahururu Magistrate's court wherein he had sought that land No. Nyandarua/Kipipiri/486, the same subject suit herein, be declared legally his, him having been registered proprietor of the same on the 22nd May 2007.

15. That in the matter before the Magistrate's court, the 2nd Defendant herein had obtained injunctive orders against the Plaintiff who had subsequently entered appearance and even filed third party proceeding seeking to enjoin third parties, one of them being the 1st Defendant herein, before the substantive matter could be heard. Leave was granted but the Plaintiff was never ready to proceed with the hearing of the substantive suit.

16. That it was during one of those instances when the Plaintiff prayed for the matter in the Magistrate's court to be stood over, that he filed the present suit which is an abuse of the court process.

17. The Defendants relied on the decided case **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** to submit that the present suit raises the issue of sub judicata and sub judice for reasons that the suit before the Magistrate's court was identical to the present suit, the suit property is the same and the parties were the same seeking a declaration of proprietorship to the suit property hence the present suit was in contravention of the provisions of Sections 6 of the Civil Procedure Act.

18. The Defendants further looked at the issue of jurisdiction and while supported by the decided cases of **Geoffrey Chege Kirundi vs Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd and Another [2017] eKLR**, and **Edward R Ouko vs Peaker of the National Assembly & 4 Others [2017] eKLR**, submitted that this court had inherent jurisdiction to make orders as it would be necessary for ends of justice and to prevent abuse of its process especially where issues of sub judice are applicable.

19. While laying reliance on the decided case of **Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (deceased)) vs Caroline Wangui Kiguru [2013] eKLR**, the Defendants further submitted that the Plaintiff herein had not come to court with clean hands as he had not disclosed the existence of another case. That the Plaintiff was therefore guilty of material non-disclosure thus he lacked the locus standi to sustain the suit. That the present suit was frivolous, vexatious and an abuse of the court process and ought to be dismissed.

20. In response and in opposition of the Defendants Preliminary objection, the Plaintiff framed his submission under three heads.

21. **Whether the Plaintiff had locus standi in the present case.**

The Plaintiff gave a history of when he was allotted the suit of land Ref no. NYA/KIP/229/2124 in Kipipiri scheme on the 1st July 1966 to when he took possession of the same in 1968 and cleared his loan with the Settlement Fund Trustee in the year 1981.

22. That at the time, the 2nd Defendant was in occupation of parcel No. NYA/KIP/229/2128. That later the 1st Defendant had written to the Plaintiff claiming ownership of the land he had been in occupation of, thereby asking him to desist from using it in whichever manner. The

matter was thereafter escalated to the DCIO Nyahururu who promised to investigate on the same.

23. That it was while the matter was pending investigations that the 1st Defendant instituted suit No. 144 of 2008 in the Nyahururu Magistrate's Court wherein he obtained interim orders of injunction. Meanwhile the 2nd Defendant also obtained a loan with Equity Bank against the Plaintiff's land reasons which the Plaintiff filed the present suit to safeguard his interests in the suit land. Based on this background, it was the Plaintiff's submission that he had the locus standi to institute the present suit.

24. The second issue was **whether the Plaintiff's suit was sub judice.**

The Plaintiff's submission was that having established that he was justified in filing this suit, the court must act with caution before striking out this pleading since doing the same would be draconian. He relied on the decided case of **D.T Dobie & Co. (K) Ltd vs Muchina(1982)KLR** to submit the parameters within which the court ought to consider while determining the Defendants' Preliminary Objection.

25. Further submission was that Section 6 of the Civil Procedure Act was not applicable where the suits were not similar. That the Suit before the Magistrate's Court had two other parties who were enjoined and who were not party to the present suit. The claim by the Defendants that parties in both suit were similar cannot therefore stand as the suit was not sub judice.

26. **On the issue on jurisdiction of the court**, the Plaintiff's submission was to the effect that pursuant to the provisions of Sections 37 and 38 of the Limitation of Actions Act, it is clear that the High Court was clothed with the jurisdiction to hear matters on adverse possession of land. Further that the provisions of Section 13(1) (2) (e) of the Environment and Land Court Act gives jurisdiction to this court to hear matters on use and occupation of land.

27. The Plaintiff further submitted that the Defendant had not discharged the principles set down in the **Mukisa Biscuit case** (supra) to the effect that the Preliminary objection raised herein did not meet the said thresh hold as it was not based on pure points of law, secondly that all facts pleaded were not correct and further that the facts pleaded by the Defendants needed to be ascertained. The Plaintiff thus prayed for the dismissal of the Preliminary Objection.

28. After having analyzed the submissions by both parties as well as having paid regard to the authorities herein cited by both parties on the Preliminary Objection, I find the matters for determination being:

- i. Whether the court has jurisdiction
- ii. Whether the Preliminary Objection raised is sustainable.
- iii. Whether the said Preliminary Objection has merit and should be upheld.

29. The Notice of Preliminary Objection raised by the Defendants is based on the grounds that this court lacks jurisdiction to hear and determine the suit herein in view of the pendency of Nyahururu Magistrate's Court Civil Suit No. 144 of 2008, new number CM ELC No. 21 of 2018 That in this respect, the Plaintiff's suit is incompetent, incurably defective and a gross abuse of the court process.

30. The Defendants further submitted that the matters raised in the Plaintiff's Originating summons dated the 9th March 2009 were substantially the same in issue as those raised in the case at Nyahururu Magistrate's Court Civil Suit No. 144 of 2008, new number CMC ELC No. 21 of 2018 for which orders of interim injunction were issued.

31. That what was in dispute in both cases was the same matter touching on parcel No. Nyandarua/Kipipiri/486.

32. That the said Civil Suit No. 144 of 2008, new number CM ELC No. 21 of 2018 is pending before the Chief Magistrate's Court for hearing and determination thus rendering the present suit Sub Justice thus this suit should be struck out.

33. The Plaintiff's submission on the other hand was to the effect that although there was indeed another matter pending before the Magistrate's court being No 144 of 2008, the parties in the said suit were not substantially the same as the parties in the present suit therefore the issue of Sub Justice does not arise.

34. On the issue of the Preliminary Objection raised by the Defendant, this court shall make its determination based on the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** Court of Appeal held that a preliminary objection per Law J.A. was stated to be thus:-

'...a preliminary objection is in the nature of what used to be a demurrer. It raises a 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 improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.'

35. I have since gained sight of the proceedings in the Nyahururu Magistrate's Court Civil Suit No. 144 of 2008, new number CMC ELC No. 21 of 2018 and note that the subject matter in both the suits are directly and substantially similar and that although the reliefs sought in the two cases are different to the effect that in the previous case, the Plaintiff therein, the 2nd defendant in the present case, has sought for a declaration that he is the lawful registered proprietor of the parcel No. Nyandarua/Kipipiri/486, the Plaintiff in the present case has sought for orders that he be registered as proprietor of same parcel **of land** having acquired the title by virtue of the doctrine of adverse possession.

36. I also note that that save for two additional defendants in the previous suit, parties in both cases are virtually the same.

37. That the provisions of section 6 of the *Civil Procedure Act* provides for stay of suits as follows:-

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed

38. The issue of adverse possession was raised in the Nyahururu Magistrate’s Court Civil Suit No. 144 of 2008, new number CM ELC No. 21 of 2018 at paragraph 12 of the Plaintiff’s defence.

39. This doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

40. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts, then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

41. Section 37 of the same Act provides that:-

“ Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

42. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, (s)he must (Emphasis mine) apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

- i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.
- ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

43. Article 162 (2) (b) of the Constitution provides as follows

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

44. Section 13(1) of the Environment and Land Court provides;

(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

45. It is clear from the above provisions of the law that the Magistrate’s court have no jurisdiction to try matters where a party is seeking adverse possession. Indeed if both matters had been filed in this court, the best order suited to issue upon this application would have been an order for consolidation of both the matters. However this is not the case in question.

46. It is not the form in which the suit is framed that determines whether it is sub-judice, rather it is the substance of the suit. Having considered the pleadings in both the suits, I am satisfied that the claim in the present suit cannot be litigated in the Nyahururu Magistrate’s Court for lack of Jurisdiction. However the two cases cannot be heard parallel to each other at the risk of issuing contradictory findings which would be in violation of the overriding objective of the Section 1A and 1B of the and *Civil Procedure Act*.

47. I find that the order that commends itself in the present scenario to which I pronounce, is that the matter pending in the Chief Magistrate’s Court vide ELC No. 21 of 2018 be stayed, pending the outcome of the present matter.

48. Consequently, I dismiss the Preliminary Objection dated the 23rd April 2018 with costs to the Plaintiff. Since directions had been taken earlier, parties to fix the same for hearing of the Originating Summons expeditiously.

Dated and delivered at Nyahururu this 18th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE