



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 176 OF 2017

GLADWELL MUTHONI WARUI.....1st PLAINTIFF

ZAKAYO I MWANGI.....2nd PLAINTIFF

VERSUS

GACHAN NJUGUNA.....1st DEFENDANT

CARRIE JANE WANJIRA GACHAU.....2nd DEFENDANT

RULING

1. Coming for determination is an Application dated the 25th September 2015 in which the 1st Defendant herein has sought to have the whole suit struck and/or dismissed on the grounds that it is an abuse of the court process, further that there is non-disclosure that the 2nd Defendant is deceased and there is no administration of her estate, upon which this suit should be brought, thus making the whole suit a non-starter.
2. The 1st Defendant's application is also based on the fact that he was not the registered proprietor of the parcel of land in question and thus his name should be struck out from the proceedings. That the Plaintiffs' suit is based on a nullity and the prayers sought therein are redundant
3. The application is supported by a replying affidavit sworn by the 1st Defendant on the 25th September 2015.
4. On the 23rd May 2018 directions were taken to the effect that the said application be disposed of by way of written submissions.
5. Parties complied and filed their respective written submissions which I wish to consider as herein under:
1st Defendant's submissions.
6. The 1st Defendant's submissions, which were filed on the 29th June 2018 were to the effect that since the 2nd Defendant herein passed away, there had been no efforts to substitute her for over one year. That the law was clear that in the event a party to the suit was deceased, the end result would be an abatement of the suit if no substitution was done.
7. That indeed although the 1st Defendant herein had been sued jointly with the 2nd Defendant, yet it was the 2nd Defendant herein who was the registered proprietor of the subject suit herein. That Order 1 Rule 3 of the Civil Procedure Rules was clear as to whom could be enjoined in a suit in such a scenario, which clearly shows that the 1st Defendant cannot be enjoined in the present suit.
8. The 1st Defendant relied on the decided cases of **Mohamed Abushiri Mkullu vs Suleiman Abdalla Hassan [2012] eKLR** and **Latifa Yakb & 4 Others vs Ahanshudin M. Kassam HCCC No.226 of 2000** where the court had held that a suit instituted against a dead person was a nullity.
9. The 1st Defendant further relied on the provisions of Order 24 Rule 1 of the Civil Procedure Rules to submit that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.
10. That further, the provisions of Order 24 Rule 4 were also clear.
11. That from when the Preliminary Objection was filed to date, there had been no substitution of the 2nd Defendant herein. That it had been three (3) years since the 2nd Defendant's death, yet the Plaintiffs had not taken any steps to substitute her nor amend their plaint. Instead they

had shifted the burden of proof to the 1st Defendant.

12. That the suit abated automatically 12 months after the death of the 2nd Defendant as no application was made for substitution.

13. That since the suit land was registered to the 2nd Defendant, that indeed the 1st Defendant had no legal capacity to transact on the said land. Further, that it had been admitted that no consent had been obtained for the Land Control Board hence the sale agreement remained valid subject to seeking and obtaining the said consent. No such consent had been applied for hence the Plaintiff could not seek to benefit for an illegality that existed.

14. That the doctrine of adverse possession was a common law principle that provided that a person in possession of land owned by someone else could acquire a valid title to it although such right was not absolute. That the provisions under Order 38 Rule 7 of the Civil Procedure Rules was clear on how to make an application for adverse possession. That in the current application, there was no title annexed to the application for adverse possession as was laid down in the decided case of **John Wambura & Another vs Anakletus [2017] eKLR** where the case was struck out there having been no title annexed to the Originating Summons. To this effect thereof, the same fate should befall the present case and the same be dismissed.

15. The 1st Defendant also relied on the cases of **Wambugu vs Njuguna [1983] eKLR 173 and Gabriel Mbui vs Mukindia Maranya[1993] eKLR** to submit that these cases had established principles in which a party ought to satisfy before a claim for adverse possession was allowed. The said principles were missing in the instant case. That a stranger being in possession does not amount to title being transferred to him neither does it give any intruder any title.

16. The 1st Defendant prayed for the dismissal of the Plaintiff's suit as against the 1st Defendant.

Plaintiff's submission.

17. The Plaintiff's submission was to the effect that when they went to effect service of pleadings upon the Defendant s, the 1st Defendant had received service of the pleadings but had informed the process server that the 2nd Defendant had passed away and that he (the 1st Defendant) was the administrator of the 2nd Defendant's estate. That despite these allegation, there had been no proof to confirm this status. That Section 107(1) and Section 109 of the Evidence Act placed the burden of proof on the 1st Defendant to proof the death of the 2nd Defendant.

18. That without proof of the allegations, it was the Plaintiff's submission that indeed the 2nd Defendant was alive and kicking and that the said allegation was so as to give rise to the present application raising the Preliminary objection. That the said application was brought about on behalf of the 2nd Defendant who not only failed to enter appearance in the Originating Summons but failed to file his response to the notice of motion.

19. That counsel for the 1st Defendant had no authority to appear, plead and act on behalf of the 2nd Defendant when he had not filed his notice of appointment.

20. That no documents had been tabled before the court to prove the death of the 2nd Defendant and that the court should not act on mere allegations.

21. That the 1st Defendant 's replying affidavit was in relation to the Notice of Motion and cannot be taken to be a response to the substantial Originating Summons as well.

22. That further the said Replying affidavit was filed one year after the application had been filed and without seeking leave to file the same out of time. The same therefore ought to be struck out.

Analysis and determination

23. On the 19th February 2018 the court gave directions to the effect that ELC No. 18 of 2017, which had been instituted vide an Originating Summons on the 10th June 2015 be consolidated with ELC No. 176 of 2017, which had also been instituted as an Originating Summons on the 30th September 2014 and that file No. ELC No 176 of 2017 be the lead file. That further the Plaintiff in the ELC No 176 was to be treated as the 1st Plaintiff whereas Plaintiff in ELC No. 18 of 2017 was to be treated as the 2nd Plaintiff.

24. That said and done, there were further orders that the Plaintiffs herein constituted do file their responses to the Preliminary Objection dated the 25th September 2015 (in both files) that sought to have the whole suit struck out.

25. The gist of the 1st Defendant /Respondent's submissions in support of the Preliminary Objection is that although he had been sued jointly with the 2nd Defendant /Respondent, yet the suit land was registered in the name of one Carrie Jane Wanjira Gachau the 2nd Defendant herein who was now deceased and for whom neither Succession Cause had been filed nor substitution made.

26. The said application on Preliminary Objection was vehemently opposed by the Plaintiffs who submitted that although the 1st Defendant had alleged that the 2nd Defendant was deceased, yet he had not tabled any tangible evidence inform of a burial; permit or death certificate to substantiate their allegations which remained as such-allegations.

27. That the filing of the said Preliminary Objection as well as the allegation was a way devised by the 1st Defendant to have the suit against the 2nd Defendant dismissed a move that the court should frown upon.

28. The Matters for determination are:

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

29. It is worth noting that the Defendant s herein did not file their Defence to the Originating Summons but filed the current Preliminary objection.

30. On the first issue raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A Preliminary Objection per Law J.A. was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

31. In the same case Sir Charles Newbold, P. stated:

‘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.’

32. The summation of the 1st Defendant’s Preliminary Objection is that the 2nd Defendant who was the registered proprietor to the suit land is since deceased and therefore the suit against her should abate. Further, there has been no letters of administration secured and no substitution done.

33. I have gone through the Plaintiff’s Originating Summons and note that the suit property herein namely No. Nyandarua/Oraimutia/222 was registered to the 2nd Defendant on the 8th August 1988.

34. On the 12th September 1989, the 1st Defendant sold 2 acres out of 3.8 acres of the suit land to the 2nd Plaintiff’s brother the deceased John Maina Mwangi for Ksh 50,000/=. That vide an agreement dated the 9th March 1993, the 1st Defendant again sold the said parcel of land to Joseph Irungu Kago for a sum of Ksh 90,000/=. On the 4th April 1994, the said Joseph Irungu Kago subsequently sold 2 acres, of the suit land to Leonard John Warui Kubugu, the 1st Plaintiff’s father, for a consideration of Ksh 162,000/=.The 1st Plaintiff was then put in possession of the land by his father .

35. The Plaintiffs’ Originating summons is therefore based on the fact that they have been in possession of the suit land for more than 12 years hence they have become entitled to be registered as owners/proprietors of portions of the suit land.

36. In the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

37. I have also considered the fact that the Preliminary Objection raised herein by the 1st Defendant is in respect to the fact that the 2nd Defendant who was the registered proprietor of the suit land is deceased, allegation which have been vehemently disputed by the Plaintiffs who insist that the 1st Defendant is still alive. To this effect, the court has not been provided with any evidence confirming either for or against the allegations.

38. Order 24, rule 4 of the Civil Procedure Rules provides as follows:

(1)Where one of two or more Defendant s dies and the cause of action does not survive or continue against the surviving Defendant or Defendant s alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.

39. The law is clear is that for a Preliminary Objection to be considered, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

40. From the above submissions and the proceedings filed herein, it is clear that the Preliminary Objection raised herein is based on disputed facts which need to be proved through evidence.

41. In the case of **Oraro v Mbaja [2005] eKLR** the court held as follows:

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

19. From the above finding, it is clear that a Preliminary Objection cannot be based on disputed facts. I find that the present Preliminary Objection is based on disputed facts which need further investigations and therefore does not qualify as a valid Preliminary objection.

20. To this effect, the DCIO Nyandarua West, based at Ol Joro Orok is herein directed to carry out comprehensive investigations into the where about of the 2nd Defendant herein, one Carrie Jane Wanjira Gachau within the next 21 days upon the delivery of this ruling, and thereafter file a report in court on before the next date to be set by the court.

21. The Preliminary Objection dated the 25th September 2015 is herein dismissed with costs to the Plaintiff.

Dated and delivered at Nyahururu this 11th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE