



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 393 OF 2017

REUBEN CHESEREM SIMOTWO.....PLAINTIFF

VERSUS

FRANK KIBET ANDERE.....DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 12th October 2017 and the defendant's Notice of Preliminary Objection dated 6th March 2018, both of which were heard together.

2. The following orders are sought in the application:

1. Spent.

2. Spent.

3. *THAT the Honourable Court be pleased to stop and restrain the respondents by himself, his servants, employees and or authorized agents from further trespassing on the applicant's land parcel and unlawfully forcing the applicant off his said land parcel LR No. Baringo/Perkerra/101/162 in any way whatsoever pending the hearing and determination of this suit.*

4. *THAT the costs of this application be provided for.*

3. The application is supported by a supporting affidavit sworn on 12th October 2017 and a further affidavit sworn on 26th September 2018. Both affidavits are sworn by the applicant.

4. He deposed in the supporting affidavit that the parcel of land known as LR No. Baringo/Perkerra/101/162 (hereinafter the suit property) was allocated to him by the government in the year 1965 after which he fenced it and built a home on it where he settled with his family. He annexed a copy of a title deed dated 12th October 2000 and a Certificate of Search as at 28th June 2017. There is another parcel being LR No. Baringo/Perkerra/101/163 which is adjacent to the suit property and which is owned by Sylvia Andere (deceased), the defendant's mother. That he had an arrangement with the deceased where he leased part of the suit property to the deceased but he stopped the arrangement when he realised that the deceased wanted to take his land. Owing to threats from the deceased, he fled from the land but returned after the deceased passed away. However the defendant has now trespassed on the suit property and has 10 acres out of the 27 acres.

5. The defendant opposed the application through a replying affidavit sworn on 31st January 2018 and a supplementary affidavit sworn on 23rd October 2018. He deposed in the replying affidavit that the suit property was previously known as plot 599 Perkerra Settlement Scheme and that and that it was sold by the plaintiff to his deceased mother through a sale agreement dated 12th June 1974 and that the plaintiff gave his mother vacant possession in 1977. He annexed a copy of the agreement and a transfer form dated 9th December 1974. That his mother moved to Molo River in 1990 and left the suit property in his possession. He remained in peaceful possession until 6th November 2017 when the plaintiff and his family forcefully trespassed onto the land and built temporary structures. He added that the plaintiff's title deed is fraudulent and annexed a letter dated 14th November 2017 from Koibatek/Mogotio Sub-County Land Adjudication and Settlement Officer stating that records held by the said office show that the suit property is owned by the deceased. That in a judgment delivered in **HCCC No. 145 of 1977 (Nakuru) Sylvia Andere v Reuben Cheserem Simatwa** the High Court confirmed that the suit property was lawfully transferred by the plaintiff to the deceased. He stated that the plaintiff had approached the court with unclean hands and thus urged the court not to grant the orders sought.

6. In the further affidavit sworn on 26th September 2018, the plaintiff stated that the sale agreement was forced upon her by the deceased and that the agreement was conditional on the deceased getting alternative land for him, a condition which the deceased did not perform. As a result, he withdrew his application for Land Control Board consent. That although the Provincial Land Control Appeals Board decided that

he refunds the purchase price of KShs 26,000 to the deceased, the deceased avoided receiving the money thus forcing him to pay the money through his advocate to the deceased's advocate. Regarding **HCCC No. 145 of 1977 (Nakuru) Sylvia Andere v Reuben Cheserem Simatwa**, he admitted that the suit existed but added that the matter was heard and determined in his absence, that his advocate in the matter later passed away and that he only got notice that the matter had been determined when it was too late.

7. Turning now to the Notice of Preliminary Objection dated 6th March 2018, the grounds of the objection are:

a) THAT the issue of ownership of the suit land is res judicata having already been conclusively determined in favour of the late Sylvia Endere by the High Court at Nakuru in Civil Suit 145 of 1977 where neither appeal nor review have been lodged to date. Attached herein is the said judgment for ease of reference.

b) THAT the Plaintiff's suit with regards to the tort of trespass to land is incompetent since it is time barred under Section 4 of the Limitations of Actions Act (Cap 22).

c) THAT the Plaintiff's suit is designed to achieve unjust enrichment and does not warrant the orders sought since he had already sold the suit land to the late Sylvia Endere in 1974 through which he received valuable consideration.

Reasons wherefore the defendant prays that this suit be struck out with costs.

8. As previously mentioned, both the Notice of Motion and Notice of Preliminary Objection were heard together. Parties filed written submissions. It is argued on behalf of the applicant that he has established a prima facie case since he is the registered proprietor and has possession.

9. For the defendant it was argued that having sold the suit property, the plaintiff could not validly process a title deed for the very same property in his own name. As such, the plaintiff's title can only be termed fraudulent. He referred the court to one of his annexures which stated that records held by the Koibatek/Mogotio Sub-County Land Adjudication and Settlement office show that the suit property is owned by the deceased. In the circumstances, no prima facie case has been established. As regards the limb of irreparable harm, the defendant argued that the plaintiff only went to construct a temporary structure on the suit property on 6th November 2017, meaning that he has a home elsewhere and will not therefore suffer irreparable harm if the orders sought are not granted. The defendant thus urged the court to dismiss the application.

10. On the preliminary objection, the defendant argued that the issue of ownership of the suit property is res judicata having been already conclusively determined in favour of the deceased in **HCCC No. 145 of 1977 (Nakuru)**. Further that the plaintiff's claim based on the tort of trespass is time barred in view of the provisions of **Section 4** of the **Limitation of Actions Act**.

11. Regarding the preliminary objection, it was argued for the plaintiff that the matter is not res judicata since parties to the earlier suit and those in the present suit are not the same and that the matter was not determined on the merits since he was not heard. In conclusion, the plaintiff cited **Section 4** of the **Limitation of Actions Act** and argued that the judgment having been delivered on 10th March 1978, an action cannot be brought based on it after 12 years from the said date.

12. I have considered the application, the affidavits, the preliminary objection, the submissions as well as the authorities cited. I will deal with the preliminary objection first since it raises issues of jurisdiction.

13. The law on preliminary objections is settled. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** Law JA stated:

So far as I'm 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.

14. The defendant's argument that the suit is res judicata invokes the provisions of **Section 7** of the **Civil Procedure Act** which provides:

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..

15. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

16. The Court of appeal stated as follows in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the

same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

17. There is no dispute that there is a previous suit being **HCCC No. 145 of 1977 (Nakuru) Sylvia Andere v Reuben Cheserem Simatwa**, that the plaintiff in the said case was the deceased and that the defendant therein is the plaintiff herein and that judgment was delivered in the said case on 10th March 1978. There is further no dispute that the plaintiff herein is the son of the deceased and that the suit property herein is the same one that was the suit property in **HCCC No. 145 of 1977 (Nakuru)** although at that point it was known as plot 599 Perkerra Settlement Scheme. It matters not that it has since been given a new parcel number.

18. A perusal of the plaint in the present suit reveals the plaintiff is seeking a permanent injunction to restrain the defendant from interfering with the suit property needless to state, on the basis that he is the proprietor thereof. A reading of the judgment in **HCCC No. 145 of 1977 (Nakuru)** shows that the issue of the sale of plot 599 Perkerra Settlement Scheme by the plaintiff herein to the deceased as well as its consequent ownership were discussed at length and determined. The judgment further shows that the plaintiff herein testified in the matter and was represented by counsel. I am therefore satisfied that the issues in dispute in this suit were directly and substantially in dispute in **HCCC No. 145 of 1977 (Nakuru)** and were determined.

19. What about the parties to the two suits? It is not contested that the plaintiff herein was a party in **HCCC No. 145 of 1977 (Nakuru)** alongside the deceased. As the deceased's son, the defendant herein is interested in the ownership of the suit property and thus falls within the description of 'party' under **Explanation 6 of Section 7 of the Civil Procedure Act** which states:

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

20. I further note that the defendant herein states in his statement of defence and counterclaim that letters of administration ad litem in respect of the deceased's estate were issued to him and that a copy is included in his list of documents. In the circumstances I find and hold that the defendant herein is litigating under the same title as the deceased did in **HCCC No. 145 of 1977 (Nakuru)**.

21. Lastly, there is no dispute that the court in **HCCC No. 145 of 1977 (Nakuru)** had jurisdiction and conclusively determined the matter. Though the plaintiff herein has raised issues of him allegedly not having been given a just hearing in **HCCC No. 145 of 1977 (Nakuru)**, those are matters that cannot be raised in this matter or before this court. Suffice it to state that the record shows that the plaintiff herein testified in **HCCC No. 145 of 1977 (Nakuru)** and was represented by counsel.

22. In view of the foregoing discussion, I find and hold that this suit is res judicata in view of the judgment that was delivered in **HCCC No. 145 of 1977 (Nakuru)** on 10th March 1978. The preliminary objection therefore succeeds to that extent and the plaintiff's suit will be struck out. It is thus not necessary to consider grounds (b) and (c) of preliminary objection.

23. Even if the preliminary objection had been dismissed in its entirety, I would still not have allowed the Notice of Motion dated 12th October 2017 since I am persuaded that serious questions have been raised as regards the plaintiff's title to LR No. Baringo/Perkerra/101/162 more so with regard to the admitted sale agreement in respect thereof. In such circumstances, I am not persuaded that the plaintiff has any prima facie case. That being so, I need not enquire into the other tests for granting an interlocutory injunction. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. I would have dismissed the application with costs.

24. In the end, the plaintiff's suit is hereby struck out. The defendant is at liberty to set down his counterclaim for hearing. Costs of the preliminary objection are awarded to the defendant but costs of the suit shall abide the outcome of the pending counterclaim.

25. This ruling was initially scheduled for delivery on 24th January 2019. Delay in its delivery, which was occasioned by the fact that I proceeded on medical leave, is regretted.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

Mr Mutai for the defendant

Court Assistants: Beatrice & Lotkomoi