



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 73 OF 2018 O.S**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES**

**IN THE MATTER OF LAND PARCEL NO. KERICHO/KIPKELION/BARSIELE/220**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2011**

**IN THE MATTER OF SECTIONS 7 AND 13 OF THE LIMITATION OF ACTIONS ACT**

**CAP 22 OF THE LAWS OF KENYA**

**AND IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION**

**BETWEEN**

**HELLEN CHELANGAT RUTO.....APPLICANT**

**AND**

**ROROGU CHERUIYOT NGENO.....1<sup>ST</sup> RESPONDENT**

**ZACHARIAH KIPKOROR NGENO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Plaintiff moved the court by way of Originating Summons dated 30.8.2018 seeking a determination of the following questions:

1. That this honourable court do order that all that parcel of land known as L.R No. KERICHO/KIPKELION/BARSIELE/220, registered in the name of the Defendant be deregistered in his name and the same be transferred to the Applicant.

2. That the 1<sup>st</sup> Respondents absence for a period of 33 years in land parcel KERICHO/KIPKELION/BARSIELE/220 precludes him to be declared as the owner

3. That the Respondent's failure to assert his ownership from 1984 as alleged precluded him from doing so now since he is time-barred

4. That the costs of this suit be awarded to the Applicant.

2. The Originating Summons is based on the Applicant's affidavit sworn on the 30<sup>th</sup> August 2018 in which she deposes that she has been living on the suit property with her family since 1984 with the permission of 1<sup>st</sup> Respondent who is the registered owner of the suit property and she has made major developments on the said property. She further deposes that the 1<sup>st</sup> Respondent's failure to assert his ownership for more than 36 years precludes him from doing so as he is time-barred.

3. The 2<sup>nd</sup> Respondent filed a Replying affidavit stating that the suit was fatally defective as it offends the Civil Procedure Rules. He also took issue with the fact that he had been sued yet no specific claim had been made against him as he was not the registered owner of the suit property and was only a caretaker. He therefore prays that his name be struck out from the suit or alternatively, the entire suit be struck out with costs to him. The Respondents also filed a Notice of Preliminary Objection raising the following grounds:

a) That the suit is sub-judice in view of the fact that a similar matter is pending for determination before this honourable court being Kericho ELC Case No.94 of 2017

b) That the suit as instituted is grossly frivolous, fatally defective and an abuse of the process of the court because it seeks to claim adverse possession where the occupation was not exclusive and was also consensual.

c) That the suit does not disclose any reasonable cause of action and is an abuse of the court process as the issues raised by the Plaintiff are not justifiable

4. This ruling is therefore in respect of the said Preliminary Objection. The Preliminary Objection was prosecuted by way of written submissions and both parties filed their submissions which I have considered.

#### **Issues for Determination**

5. The following issues arise for determination:

i. Whether the suit is sub-judice

ii. Whether the suit is frivolous, defective and an abuse of the process of the court

iii. Whether the suit discloses any reasonable cause of action

#### **Analysis and Determination**

6. The starting point is to define what a preliminary objection is so as to isolate the wheat from the chaff.

7. The case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*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 had to be ascertained or if what is sought is the exercise of judicial discretion”*

8. Among the grounds raised by the Respondents, only the first one qualifies as a preliminary point as it does not require any facts to be ascertained nor does it require the exercise of judicial discretion. In order to determine grounds (ii) and (iii), the court would need to examine the facts of the case and exercise its discretion on whether or not to strike out the suit. In view of this finding, I will only deal with the first ground as a Preliminary point.

9. In the instant case suit, the 1<sup>st</sup> Defendant argues that the Plaintiff's suit is sub-judice.

10. The principle of *res sub-judice* is found in the provisions of section 6 of the Civil Procedure Act which states as follows:

*“No court shall proceed with the trial of any suit or proceeding 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 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 any other court having jurisdiction in Kenya to grant the relief claimed”*

11. This principle requires the court to stay any suit or application where a previous suit or application is pending determination by a court of competent jurisdiction. It is common ground that the issues raised in this suit are similar to those raised in Kericho ELC No. 94 of 2017 as they both relate to the ownership, use and occupation of land parcel number KERICHO/KIPKELION/BARSIELE/220 and that the instant suit was filed after ELC Case no. 94 of 2017. The Plaintiff in both cases is the same and the Defendants in ELC Case no. 94 of 2017 derive their claim from Rorogu Cheruiyot Ngeno who is the 1<sup>st</sup> Defendant in this suit. There is no doubt that the decision in ELC Case No. 94 of 2017 would have a bearing on the instant suit.

12. In the case of **Kiama Wangai V John N. Mugambi & Another (2012) eKLR** it was held that where the court finds that the suits in question fall within the four corners of section 6 aforesaid, the court has no discretion in the matter but to stay the subsequent suit or suits.

13. In the circumstances I have no option but to stay the instant suit and I hereby direct the same be stayed pending the hearing and determination of Kericho ELC Case No. 94 of 2017. Consequently the Preliminary Objection succeeds.

**Dated, signed and delivered at Kericho this 16<sup>th</sup> day of April 2019**

**J.M ONYANGO**

**JUDGE**

In the presence of :

Mr. J.K Kirui for the Applicant

Mr. W.K Ngeno for the Respondent

Court Assistant: Rotich