



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 78 OF 2018

HESBON WRACE ONGADI.....APPLICANT

VERSUS

PRISCILLA MUHONJA ADULU.....RESPONDENT

RULING

The respondent has raised a preliminary objection that this matter is res judicata. The facts are that the applicant filed the suit herein through an originating summons dated the 2nd day of November, 2019 seeking for the determination of the following issues;

- (1) Whether the applicant has acquired title to the land parcel number KAKAMEGA/MUDETE/198 by way of adverse possession.
- (2) Whether the applicant bought land parcel number KAKAMEGA/MUDETE/198 legally from Lena Savai Chiviya in the year 2003.
- (3) Whether the title deed held by Priscilla Muhonja in respect of land parcel number KAKAMEGA/MUDETE/198 should be cancelled and a new title deed for the same be issued to Hesbon Wrace Ongadi.
- (4) Whether Priscilla Muhonja is holding title deed in respect of land parcel number KAKAMEGA/MUDETE/198 in trust for Hesbon Wrace Ongadi who has acquired title to the same by way of adverse possession.
- (5) Who shall bear the costs of the proceedings?

The respondent submits that this matter is res judicata Succession cause number KAKAMEGA HC SUCC. NO. 41 OF 2005 as the application should have raised his objection there and not filed this suit. Order 76 of the Law of Succession Act objection proceedings are filed in court when the petitioner has filed and obtained grant of letters of administration, a beneficiary or any interested party seeks a revocation or annulment of the said grant. Hence this court has no jurisdiction to entertain this matter.

The applicant submitted that the originating summons were duly served upon the respondent and she duly entered appearance and filed a replying affidavit. The proceedings in an originating summons are provided for under order 37 of the Civil Procedure Rules. These are special proceedings which are provided for in special cases. Under order 37 rule 16 the parties are required to take directions upon the close of pleadings. Parties are at liberty to raise any issues after the court as given directions on how the matter should proceed. In the current case the court has not given any directions as to how the current cases should proceed, whether by affidavits and or oral evidence. It is their submissions that the preliminary objections are premature and the same should be dismissed with costs to the applicant.

On the issue of res judicata, matters are held to be re-judicata when parties have filed suits in respect of the same subject matter and the same issues raised and determination made by the court. He is not aware of any suit between the applicant and the respondent where parties have raised issues of adverse possession and trust substantially before the honourable court. There is no case which has been determined between the applicant and the respondent raising issues of adverse possession and trust. The only suit between the applicant and the respondent is case number KAKAMEGA HC ELC No. 209 of 2017 where the respondent is claiming for orders of eviction of the applicant from land parcel number KAKAMEGA/MUSETE/198 and the case has not been determined since it is pending judgment. Succession cause number KAKAMEGA HC SUCC. NO. 41 OF 2005 cannot be used to deem the current suit re-judicata since the applicant was not a party and the issues in the case were purely succession proceedings without any issues for determination between the applicant and respondent herein. It is their submissions that the issues of adverse possession and trust have not been heard and determined by this court and hence an objection in respect of re-judicata can not be raised in the current case. They urge the court to reject the preliminary objection since it is premature and lacks merit and allow the applicant to take directions and proceed with the case for determination on merit.

This court has considered the preliminary objection and the submissions herein. On the issue of jurisdiction the Constitution of Kenya 2010 states as follows;

“162. System of courts

(1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

(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.

(3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

(4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article”.*

I find that this court has jurisdiction to determine this matter as it relates to the use and occupation to land. A Preliminary Objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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”.

J.B. Ojwang, J (as he then was) in the case of *Oraro vs. Mbajja* [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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 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 that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection and is not premature in this case. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

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

Section 7.

“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.”

The respondent submitted, that this matter is res judicata Succession cause number KAKAMEGA HC SUCC. NO. 41 OF 2005 as the application should have raised his objection there and not filed this suit. Order 76 of the Law of Succession Act objection proceedings are filed in court when the petitioner has filed and obtained grant of letters of administration, a beneficiary or any interested party seeks a revocation or annulment of the said grant. Hence this court has no jurisdiction to entertain this matter. It is the applicant’s submissions that the preliminary objections are premature and the same should be dismissed with costs to the applicant. On the issue of res judicata, matters are held to be re-judicata when parties have filed suits in respect of the same subject matter and the same issues raised and determination

made by the court. He is not aware of any suit between the applicant and the respondent where parties have raised issues of adverse possession and trust substantially before the honourable court. There is no case which has been determined between the applicant and the respondent raising issues of adverse possession and trust. The only suit between the applicant and the respondent is case number KAKAMEGA HC ELC No. 209 of 2017 where the respondent is claiming for orders of eviction of the applicant from land parcel number KAKAMEGA/MUSETE/198 and the case has not been determined since it is pending judgment. Succession cause number KAKAMEGA HC SUCC. NO. 41 OF 2005 cannot be used to deem the current suit re-judicata since the applicant was not a party and the issues in the case were purely succession proceedings without any issues for determination between the applicant and respondent herein.

I concur with the applicant that he was not a party in Succession cause number KAKAMEGA HC SUCC. NO. 41 OF 2005 and hence cannot be used to deem the current suit re-judicata. Be that as it may it is admitted that there is a suit number KAKAMEGA HC ELC No. 209 of 2017 where the respondent is claiming for orders of eviction of the applicant from land parcel number KAKAMEGA/MUSETE/198 and the case has not been determined since it is pending judgment. The current suit was filed in 2018. These matters concern the same parties and the same subject matter. I therefore find this matter is sub judice. For that reason this matter is struck off with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE