



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 60 OF 2018

MWANAHAWA ANYONA CHITAYI.....PLAINTIFF

VERSUS

MUSA NDALIRO MUCHELULE & 4 OTHERS.....DEFENDANTS

RULING

The Preliminary Objection to the originating summons dated 8th October, 2018 by the 1st defendant and the 2nd defendant dated 6th February, 2019 raised the following issues;

1. The whole procedure adopted by the plaintiff is totally defective.
2. The whole claim is incompetent and offends the provisions of the law.
3. The originating summons filed by the plaintiff is defective, wanting and ought to be struck out.
4. The plaintiff has totally failed to lay a basis for his case.
5. The orders sought are not maintainable in the circumstances.
6. The claim as filed raises no reasonable cause of action.
7. The claim as filed is vexatious, scandalous and an abuse of court process.
8. The orders sought by the plaintiff cannot issue in the circumstances set out by the plaintiff.
9. They have active pending proceedings between the plaintiff and the 1st defendant.
10. That the suit is res judicata and sub judice.
11. The claim is statute barred and/or time bad and guilty of material non-disclosure.

The plaintiff submitted that the parties have been embroiled in a court battle over land for a long time. The dispute has been handled by village elders, the Land Disputes Tribunal, the Magistrates court all the way to the Court of Appeal. The plaintiff is the true owner of the parcels of land in dispute, having inherited it from her late husband who in turn had inherited it from his late father. The plaintiff brought this suit because she is the legal beneficiary of the parcel number S/WANGA/LUREKO/176 which was mistakenly assigned to Ben Nakhungu. Her husband lived on the land having inherited the land from his father the late Hamisi Nambande. The widow has been enjoying continuous, exclusive and uninterrupted occupation of the said parcel. The plaintiff raises substantive issues for hearing and just determination by this honourable court as provided for in Articles 10, 40, 47 and 50 of the Constitution of Kenya 2010. The plaintiff has a valid claim to the property which she has filed in accordance with the law and has a right to be heard on the same. That there are no active proceedings whatsoever between the plaintiff and the 1st defendant. The 1st defendant first filed a Civil Suit No. 136 of 2005 before the Senior Resident Magistrate's Court at Butere seeking an eviction order against the plaintiff and her son who had been named as the 2nd defendant therein. The suit was fully heard and dismissed. The 1st defendant herein aggrieved by the trial court's decision lodged an appeal at the High Court in Kakamega in Civil Appeal No. 130 of 2007. The High Court found that the trial court exceeded its powers and arrived at the wrong conclusion that the respondents had acquired the land by way of adverse possession. The High Court allowed the appeal and granted eviction orders to the appellant against the respondents. Aggrieved by the High Court's decision the plaintiff herein lodged an appeal at the Court of Appeal at Kisumu in Civil Appeal No. 35 of 2015. The appellate court agreed with the appellants that the trial court did not have jurisdiction to entertain the matter and therefore the subsequent appeal to the High Court was devoid of substratum.

The 1st defendant moved the court in the Senior Principal Magistrate's court at Mumias in MELC Suit No. 157 of 2018 via a Notice of Motion dated 28th June, 2018. The application was opposed by the plaintiff. The court observed that the Court of Appeal did not address the validity or otherwise of the title acquired by the 1st and 2nd defendants. The court in its ruling dated 17th of October, 2018, declined to hear the application because the defendant pleaded adverse possession which the court lacked jurisdiction to hear and same transferred to it for hearing and determination. This matter is therefore properly before this court and they confirm that there is no other pending suit between the same parties raising similar issues in any other court. Both the 1st and 2nd defendant allege that the plaintiff's claim is statute barred and/or time barred and guilty of material non-disclosure. On the issue as to whether the claim is statute/time bared, they wish to submit that the plaintiff's claim is deeply rooted in Article 40 of the Constitution of Kenya which provides for the protection of individual rights to property. It is the plaintiff's submission that a claim based on fundamental rights and freedoms is neither a claim in tort nor contract that would require the application of the Limitation of Actions Act.

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. 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 defendants submitted that there has been various proceedings touching on the same suit land and the same parties in this matter. I have perused the proceedings of the said previous cases and I find that the same dealt with the issue of jurisdiction in that the Court of Appeal at Kisumu in Civil Appeal No. 35 of 2015 agreed with the appellants that the trial court did not have jurisdiction to entertain the matter. I find the issues in the previous cases were different hence the matter is not res judicata. On the issue that the plaintiff's claim is statute barred and/or time barred, I find that this is a claim for adverse possession and the dispute on the land was litigated upon up until the year 2015 and that is when the time frame for recovery of property started running. The case is therefore not time barred. The orders sought are not maintainable in the circumstances. The objection that the claim as filed raises no reasonable cause of action can only be determined once the matter goes to full trial. I find the preliminary objections are not merited and I overrule the same and the costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE