



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 222 OF 2018**

**(FORMERLY HCCC NO. 86 OF 2010 (O.S))**

**GEORGE MWANGI NDIRANGU alias Njogu Ndirangu.....1<sup>ST</sup> APPLICANT**

**MICHAEL NDERITU NDIRANGU alias Nderitu Ndungu ... 2<sup>ND</sup> APPLICANT**

**FREDRICK KARIUKI NDIRANGU alias Kariuki Ndungu...3<sup>RD</sup> APPLICANT**

**BENJAMIN MAINA NDIRANGU alias Maina Ndungu .....4<sup>TH</sup> APPLICANT**

**NGURE NDIRANGU NJOGU alias Ngure Ndungu ..... 5<sup>TH</sup> APPLICANT**

**KAGEMA NDIRANGU NJOGU alias Kagema Ndungu..... 6<sup>TH</sup> APPLICANT**

**KINARO NDIRANGU NJOGU alias Rinewo Ndungu.....7<sup>TH</sup> APPLICANT**

**PETER SHAU KURIA alias Chau Kiniga .....8<sup>TH</sup> APPLICANT**

**JOSEPH KINYANJUI KURIA alias Karanja Kuria .....9<sup>TH</sup> APPLICANT**

**JOSPHAT WAINAINA KURIA alias Chege Kuria.....10<sup>TH</sup> APPLICANT**

**VERSUS**

**MUHU HOLDINGS LIMITED.....RESPONDENT**

**RULING**

1. This ruling is in respect of respondent's Notice of Preliminary objection dated 13<sup>th</sup> January 2017. The objection seeks striking out of the Originating Summons dated 1<sup>st</sup> April 2010 on the following grounds:

1. That this honourable court lacks jurisdiction to entertain the entire motion.

2. That the issues raised in the present Originating Summons were the same issues raised in HCCC No. 341 of 1996 - Muhu Holdings & Ano vs. Njogu & Others where the parties and the subject matter therein were the same and which issues were heard and determined by a court of competent jurisdiction and therefore the present Originating Summons is res judicata for all intents and purposes.

3. That the judgement of the High Court in HCCC No. 341 of 1996 has never been appealed against, varied and/or set aside and therefore the present motion flies in the face of the said judgement and/or decree of 12<sup>th</sup> March, 2007.

4. That the entire motion is a total affront on the provisions of sections 1A, 1B, 3A and 7 of the Civil Procedure Act and is therefore scandalous, frivolous, vexatious and an abuse of this Court's process.

2. Proceedings in this matter were commenced through the aforesaid Originating Summons (OS) wherein the applicants averred that they have been in open and peaceful user and occupation of about 70 acres of the parcel of land known as LR Number 5605 (hereinafter ‘the suit property’) which is registered in the name of the respondent for a period of exceeding 12 years. They added that the respondent filed Nakuru HCCC No. 341 of 1996 against them claiming that they were trespassers and that the High Court rendered its judgment on 12<sup>th</sup> March 2007 whereby the suit was dismissed. Among others, they annexed a copy of the judgment in Nakuru HCCC No. 341 of 1996. They therefore seek judgment for orders that:

1. The applicants are entitled by adverse possession to seventy (70) acres or thereabout of all that parcel of land known as L.R. Number 5605 registered in the name of the Estate of Muhu Kangari (deceased) of which Muhu Holdings Limited is the estate's legal trustee, but currently occupied by the Applicants.
2. The Applicants have been in occupation of the said seventy (70) acres or thereabouts, of all that parcel of Land known as L.R. Number 5605 without permission though with the knowledge of the registered owner for an uninterrupted period exceeding twelve (12) years.
3. The Applicants are entitled under Section 38 (1) and (2) of the Limitation of Actions Act (Cap.22) Laws of Kenya to be registered as the absolute proprietor of the said seventy (70) acres or thereabouts of L.R. Number 5605.
4. The Respondent should transfer the said parcel of Land to the Applicants
5. In default of the Respondent failing to transfer the said land to the Applicants by signing all the requisite conveyance documents, the Deputy Registrar of this Honourable Court do execute all such documents as may be necessary for the registration of the Applicants as proprietors of the above said land.
6. The Applicants should be granted any other relief that the court finds just and fit.
7. The Respondent do pay costs of this suit.

3. The objection was canvassed through written submissions. Both the applicants and the respondent duly filed and exchanged submissions. I have duly considered the objection and the submissions.

4. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *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.**

5. I have perused the preliminary objection herein and I find that it meets the above criteria. I will therefore proceed to consider its merits.

6. Citing the judgment in Nakuru HCCC No. 341 of 1996, the respondent has argued that the suit herein is *res judicata* since the applicants had filed a counterclaim in the said suit wherein they sought a declaration that they were legally entitled to about 30 acres of the suit property as they had acquired it by adverse possession. The respondent relied inter alia on the case of **Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR**. On the other hand, the applicants argue that although there was indeed a claim for adverse possession, *res judicata* does not apply since there was no final decision on the matter. Additionally, the respondent concedes that the litigation in Nakuru HCCC No. 341 of 1996 was between the applicants herein as defendants and the respondent herein together with one other party as plaintiffs.

7. Statutory guidance on *res judicata* is found at **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.** [Emphasis supplied]

8. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** the Court of Appeal stated thus:

**... the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be 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...** [Emphasis supplied]

9. I have read the judgment rendered on 12<sup>th</sup> March 2007 in Nakuru HCCC No. 341 of 1996 by D. Musinga J (as he then was). It is indeed

correct that there was a counterclaim seeking a declaration that the defendants in the said suit were entitled to about 30 acres of the suit property as they had acquired it by adverse possession. Having considered the case, the judge came to the conclusion that the defendants had established their claim for adverse possession. However in view of the provisions of the then prevailing **Order XXXVI rule 3D** of the **Civil Procedure Rules** which mandatorily required that claims in the nature of adverse possession be brought by way of Originating Summons, the judge dismissed the defendants' claim as regards adverse possession. That was the law then. The situation is now different since a claim in the nature of adverse possession can now be introduced by way of counterclaim. The mission of the court is to do substantive justice and there have been instances when the courts have ordered that litigants be registered as proprietors even when they raised adverse possession only in the defence but without a counterclaim. In **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** the Court of Appeal stated:

**The last matter for us relates to the final orders. We alluded at the beginning of this judgment to a statement in the trial court's judgment to the effect that the respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the reason that the claim was not brought by suit pursuant to section 38 (1) of the Act. We reiterate that section 38 provides that whenever an adverse possessor claims to have become entitled to land he "may apply to the High Court for an order that he be registered as the proprietor...."**

**In the case of Gulam Mariam (supra) in which a similar question arose, this Court resolved it thus;**

**"When the respondent elected to raise the defence of adverse possession without a counterclaim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished."**

**... Like in the above authority, we make the order that the appellant shall transfer to the respondent the property at the latter's expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute, on behalf of the appellant the necessary transfer documents. ....**

10. Needless to state, the applicants herein will have to establish their claim since the court is not bound by the decision of the High Court in Nakuru HCCC No. 341 of 1996.

11. One key aspect of *res judicata* is that the issue must have been **finally** determined. The question of adverse possession was not finally determined in Nakuru HCCC No. 341 of 1996 since the court was barred by the then existing procedural law from making any award on it. The judge, as a parting shot, stated that the applicants "may take such action to obtain titles as they may be advised." I think this is one of those instances where the court must walk decisively past ghosts of yore. As Madan, JA (as he then was) stated in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others[1978] KLR 143; [1976-80] 1 KLR 891:**

**If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred.**

12. In the totality of the circumstances of this case and considering the overall mission of the court to do substantive justice, the court would be failing if it slammed its doors on the applicants on the basis of *res judicata*. Let the applicants have their day in court. The respondent will not suffer any prejudice beyond that which can ultimately be compensated by an award of costs.

13. In view of the foregoing, I find no merit in the preliminary objection and dismiss it. Costs shall be in the cause.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of September 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mburu Kagucia for the applicants

Mr Mburu P. holding brief for Mr Kahari for the respondent

Court Assistants: Beatrice & Lotkomo