



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 12B OF 2019

**ROSE WANGUI WANDERI (suing as the personal legal Representative to the estate of
HEZRON GATHERU KURIA).....PLAINTIFF /APPLICANT**

VS

SAMWEL MWANGI GITHAMARO.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling in respect to the Preliminary Objection as raised by the Defendant/ Respondent to the Originating Summons dated 17/4/2019 on the following grounds;

- a. That the entire suit herein is res judicata in view of the ELC No. 554 of 2010- Nairobi (OS) filed on 10/11/2010 as between the Plaintiff and the Defendant claiming through the same capacities.
- b. That there is already a pending suit vide Thika CMC &E No. 141 of 2014 which is still pending and it involves both parties hence the matter herein raised are sub-judice.
- c. That the Plaintiff's claim for registration by way of adverse possession is not anchored on any statutory authority and her claim if any was extinguished on the 12/4/2010 upon sealing the decree in Thika Chief Magistrate's Court vide D.O Case No. 49 of 2008.
- d. That the Plaintiff has no capacity to sue as an ad litem administrator since the claim for adverse possession does not survive the demise of a deceased litigant.

2. The Preliminary Objection was canvassed through written submissions.

3. The Defendant / Respondent submits that the suit herein is res judicata because the Plaintiff /Applicant had instituted Nairobi ELC No. 554 of 2010(OS) on 10/11/2010 claiming under the same capacities over the same subject matter but does not go ahead to say what the determination if any in that suit as neither has he supplied copies of proceedings in the said matter. The Respondent goes further to submit on the claim being sub-judice by dint of the pending and ongoing suit before the CM's Court at Thika being Thika CMCC No. 141 of 2014 where he alleges the parties therein are the same litigating over the same subject matter. He believes the instant suit is an abuse of Court process despite the pending application by the Plaintiff for the transfer of the Thika matter to this Court.

4. The Respondent further contends that the Applicant's claim on adverse possession was extinguished upon the entry of decree in the Thika Magistrate's Court vide D.O case no. 49 of 2008 where the Respondent was declared to be rightfully registered over the suit land having been so registered for a period of 12 years. He contends that he holds an absolute title to the suit land and is therefore the indefeasible owner. That after the said verdict the Respondent did not evict the Applicant from the suit but consented to her continued stay thus adverse possession does not arise.

5. Lastly, the Respondent avers that the claim for adverse possession does not survive the deceased, thus the Applicant's claim as an ad litem administrator cannot stand because apparently the Respondent acquired the suit land adversely from the Applicant's deceased father vide the ruling in the D.O Case number 49 of 2008 and that time in favour of the Applicant would therefore start to run after the said ruling, which is yet to lapse. He has made reference to several case law therein.

6. The Plaintiff/ Applicant denied that she has instituted the Nairobi ELC No. 554 of 2010(OS) as alleged and challenged the Respondent to supply to the Court the proceedings in that case and the verdict if any. She contends that in absence of such documentary evidence this Honourable Court would have no factual and legal basis to make a finding of the suit being res judicata.

7. In answer to whether her claim is sub-judice the Applicant admits the existence of the pending Thika CMCC No. 141 of 2014 in which she

is sued by the Respondent herein seeking to evict her from the suit land and goes ahead to explain that with leave of the lower Court she had opportunity to amend her defence to include a Counter claim premised on adverse possession of a portion 0.8 acres of the Respondent's land. That the lower Court lacks jurisdiction over adverse possession claims and it is for that reason that after filing the instant suit she made the application dated 6/5/2019 seeking to transfer the lower Court file to this Court for determination. That it was not her intention to have the two matters heard concurrently but to be heard as one suit as and when her said application for transfer is allowed.

8. In response to whether the Applicant's claim on adverse possession had been extinguished by the judgment entered in the Thika Magistrate's Court vide D.O case no. 49 of 2008, the Applicant responds in the negative and avers that she had been in occupation long before that decision was made and continued to remain in occupation of the portion of 0.8 acres of the suit land even after the verdict was made whilst the Respondent took no action whatsoever to disturb her said occupation. She is cognizant of the fact that time stops to run when the registered owner takes action to evict the would be adverse possessor before the lapse of the stipulated 12 years. In the premises, she is convinced that her claims still stands.

9. On the fourth limb of the Preliminary Objection the Applicant submits that the law provides for survival of suits after the demise of a Plaintiff under Order 24 Rule of the Civil Procedure Rules and that the awards of letters of administration operate retrospectively to the date of death of the Plaintiff in respect to actions for recover of land by dint of Section 16 of the Limitation of Actions Act. The Applicant concludes that having obtained the letters ad litem to her husband's estate she has the legal capacity to institute the instant suit.

10. The Applicant concludes that hers is the proper legal standing in this suit, that her claim is not res judicata nor is it sub judice and her claim on adverse possession on behalf of her deceased husband's estate was never extinguished. She maintains the Preliminary Objection as being baseless and abuse of Court process and enjoins the Court to dismiss the same with costs.

11. The first issue is whether the Preliminary Objections are valid. The law relating to Preliminary Objections is well settled. A Preliminary Objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of Preliminary Objection. 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.

12. On res judicata, the doctrine is provided for in our jurisprudence by dint 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.”

13. For a claim of res judicata to succeed the following elements must be present;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

14. The Respondent did not table any evidence of the alleged previous suit to wit ELC 554 of 2010, Nairobi. He did state what remedies were sought thereunder and what reliefs were awarded if any. The Applicant has openly denied the existence of such a suit. This leaves the Court with absolutely no material to evaluate against the ingredients of the claim of res judicata as prescribed under statute, the objection on the first limb should fail. To the extent that the Court requires to investigate whether the matter is res judicata, the objection fails to be a pure point of law.

15. The next issue is whether the suit offends the provisions of Section 6 of the Civil Procedure Act. The section provides 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 between 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.”

16. The Applicant has admitted to the existence of the pending Thika CMCC No. 141 of 2014, copies of the pleadings thereunder are annexed to her application for transfer which does not disclose similar cause of action though the same parties are litigating under the same title as is in the instant suit. The cause of action in the current suit is adverse possession while in the lower Court the Plaintiff is seeking

eviction of the Defendant. The Defendant denied the Plaintiffs claim and filed a Counterclaim in which she seeks recovery of 0.8 acres which was fraudulently registered in the name of the Plaintiff, as alleged.

17. It is the view of the Court that the current suit is neither resjudicatanor subjudice.

18. The Preliminary Objection is unmerited.

19. It is dismissed with costs in favour of the Respondent.

20. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF NOVEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kinuthia HB for Kanyi for the Plaintiff/Applicant

MuturiNjoroge for the Defendant/Respondent

Ms Irene and MsNjeri, Court Assistant