



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 35 OF 2019 (OS)

FATUMA GATITU MUHAMUDO.....1ST PLAINTIFF

ZUBERI ABDALLA HASSAN.....2ND PLAINTIFF

VERSUS

YUSUF JUMA (The administrator

of the estate of the late JUMA YUSUF).....DEFENDANT

RULING

1. This ruling is in respect of the notice of Preliminary objection filed on 18.9.2019 by the defendant as well as the application filed on 9.7.2019 by the plaintiff. On 19.9.2019 the court gave directions that the preliminary objection and the notice of motion application be canvassed simultaneously.

Notice of preliminary objection

2. The defendant has filed this notice of preliminary objection averring that the suit is res judicata and offends the provisions of section 7 of the Civil Procedure Act, that the plaintiffs have no locus to sue over the estate of the deceased (Juma Yusuf), that the suit is otherwise bad in law and is an abuse of the court process and therefore fatally defective. The defendant urges the court to dismiss or strike out the entire suit with costs to the defendant.

The notice of motion

3. In this application filed on 9.7.2019, the plaintiff is seeking orders of temporary injunction restraining the defendant or any other person claiming on his behalf from interfering with plaintiffs and their other family member's occupation and user of ½ share of land parcel no. LR Ntima/Igoki/610 measuring 0.06 Ha. (herein after the suit land) pending the hearing and determination of the suit. The plaintiff is also seeking an order of inhibition to be lodged in respect of the suit land.

Arguments for the plaintiff

4. The plaintiffs' application is supported by the grounds on the face of the application and in the supporting affidavit of the two applicants. Basically the said applicants are claiming that they have always occupied ½ share of the suit land openly, continuously, notoriously and without interruption since year 1958. They aver that if the orders sought for are not granted, the defendants might evict them rendering the whole suit a nullity. They also allege that it is necessary to have the orders of inhibition in order to stop the defendant from registering any dealings in respect of the suit land.

5. On the issue raised by the defendant that there was a succession cause at Isiolo Kadhis court no. 8 of 2015, the plaintiffs aver that the Kadhis court has no jurisdiction to hear claims of adverse possession just in the same way that this environment and land court cannot entertain succession disputes. The plaintiffs therefore state that this suit does not offend the provisions of section 7 of the civil procedure act. They contend that a preliminary objection ought to be grounded on strict points of law, which is not the case in the present suit.

6. The plaintiffs therefore urge this court to allow their application dated 8.7.2019 and dismiss the preliminary objection dated 17.9.2019 with costs.

Arguments for the defendant

7. The defendant has filed grounds of opposition dated 12.9.2019, a replying affidavit dated 17.9.2019 and the Notice of Preliminary Objection dated 17.9.2019. He contends that the applicants have intentionally not disclosed to this court that the suit land was the subject of

Isiolo Kadhi succession cause no. 8 of 2015 which was determined way back on 31.5.2017 with the result that the suit land was distributed to the children of the late Juma Yussuf. The defendant further avers that the 2nd plaintiff herein lodged an appeal in Meru High court Civil appeal no. 48/17 against the judgment of the Kadhi but the matter was dismissed. The plaintiffs then filed Meru High court Misc. succ. 138/2015 which too was equally dismissed on 5.6.2019.

8. The defendant contends that since the Isiolo Kadhi succession case and Meru High court Misc. Succ. Cause were heard and determined by courts of competent jurisdiction where the parties were the same and the subject matter was the same, then the present application as well as the suit are res judicata. Therefore, if the orders sought herein are granted this will render the decision in the Kadhis court useless and an academic exercise.

9. In the submissions, defendant avers that the plaintiffs lack locus to bring a claim of adverse possession over the same land which they have all along claimed to be ancestral land given to them by the defendant's deceased father. Defendant therefore contends that this suit is not only an abuse of the court process, but it is also an afterthought and a mere fishing expedition. Further the defendants have submitted that this suit is a ploy by the plaintiffs to defeat the court's judgment in Isiolo Kadhis succession cause no. 8/2015 and the Meru High Court civil appeal no. 48/17 as well as Meru High court Misc. succ.no. 138/15.

10. Finally, it was submitted by the defendant that the affidavit in support of the notice of the motion is not commissioned and is therefore bad in law and is an abuse of the process of the court.

Determination

11. The main issues for determination are:

- Whether this suit is res judicata to Isiolo Kadhis succession cause 8/2015, Meru civil appeal no. 48/2017 and Meru Misc. succession no. 128/15.
- Whether the orders of inhibition and injunction are merited.

Res judicata

12. I find that the defendant herein has availed the proceedings and judgment in Isiolo Kadhis court in succession cause no. 8/2015 as well as the ruling in High court civil appeal no. 48/2017. The judgment in Isiolo Kadhis court was concerned with the distribution of the estate of one Juma Bin Yusuf, whereby the petitioners were Yusuf Juma (the current defendant) and Zubheir Abdalla as the respondent (the current 2nd plaintiff). The suit land in the Isiolo matter was Ntima/Igoki/610 which is the suit land in the present suit. Under these circumstances can the present suit be said to be res judicata?

13. Section 7 of the Civil Procedure Act provides as follows:

“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”.

14. In the case of **Michael Gachoki Gicheru vs Joseph Karobia Gicheru Kerugoya ELC No. 783/2013, Judge Olao** laid out the five essential elements that must exist before the claim of res judicata can successfully be raised and which elements are captured in section 7 of the civil procedure Act. These are:

- (i) “The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue before the former suit (emphasize added).**
- (ii) The former suit must have been between the same parties or parties under whom they claim.**
- (iii) The parties must have litigated under the same title.**
- (iv) The court which decided the former suit must have been competent and lastly,**
- (v) The former suit must have been heard and finally decided by the court”.**

15. In the case of **Henry Wanyama Khaemba vs Standard Chartered Bank Kenya LTD and another, Nairobi High court, Commercial and Admiralty division civil suit no.335/2013,** it was stated that:

“The issues of res judicata, duplicity of suits and suits having been spent will require probing of evidencethey are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objections”.

16. In the present suit, the plaintiffs claim is anchored on the principal of adverse possession. This is not an issue which was litigated upon before the Kadhis court and neither does the Kadhis court have the jurisdiction to determine such an issue. It is contended by the defendant that all along the plaintiffs were claiming the suit on the basis of ancestry. This is not a pure point of law as the same invites the court to

peruse the evidence and the facts thereon. A Preliminary Objection must not be blurred by factual details calling for evidence. It follows that even if the parties herein were the same in the succession cause before the Kadhis court and that the subject matter is also the same the issues are certainly different.

17. I therefore conclude that this case is not res judicata and therefore the preliminary objection is not merited.

Inhibition/injunction

18. The plaintiffs aver that they have been on the suit land for many years. The respondent has not rebutted this claim. Even before the Kadhis court the 2nd plaintiff herein had stated that they use the suit land as their home. It is therefore necessary to have the status quo maintained and to have the substratum of the suit preserved in the intervening period, before the suit is heard and determined. I am inclined to believe that the applicants have met the criteria set out in the celebrated case of **Giella vs Cassman Brown** whereby they have established a prima facie case with high chances of success, that they stand to suffer irreparable damage if the orders sought are not granted and that the balance of convenience tilts in their favour.

19. I must point out that the plaintiffs have filed a proper affidavit the one filed on 3.10.2019.

20. I therefore find that the application is merited.

21. Final orders:

1) The preliminary objection dated 17.9.2019 is hereby dismissed.

2) The court allows the prayers for inhibition and injunction set out in the application dated 8/7/2019 but such orders shall stay in force for a period of 1 year only.

3) Each party to bear their own costs of the preliminary objection and the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 4TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Ndegwa holding brief for Muthomi for applicant

Ndubi for respondent

Both plaintiffs

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE