



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COAURT

AT KITALE

LAND CASE NO. 167 OF 2017(OS)

Formerly Eldoret ELC No. 270 of 2017(OS)

PIUS ISAIGA & 57 OTHERS.....PLAINTIFFS

VERSUS

SAMMY KIPROTICH KOSGEI

CLEMENT KIPROTICH LAGAT.....RESPONDENTS

R U L I N G

1. The 58 plaintiffs in the Originating Summons herein have sought the following orders in their originating summons:

(1) Whether the applicants herein have acquired title (s) to the said parcel of land measuring 11.2 Hectares or thereabouts respectively from the parcel of land originally known NANDI/KAPKANGANI/272 now subdivided to create new Titles Nos. NANDI/KAPKANGANI/1371-1384 by adverse possession.

(2) Whether the respondents Sammy Kiprotich Kosgei and Clement Kiprotich Kosgei holds title to the said land in trust for the applicants herein.

(3) Whether the title of the respondents in respect of the said parcel of land got extinguished on the expiry of 12 years after the applicants took possession thereof.

(4) Whether the registration of the respondents as the proprietor of the whole land originally known NANDI/KAPKANGANI/272 now subdivided to create new titles Nos. NANDI/KAPKANGANI/1371-1384 should be cancelled and the said land measuring 11.2 Hectares or thereabouts to applicants herein respectively which is under the possession of the applicants be registered in their names respectively.

(5) Whether the respondents should be ordered to execute all such documents of transfer as shall facilitate the transfer into the applicants' names the said parcel of land measuring 11.2 Hectares or thereabouts applicants from the said parcel of land originally known NANDI/KAPKANGANI/272 now subdivided to create new titles Nos. NANDI/KAPKANGANI/1371-1384 and in default the Deputy Registrar be empowered to execute all the relevant documents on behalf of the respondents.

(6) Declaration that the orders made on 30th June, 1989 in Eldoret CMCC No. 794 of 1979 are unenforceable and statutory time barred against the applications herein.

(7) Whether the respondent should be condemned in the costs of this suit.

2. In the grounds at the foot of the Originating Summons they aver that they have been in occupation and utilization of the suit land between the year 1969 and 1989 to date continuously, openly, peacefully and ***“uninterrupted and that they have extensively developed the land in total exclusion of”*** the defendants.

3. It is further alleged in those grounds that some of the applicants' parents and others had purchased some portions of the suit land from one Kipkosgei Arap Chepturo, a former owner and settled thereon. The plaintiffs allege that the defendants secretly acquired the title to the suit land on 30/11/2015 from the original owner and without the knowledge and consent of the plaintiffs. It is further averred that the defendants sold their portions and moved elsewhere and have never occupied or utilized the plaintiffs' portions of land since in between the year 1969 to

1989 to date, they have also never been successful at evicting the plaintiffs.

4. The Originating Summons is supported by the sworn affidavit of one Pius Isaiga who identifies the defendants as the sons of the original owner of the suit land and reiterates in greater detail the contents of the grounds at the foot of the Originating Summons.

5. From the said affidavit the information that comes out is that the original land owner died and was buried on a different land parcel and the defendants became the administrators of the deceased's estate vide a grant issued in Eldoret H.C. Succession Cause No. 771 of 2015. The deponent states that the parents of the applicants died and were buried on the suit land without any demur on the part of the defendants, and that the defendants did sell some of the suit land to some of the plaintiffs in 1989 and moved out of the suit land. The deponent avers that the plaintiffs have been in possession of the suit land for more than 12 years to the exclusion of the defendants hence the claim that they have acquired title by way of adverse possession. The deponent describes the extent of land occupied by each plaintiff and avers that each portion has definite boundaries and is developed. However, the deponent states, the defendants have caused the original title that is Nandi/Kapkangani/272 to be subdivided into 14 smaller portions, but they have been unable to enforce a warrant of removal or eviction dated 25/7/1989 issued in **Eldoret SPM.CC. No.764/79**. The deponent states that the said order is now statutorily time barred and all the parties therein are dead.

6. For those reasons the plaintiffs allege that the respondent's title is extinguished. That, in brief, is the background to the application dated 16/8/2017 filed in person by the respondents named in the Originating Summons which we will deal with from this point. That application seeks orders that:-

- (1) **The orders issued by this court on 25/7/17 in their entirety be varied and/or vacated and/or set aside.**
- (2) **That the Originating Summons filed dated 24/7/17 be refused and dismissed;**
- (3) **That the respondents who are the plaintiffs in the Originating Summons be declared vexatious litigants;**
- (4) **Costs.**

7. The grounds upon which the application dated 16/8/2017 is made are that:-

- (1) **The respondents have concealed material facts in that they failed to disclose that a petition, *Kitale High Court Constitutional Petition No. 6 of 2016* which the defendants had filed had been dismissed by the court which found that prescriptive rights had not accrued to them.**
- (2) **That this court is now *functus officio*;**
- (3) **That two other matters to wit, Eldoret CM.CC. No. 794 of 1979 and Kakamega High Court Civil Appeal No. 49 of 1991 in respect of the same subject matter as this Originating Summons had been dismissed.**
- (4) **That the defendants have filed objection proceedings in Eldoret High Court Succession cause No. 221 of 2015 and the same is pending for determination.**

8. The application is supported by the sworn affidavit of Sammy Kiprotich Kosgei who is the 1st defendant in the Originating Summons. It reiterates in greater detail the contents of the grounds at the foot of the application. In particular the deponent states that in **Eldoret SPM.CC.No.794 of 1979** the respondents sought orders against the applicant's father but the suit was dismissed and the respondents were ordered to vacate the suit premises. They filed an appeal soon thereafter which appeal remained unprosecuted until 12/3/2015 when the said appeal was dismissed for want of prosecution. Upon the dismissal of the appeal the respondents filed **Eldoret High Court Petition No.11 of 2016** and the court granted them conservatory orders till the petition was heard and determined. It is the deponents' position that the orders sought in that constitutional petition are similar to the orders sought in the originating Summons in which the instant application has been brought. That constitutional petition, it is urged, was determined on 30/5/2017. The objection proceedings that the respondents are said to have filed in **Eldoret High Court Succession Cause No. Eldoret 221 of 2015** are exhibited as "SKK 6" in the supporting affidavit.

9. The deponent therefore avers that the defendants have been filing frivolous proceedings and that the plaintiffs have suffered much damage due to the litigation filed by the defendants. They therefore urge that in future the defendants be required to seek leave of court to file any other proceedings over the subject matter of the Originating Motion.

The Respondents' Response

10. The respondents filed the sworn affidavit of Pius Isaiga dated 21/9/2017 in reply to the application. They restate all the contents of the Affidavit in support of the Originating Summons and, based on advice from their advocate on the record, add that they believe that the Originating Summons herein is not Res Judicata as the issues raised in **Kitale High Court Constitutional Petition No. 6 of 2016** were in relation to violation of their constitutional rights and the court did not therein address the issue of ownership of the land.

11. They also aver that issues concerning ownership and acquisition of the suit land have never been heard and determined thus the suit is not res judicata. The defendants deny that they were parties in **Eldoret CM.CC.No.794 of 1979** and **Kakamega High Court Misc. Civil Appeal No. 49 of 1991** and that the parties to those suits are deceased and they have since abated. They also deny being parties in **Eldoret High Court Succession Cause No.221 of 2015**. They term the application as frivolous and vexatious and an abuse of the process of court and urge that the court has jurisdiction to entertain the suit. They aver that the application raises only technicalities in order to circumvent the hearing of the Originating Summons on its merits.

The Applicants' Submissions

12. The applicants filed their written submissions on 31/10/2017. They urged that the respondents have not satisfied the criteria set by the Law to enable them be decreed adverse possessors as they have not exhibited a certified extract of the title to the land in question as required in **Order 37 Rule 7** of the Civil Procedure Rules.

13. The second point raised by the applicants is that the Originating Summons is *res judicata* in that in **Kitale High Court Constitutional Petition No. 6 of 2016**, the respondents sought in prayer **No. 4** thereof that this court declare that they had acquired adverse possession rights over the suit land. It is urged that this court did delve into the issue and that it stated clearly that the respondents have not acquired adverse possession rights over the suit land. The applicants also argue that since the subject matter land has been under litigation since 1975, time stopped running in respect of adverse possession rights and the judgment in **Kitale High Court Petition No. 6 of 2016** determined that that was the true position.

14. The applicants relied on the cases of **Githu -vs- Ndele (1984) KLR 776**, **Wilson Katama and 101 others -vs- Salim Abdalla Bakshwen and Another - Civil Appeal No. 11 of 2014 - Malindi** and **Kamunye & Another -vs- Pioneer General Assurance Society Ltd (1971) EA 263**. They urge that the Originating Summons herein be dismissed with costs.

The Respondents' Written Submissions

15. The respondents filed their written submissions on 21/11/2017. The respondents aver that the firm of Seneti Oburu & Co. Advocates drew up and filed the application now under consideration, that the firm of Seneti Oburu & Co. Advocates is irregularly and improperly on record and has no audience before this court and therefore the said application should be expunged from the record as there is no notice of appointment of Advocates or Notice of change of Advocates filed by Seneti Oburu & Co. Advocates. They urge that an omission to file and serve a Notice of change of Advocates is fatal. They cite **Order 9 Rules 1 and 7**.

16. The respondents also submit that the firm of Mr. Murgor appeared in court alongside the firm of Seneti Oburu & Co. Advocates yet there is no provision in law for two or more advocates firms to act for a party. The respondents cite the case of **Kenya Commercial Bank Ltd -vs- John Benjamin Wanyama Kakamega HCCA No. 97 of 1999** in aid of this proposition. They also cite the case of **Kenya National Private Security Workers Union -Vs- Total Security Surveillance Ltd 2014 eKLR**.

17. Thirdly the respondents aver that no good basis has been made for the prayer for setting aside orders of 25/7/17 as the applicants are not in occupation of the suit land since 1969 to date.

18. The respondents aver they have never been parties in **Eldoret C.M.C.C. No.794 of 1979 and Kakamega HCCA No.49 of 1991 and Eldoret HC. Succ. Cause No.221 of 2015** and urge that the parties in **Eldoret CMCC.No.794 of 1979** in which an order was issued for removal and giving possession of the suit land died and the suit abated and therefore the orders made therein can not be enforced against the respondents. The respondents also aver that the suit land has already changed hands. The respondents aver that issue of ownership and acquisition can only be ventilated through the hearing of the Originating Summons. The respondents despite having filed a Constitutional Petition for the purpose earlier, now argue that a Constitutional Petition is not the appropriate forum for the ventilation of claims based on adverse possession. Consequently they claim that the Originating Summons is therefore not *res judicata* and that in any event the doctrine of *Res Judicata* does not apply to constitutional petitions. They cite the case of **Nancy Mwangi T/A Worthlin -vs- Airtel Network (K) Ltd and 2 Others 2014 eKLR** and the case of **Mercy Munene King'oo & Another -vs- Safaricom Ltd and Another 2016 eKLR** and **Enock Kiwao -vs- Hamid Abdallah Mbarak 2015 eKLR**.

Determination Issues for Determination

19. The issues for determination in this application are as follows:-

(1) *Are the respondents guilty of non-disclosure of any material facts?*

(2) *Is the Originating Motion res judicata?*

(3) *Should the respondents be declared vexatious litigants?*

(3) *Who should bear the costs of the application?*

(1) *Are the respondents guilty of non-disclosure of any material facts?*

20. This allegation focuses on the alleged non-disclosure of the existence of **Kitale Court petition No. 6 of 2016**. For the purposes of this ruling the non-disclosure has to be of such nature that it would affect the decision of this court once the proper state of affairs is revealed. Not much is discussed in the applicants' submissions on the issue of non-disclosure. However this court notes that it is a self-explanatory ground in the instant application.

21. Upon a review of the Originating Summons, I find that the existence of **Eldoret CM.CC. No.794 of 1979, Eldoret High Court Succession Cause No.221 of 2015** has been disclosed. What has not been disclosed is the existence of a judgment affecting the suit land in **Kitale Constitutional Petition No.6 of 2016** and **Kakamega High Court Civil Appeal No. 49 of 1991**.

22. Is the non-disclosure material? It can be gathered from the applicants submission and affidavit evidence that the issue herein as to whether the plaintiffs had acquired rights to the land by way of adverse possession has already been determined in **Kitale Constitutional**

Petition No. 6 of 2016 which was filed by the plaintiffs. An examination of that petition which is attached as exhibit “**SKK 4**” in the Applicants Supporting affidavit sworn on 17/8/2017, shows that the respondents herein sought constitutional redress for what they considered as a violation of their constitutional rights. **Articles 27** (right to equality before the law and protection of the law) **28** (right to inherent dignity of the person and its protection), **31** (right to privacy), **35** (access to information held by the state), **40** (right to own property), **43** (economic and social rights) and **47** (right to fair administrative action), were cited.

23. However, besides these allegations of threatened violation of rights the respondents herein also averred in that petition that they have been in interrupted (probably they meant “uninterrupted”) quiet and continuous occupation of the suit property. Apart from an injunction the respondents also prayed for other orders in that petition including:

“(2) A declaration that the judgment in Civil Suit No.794 of 1979 at Eldoret has been overtaken by events and is time barred.

(3) A declaration that Eldoret Resident Magistrates Court Civil Suit Number 794 of 1979 abated and no decree or order arising therefrom is executable.

(4) A declaration that the petitioners have had and enjoyed uninterrupted open and peaceful possession of the property previously known as Nandi/Kapkangani/272 and now property known as Nandi/Kapkangani/1371 - 1384 for since 1969 and it has been not through force not, secretly and have acquired the same through adverse possession.

(5) A declaration that the petitioners’ constitutional rights as per 13 above have been violated and/or threatened to be violated.”

24. At **paragraph 16** of the judgment of the **Court in Kitale Petition No.6 of 2016**, the court considered in detail the issue of whether the petitioners have acquired any prescriptive rights over the suit property. It found that even if the petitioners are seeking to be declared as having acquired the land by adverse possession evidence in the petition showed that the 10 original plaintiffs started staying on the suit land in 1969 and the first case by the 10 plaintiffs was filed in 1975. This was some six years from the time of occupation. The effect of filing of the 1975 case, the court stated, was that under the law relating to adverse possession, time stopped running and the petitioners and their forefathers cannot therefore have any claim based on adverse possession. The court made a specific finding that the petitioners had not acquired the suit land by way of adverse possession and that in any case the register for the suit property was in the name of the deceased was opened in 1983. If time was to run, it would not have started running against the deceased until he became registered as owner of the suit land. It is the above prayer on adverse possession in the petition, and the courts deliberate determination on that prayer that makes it necessary for this court to conclude that the omission to declare the existence of the petition and judgment in Kitale Petition No. 6 of 2016 to be material non-disclosure in the instant Originating Summons which also seeks determination of the issue whether the plaintiffs have acquired prescriptive rights over the property.

25. I therefore find that the plaintiffs in the Originating Summons are culpable of material non-disclosure.

(2) Is the Originating Summons filed on 24/7/2017 Res Judicata?

26. While addressing the first issue of material non-disclosure I delved at length on the nature of the prayers in the **Kitale Constitutional Petition No. 6 of 2016** for purpose of comparison with the prayers sought in the current Originating Summons.

27. The conclusion is that in both cases the prayers for a declaration that the respondents herein have acquired the prescriptive rights to the suit land was a common denominator in both suits. However the issue of *Res Judicata* requires this court to explore further to determine whether that issue was determined firstly, between the same parties, secondly by a court of competent jurisdiction and thirdly, with finality.

28. It is not in doubt that the issue of adverse possession was determined in the **Kitale Constitutional Petition No.6 of 2016** which was between the same parties named in the Originating Summons herein. The plaintiffs in the Originating Summons who are the respondents in the instant application clearly argue that:-

“Conversely a Constitution Petition is not an appropriate forum to ventilate claims based on adverse possession”.

29. This averment is contained in **Paragraph 17** of their submissions dated 18/11/2017 and filed in this case on 21/11/17. For this reason, the plaintiffs urge that the Originating Summons herein is not *res Judicata* and that in any event the doctrine of *Res Judicata* does not apply to constitutional petitions. In the same breath they cite the case of **Nancy Mwangi, (supra)** in which the court pays tribute to the readiness of Kenyan courts to safeguard the right to fair trial when faced with applications to strike out pleadings. They also cite the case of **Mercy Muneo Kingoo** where the court stated as follows:

“My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alleged to be in contravention of the constitution, similar cases may be brought to court but based on a different dimension. A petitioner can say that a certain provision of statute is unconstitutional as it violates a certain article of the constitution. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violates another article of the constitution.”

That in my view is a self-explanatory argument regarding ability to institute multiple constitutional petitions for similar prayers but based on allegations of violation of different articles of the constitution.

It has no application in this case where the second proceeding that followed a constitutional petition that conclusively dealt with the same issues said to be *res judicata* is an originating summons.

30. Given the circumstances of this case the respondents' argument that "*a Constitutional Petition is not an appropriate forum to ventilate claims based on adverse possession*" is, in my view, strange. When a party, as the respondents did, invites a court of law formally to determine an issue of infringement of rights by way of a constitutional petition, which issue cannot be determined without establishing certain basic facts, if that court makes findings on those basic facts that will form the basis for the grant or denial of the constitutional remedies sought on the basis of evidence presented in that petition, that party is, in my view, estopped from subsequently disputing that the court handling such petition had jurisdiction to establish the existence or non-existence of those basic facts. In my view, a constitutional remedy is a higher remedy than an ordinary remedy, and its grant depends on the existence of certain facts which the court has to determine first in order to issue any declaration sought or to deny it. The court has jurisdiction to make binding findings on such issues of fact. It is incumbent upon the petitioner in the constitutional petition to present all necessary evidence that will support the case he has placed before that court. If, while arriving at the determination on the main issue of the breach of rights the court determines the existence or non-existence of those facts, then any other suit that seeks a fresh findings and a determination of the same issues arising from those facts between the same parties must be held to be *res judicata*.

31. At **Paragraph 18** of their submissions in this application the plaintiffs in the Originating summons state that the under **Article 50 and 159** of the constitution courts should dispense substantive justice by allowing parties to ventilate their cases in an open and full trial. There is no evidence presented before this court that the plaintiffs were prevented from doing so in the petition, or that the court relied on any technicalities at the expense of substantive justice. In my view, it would be a different case altogether had the court hearing the petition preliminarily struck out the claim for adverse possession. In that event, this court would be reluctant to declare the instant Originating Summons *res judicata*.

32. However it being that a determination of whether any title to the suit land vested in the petitioners in any manner (including by way of adverse possession) was preliminary to the issuance of certain constitutional declarations sought in that petition, that decision on the issue of title by way of adverse possession was sound, and it bound the petitioners who had sought judgment on it in that petition. The respondents have not indicated that they have successfully appealed that decision in **Kitale Constitutional Petition No.6 of 2016**. In my view proceeding with the hearing of the Originating Motion herein risks a retrial of the issues dealt with in that petition. The upshot of the foregoing is that I find that the Originating Summons is *res judicata*. This court therefore has no jurisdiction in these proceedings and it can not take any further step forward in the matter.

(3) Should the plaintiffs be declared vexatious litigants?

33. According to the Vexatious Proceedings Act, before such an order is made, the Attorney General is the one to make an application before the High Court in which he should satisfy that court that any person has, habitually and constantly and without any reasonable ground instituted vexatious proceedings in any court. **Section 3** of that Act requires that once declared vexatious litigant, such a litigant shall institute or have a suit instituted on his behalf only after leave has been granted by the High Court. I find no justification given by the applicants for the proposition that a declaration that the plaintiffs in the Originating Summons are vexatious litigants in view of the express provisions of the statute, or for their making such a prayer which should be only sought by the Attorney General. For that reason, I find that the prayer no.4 of the application dated 16/8/2017 is not merited.

34. Nothing turns on the allegation that Ms Seneti Oburu & Associates Advocates were not properly on the record in this matter. I have perused the record and found that a Notice of Appointment was filed on 16/8/2017 showing that that firm had been appointed by the respondents to handle the matter. The argument that the application dated 16/8/2017 should be struck out for being filed by that firm prior to the filing of the Notice of appointment must fail as it would put the court on a needless mission to find out whether the Notice of Appointment or the application was filed first yet both bear the same date and were evidently filed on the same date.

Conclusion

35. I have found that there was material non-disclosure on the part of the plaintiffs in the Originating Summons as described herein before. I have also found that the Originating Summons is **res judicata**. Consequently, I find that prayer 3 in the application dated 16/8/2017 has merit but prayer No.4 has no merit.

36. I have also found that on 2/10/2017 the court discharged the orders made on 24/7/2017 and there were no orders made on 25/7/2017 as intimated in prayer No.2. However on 18/10/2017 when the matter came up for mention at Kitale this court ordered that the status quo orders be extended apparently on the understanding that such orders were those issued on 4/10/2017 by the court at Eldoret. I hereby vacate those orders of status quo.

37. I therefore grant **Prayer No. 3** of the Notice of Motion dated **16/8/2017**. Consequently, the Originating Summons dated **24/7/2017** is hereby dismissed with costs to the applicants as the same is *res judicata*. The costs of the application dated **16/8/2017** shall also be borne by the respondents named in that application.

Dated, signed and delivered at Kitale on this 22nd day of January, 2018.

MWANGI NJOROGE

JUDGE

22/01/2018

Coram - Before Mwangi Njoroge Judge

Court Assistant - Isabellah

COURT

Ruling read in open court in the presence of

Mr. Osango for Respondents.

Mr. Bisonga holding brief for Mr. Murgor for the Applicants.

MWANGI NJOROGE

JUDGE

22/01/2018