



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.154 OF 2015

NELSON ZADOK OTIENO PLAINTIFF

(SUING AS THE REPRESENTATIVE OF

THE ESTATE OF MANASSE OGOT (DECEASED)

VERSUS

LUCAS ONG"INJO GOGO DEFENDANT

RULING

1. **Nelson Zadok Otieno**, the Plaintiff, suing as the representative of the estate of **Manasse Ogot**, deceased, commenced this suit against **Lucas Onginjo Gogo**, the Defendant, through the plaint dated 23rd June 2015, and filed with the court on the 25th June 2015. The Plaintiff's claim is summarized at paragraphs 3, 6 and 6 that his late father was allocated plot No.4 in 1973. That the Defendant merged that plot into **East Alego/Mur-Ngiya/317** that was registered in the names of Gogo Mari and Nyangaya Opiyo. That **East Alego/Mur-Ngiya/317** was subsequently subdivided into parcels 1693, 1694, 1696, 1697 and 1698. That the land parcel 1694 is now where plot No.4 falls. The Plaintiff prays for eviction of the Defendant from plot No.4, now registered under East Alego/Mur-Ngiya/1694, declaration that plot No.4 belongs to him, permanent injunction against Defendant, alternatively mesne profits and costs.

2. The Defendant opposed the plaintiff's claim through his defence and counterclaim dated 13th August 2015, and filed on the 14th August 2015. The defendant avers that his late father allowed the plaintiff's late father to construct on his freehold land parcel **East Alego/Mur/Ngiya/317** for a period which expired 2000. That the Defendant thereafter took possession of the land and subdivided it creating East Alego Mur/1694 which is in his name. That the Plaintiff sued the Defendant in Nairobi CMCC NO.8745 of 2004 and Kisumu HCC NO.49 of 2007 (O.S) over the same land but lost. That the Defendant then filed Siaya PMCC NO.12 of 2005 which was ruled in his favour before retaking possession of the plot. That as the Plaintiff had filed other suits in the past over the same land, he would raise a preliminary objection. The Defendant counterclaimed against the Plaintiff seeking to have the caution filed against **East Alego/Mur/ngiya/1694** lifted.

3. That in the reply to the Defendant's defence and defence to the counterclaim, dated 20th August 2015 and filed in court on the 21st August 2015, the Plaintiff justified his filing of the caution against **East Alego/Mur-Ngiya/1694** being the parcel in which plot No.4 falls.

4. The Defendant then issued the notice of preliminary objection dated 6th March 2017, and filed in court on the 8th March 2017 on one ground; "**That the suit as instituted offends the provisions of Section 7 of the Civil Procedure Act cap 21 Laws of Kenya.**" The preliminary objection came up for hearing on the 22nd JANAUARY 2018 when M/S Cheruto and Mr. Amondi, learned counsel for the Defendant and Plaintiff respectively, made their oral submissions.

5. The issue for determination is whether or not a competent court has already decided on the question of ownership of the suit land between the parties herein or those claiming from them.

6. The court has carefully considered the pleadings as filed by both parties as summarized herein above, the ground on the notice of preliminary objection, oral submissions by both counsel and come to the following determinations;

a) That land parcel **East Alego/Mur-Ngiya/1694**, the suit land, is a subdivision from **Siaya/Mur-Ngiya/317** as confirmed by the copies of the green cards availed by both the Plaintiff and the Defendant through their respective lists of documents.

b) That **Siaya/Mur Ngiya/317** was first registered in the names of Gogo Mari, (Late father to the Defendant) and Nyangaya Opiyo, each owning half share on the 27th July 1976 under entry No.1. The land was subsequently transferred to the name of the Defendant, Lucas Onginjo Gogo on the 17th June 2003 through succession under entry No.2. The title was closed on the 29th April 2004 upon subdividing it into parcels 1693 to 1698.

c) That though the Plaintiff claim that his late father had been allocated plot No.4 Ngiya Filling station, in 1973 by county Council of Siaya, he has not annexed any document of ownership, like a letter of allotment to his list of documents. The letter dated 9th August 2010 addressed to Wasuna & Company Advocates by the County clerk of Siaya states that the allotment or other document of the title to land, had been made through a miscellaneous receipt No.003709 of 7th March 1973 which has not been annexed. That in any case, a payment receipt is not a substitute for a letter of allotment or other document of title to the land, but is only evidence of the payment made.

d) That the Plaintiff did not disclose in his plaint that the issue in dispute has even been decided upon by another court. That the submissions by counsel show that there was Kisumu H.C.C.C. No.49 of .2007 (o.s), in which the Plaintiff had sought to be declared the adverse possessor of 0.11 hectares of **East Alego/Mur-ngiya/1694, the suit land**. That counsel for the Plaintiff submitted that the cause of action in this case is different from that in the earlier suit. That this suit is based on an allotment of plot No.4 made in 1973, which issue could not have been exhaustively dealt with in the earlier suit commenced through originating summons, the provision of

Section 7 of Civil Procedure Act, Chapter 21 of Laws of Kenya, especially explanation 3, 4, and 6 thereof are clear and relevant. The explanations are reproduced herein below;

“Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other. Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such suit shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

e) That Jeremiah W. Owuor, the Plaintiff in MILIMANI Commercial Courts CMCC No.8745 of 2004 had filed the suit

against the Defendant herein and had sought to be declared the owner of the building standing on plot No.4 Ngiya filling station and permanent injunction, among others. The said Jeremiah Walter Owuor was also the 1st Plaintiff in Kisumu H.C.C. NO.49 of 2007 with Martin Owuor Ogot and the Plaintiff herein as the 2nd and 3rd Plaintiffs respectively. The Defendant’s position that both suits were dismissed has not been disputed by the Plaintiff and there is not evidence that the decisions thereon have been successfully appealed against.

f) That in view of the undisputed facts that both Millimani Commercial Courts CMCC NO.8745 of 2004 and Kisumu HCCC NO.49 OF 2007 were against the same defendant, and had been filed by the Plaintiff and or his brothers in their names or as administrators of their late father’s estate, and that the claim was over a portion of land registered as **East Alego/Mur-ngiya/1694**, and or plot No.4, then it is obvious the issue of the suit land’s proprietorship has already been decided by courts of contempt jurisdiction as between the parties herein and or those claiming under or with them. The fact that Jeremiah W. Owuor and Martin Owuor Ogot, who were involved in the previous suits are not parties in this suit does not mean the subject matter is different or new.

7. That flowing from the foregoing, the court upholds the Defendant’s preliminary objection and finds the Plaintiff’s suit commenced through the plaint dated 23rd June 2015, and filed on the 25th June 2015, to be res judicata and to have been filed in contravention of **Section 7 of Civil Procedure Act**. The Plaintiff’s suit is therefore struck out with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF APRIL 2018

In presence of;

Plaintiff Absent

Defendant 1st Defendant present

Counsel Mr. Anula for Achira for Plaintiff

Mr. Odeny Ndeda for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/4/2018

18/4/2018

S.M. Kibunja Judge

Joane court assistant

1st Defendant present

Odeny for the Plaintiff

Mr. Arunda for 2nd Defendant

Court: Ruling dated and delivered in open court in the presence of 1st Defendant, Mr. Odeny for the Plaintiff and Mr. Arunda for the 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/4/2018