



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 72 OF 2017 (ORIGINATING SUMMONS)

EFUREITH IRIMA MBOGO.....PLAINTIFF

VERSUS

IBARA MWANIKI.....1ST DEFENDANT

PETERSON WAMBUGU.....2ND DEFENDANT

MWANGI MUTHINJI alias

MOSES MWANGI MUTHINJI.....3RD DEFENDANT

KAHARIRI BURI KARUGU.....4TH DEFENDANT

JOSIAH WAMBUA SILAS alias

JOSIAH KINYUA MUCHINA.....5TH DEFENDANT

DOUGLAS KIRINYU MATHENGE alias

DOUGLAS KIRUNYU MWANGI MATHENGE.....6TH DEFENDANT

MOFFAT MURIITHI KANGI.....7TH DEFENDANT

RULING

1. By an originating summons dated 11th April 2017 and amended on 27th March 2018 under the provisions of **sections 7, 37, 38 of the Limitation of Actions Act (Cap 22), Order 37 Rules 7 and 19 of the Civil Procedure Rules** and **all enabling provisions of the law**, the Plaintiff sought the following orders;

a. That the honourable court do declare that the applicant has become entitled to ownership of parcel of land No. Mbeere/Kirima/2231 (7.40 Ha) as against the 1st Defendant by virtue of section 7 of the Limitations of Actions Act on the ground that since the 50s the Plaintiff and her parents have openly peacefully and of right been in occupation of the said parcel of land, that is to say for a period exceeding 12 years preceding the presentation of this summons.

*b. That the honourable court do declare that the Plaintiff has become entitled to ownership of parcel of land No. Mbeere/Kirima/5046 measuring approximately 2.43 Ha as against the 2nd Defendant by virtue of **section 7 of the Limitations of Actions Act** on the ground that since the 50s, the Plaintiff has openly, peacefully and as of right been in occupation of the said parcel of land, that is to say for a period exceeding 12 years preceding the presentation of this summons.*

*c. That the honourable court do declare that the Plaintiff has become entitled to ownership of parcel of land No. Mbeere/Kirima/5047 measuring approximately 10.93 Ha as against the 3rd, 4th, 5th, 6th and 7th Defendants by virtue of **section 7 of the Limitations of Actions Act** on the ground that since the 50s the Plaintiff has openly, peacefully and as of right been in occupation of the said parcel of land, that is to say for a period exceeding 12 years preceding the presentation of this summons.*

d. That in the alternative, there be a declaration that the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants were registered as proprietors of

parcels of land Nos Mbeere/Kirima/2231 (1st Defendant), Mbeere/Kirima/5016 (2nd Defendant) and Mbeere/Kirima/5047 (3rd, 4th, 5th, 6th and 7th Defendants) on behalf of and in trust for the Plaintiff herein.

e. That the costs of the suit be awarded to the Plaintiff.

2. The said originating summons was supported by the affidavit sworn by the Plaintiff on the date of amendment which provided the factual foundation for the reliefs sought in the amended originating summons. As can be seen, all the reliefs sought were based upon adverse possession of the various suit properties except one which sought a declaration of trust in favour of the Plaintiff.

3. The 6th Defendant filed a replying affidavit sworn on 9th May 2018 on his own behalf and on behalf of the 3rd, 4th and 5th Defendants in opposition to the amended originating summons. He gave a detailed history of the suit properties in dispute which indicated that the suit properties had undergone the process of land adjudication under the **Land Adjudication Act**. The process entailed resolution of competing claims through the concerned Land Adjudication Officers and appeals to the Minister responsible for matters relating to land under **section 29 of the Land Adjudication Act**. There was at least one Judicial Review application pending in the Environment and Land Court at Embu (i.e. *ELC JR No. 32 of 2015*) with respect to the decision of the Minister in one of the appeals.

4. The 7th Defendant filed a replying affidavit sworn on 22nd May 2018 in opposition to the amended originating summons. He contended that he was an innocent purchaser for value without notice of one of the suit properties. He contended that the Plaintiff had no cause of action against him and that he ought not to have been joined in the proceedings. He further stated that there was a pending suit, that is, *Embu ELC JR No. 32 of 2015* in respect of the suit properties. He did not, however, exhibit copies of the pleadings in those proceedings.

5. The advocates for the 3rd – 7th Defendants also filed two separate notices of preliminary objection to the amended originating summons. The first is dated 27th April 2018 and raises the following issues;

a. That the suit offends the provisions of **section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

b. That the suit offends the provisions of **section 8 of the Civil Procedure Act Cap 21 of Laws of Kenya**.

c. That the suit offends the provisions of **sections 11 and 12 of the Civil Procedure**.

d. That the entire suit is a nullity.

6. The 2nd notice of preliminary objection is dated 17th May 2018 and raises the following issues;

a. That the suit offends the provisions of **section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya**.

b. That the suit offends the provisions of **sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012**.

7. The 1st and 2nd Defendants were said to be deceased long before the filing of the suit. They did not enter an appearance to the originating summons and neither did they file any responses.

8. It was directed by the court on 28th May 2018 that the said preliminary objections shall be heard first. It was further directed that they shall be canvassed through written submissions. The parties were given 60 days to file and exchange submissions on the preliminary objections and the matter was fixed for ruling on 8th November 2018.

9. The record shows that the Defendants filed their written submissions on 27th June 2018 but there was no indication of the Plaintiff having filed any submissions by the time of preparation of the ruling. The court, therefore, decided to determine the matter on the basis of the material on record and the Defendants' submissions on record.

10. In the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** the court described a preliminary objection as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. The 1st objection claimed that the originating summons offended **section 6 of the Civil Procedure Act**. That section provides as follows;

“No court shall try any suit or issue in which the matter 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.”

12. In their written submissions, the Defendants submitted that there were five (5) pending suits involving some of the suit properties i.e.

13. The court has noted that the Defendants did not exhibit copies of the proceedings of any of the said proceedings which are said to be pending before various courts. It would not be possible for the court to establish if the requirements of **section 6 of the Civil Procedure Act** have been fulfilled in relation to the originating summons pending before this court. The court also notes that most of the cited proceedings are succession causes concerning the administration of the estates of some deceased persons. The matters directly and substantially in issue in succession proceedings would obviously be different from those of an originating summons for adverse possession.

14. The court also notes that the alleged existence of the 4 succession causes were introduced for the first time in the Defendants' written submissions. They were actually sneaked in to aid in the prosecution of the preliminary objection. They were not introduced formally through an affidavit and the Plaintiff was not accorded an opportunity to respond thereto through an affidavit. In the result, the court finds that the objection requires an investigation of facts hence not suitable for determination as a preliminary objection.

15. The 2nd objection claimed that the suit offended **section 8 of the Civil Procedure Act**. **Section 8** of the said **Act** provides that;

“Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

16. It was not demonstrated in what manner the Plaintiff was precluded from filing the originating summons claiming adverse possession of the various suit properties. It was not demonstrated how the pendency of a Judicial Review application or succession proceedings could preclude the Plaintiff from seeking the declarations sought in the originating summons. Moreover, it was not demonstrated under what **Rules** and **Order** of the **Civil Procedure Rules** the Plaintiff was so precluded. The court finds no merit in this objection hence the same is dismissed.

17. The 3rd objection stated that the suit offends **sections 11 and 12 of the Civil Procedure Act**. It was submitted that the originating summons herein ought to have been filed at Siakago Law Courts within whose jurisdiction the suit properties are located. It was further submitted that the Magistrate's court at Siakago had pecuniary jurisdiction to try the suit.

18. The court has considered the provisions of those two sections of the law. **Section 11** requires a litigant to file suit in the court of the lowest grade which is *competent* to try it. **Section 12** requires a litigant having a claim in relation to immovable property to file it in a court within the local limits of whose jurisdiction the property is located. The court has noted that the originating summons herein was filed under **section 37 and 38 of the Limitation of Actions Act (Cap 22)**. The provisions of **section 38** of the said **Act** are clear that a person who considers himself to have become entitled to land on account of adverse possession may apply to the *High Court* for a declaration to that effect. **Section 38 (1) of the said Act** states that;

“38 (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of land or lease in place of the person then registered as proprietor of the land.”

19. The court is, therefore, of the opinion that the magistrate's court at Siakago is not a court which is *competent* to try the originating summons for adverse possession within the meaning of **section 11 of the Civil Procedure Act**. The only court which is competent to try the instant suit is a superior court. There is no doubt that the suit properties fall within the local limits of the Environment and Land Court at Embu. The mere fact that the suit properties fall within the pecuniary jurisdiction of Siakago Law Courts would not suffice in this case. That is why the opening words of **section 12 of the Civil Procedure Act** state that “*Subject to the pecuniary or other limitations prescribed by any law...*” The court finds no merit in the 3rd objection.

20. The 4th objection stated that the entire suit was a *nullity* without elaboration. The court has noted from the Defendants' submissions that this objection was not argued. It is, therefore deemed to have been abandoned. The same is accordingly disallowed.

21. The 5th objection stated that the originating summons offended the provisions of **section 7 of the Limitation of Actions Act (Cap 22)**. It was submitted that the suit was time barred because it was instituted after the lapse of 12 years from the date the cause of action first occurred. It was submitted that the cause of action herein arose in 1972 in favour of the Plaintiff's late father hence the suit was time-barred.

22. The court considers that objection to be quite strange. No legal authority was cited by the Defendants in support thereof. A plain reading of the provisions of the **Limitation of Actions Act (Cap 22)** indicates that a claimant's right to sue for adverse possession only arises upon the registered owner getting time-barred in the recovery his land. In other words, it is only upon the proprietary rights of the registered owner getting extinguished that the claim of the adverse possessor springs into life. It would, therefore, follow that the limitation period prescribed in **section 7 of the Act** applies only against the registered proprietor and not the adverse possessor. Accordingly, the court finds no merit in this objection and the same is dismissed.

23. The 6th objection states that the suit offends **sections 24, 25 and 26 of the Land Registration Act, 2012**. It was submitted that the rights of a registered proprietor under the said **Act** were absolute and indefeasible and could not be challenged except on grounds of fraud, misrepresentation, illegality, corruption or irregularity. The Plaintiff was faulted for having based her claim on adverse possession which is not captured in **section 26 of the said Act**. This objection is for outright rejection. It is totally misconceived and mischievous. A claim for adverse possession is not a challenge against the title of the registered owner. On the contrary, it is a recognition of such title with an assertion that the right to recovery of his land has been extinguished.

24. The upshot of the foregoing is that the court finds no merit in the Defendants' notices of preliminary objection dated 27th April 2018 and 17th May 2018 respectively. They are consequently dismissed with costs to the Plaintiff.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **25TH** day of **OCTOBER, 2018**.

In the presence of Ms Muriuki holding brief for Ms Rose Njeru and Mr Abubakar holding brief for Mr Ombachi for the 3rd – 7th Defendants and in the absence of the 1st and 2nd Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

25.10.18