



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 140 OF 2017 (O.S)

CHEPTUM MUREI ANNAH.....APPLICANT/RESPONDENT

VERSUS

FLORENCE CHERUGUT.....RESPONDENT/PLAINTIFF

RULING

1. The application dated **13th July, 2018** prays for orders that this suit be dismissed with cost for being *res judicata* and for having been filed prematurely. He also prays for costs be paid by the respondent.
2. The grounds on which the said application is made are that the subject matter herein, that is **Title No. Kitale Municipality Block 15/Koitogos/1956**, was dealt with by a competent court and finalised vide **Kitale HCCC No. 27 of 2009**; that the respondent filed an appeal against the said judgment in the Court of Appeal; that the suit filed herein is incompetent for being *res judicata* and that the filing of a fresh suit is an abuse of the due process of the court.
3. The respondent filed her sworn affidavit dated **14th September 2018** on the same date. She averred that her claim in the previous suit that is **Kitale HCCC No. 27 of 2009 (OS) Florence Cherugut vs Cheptum Murei Anna** was that as at **23rd February 2009** she had acquired by adverse possession the land which she occupied and which was **Kitale Municipality Block 15/Koitogos/1956**, that in that suit there was no counterclaim for possession and consequently time never stopped running in the plaintiff's favour, that the judgment held that **12 years** had not expired since the defendant got registered as proprietor on **11/5/2005**; that no eviction was ordered; that in contrast in this suit this court is called upon to decide whether as at **16/8/17** (the time of filing of this suit) 12 years had elapsed, basing **11/5/2005** as the starting point for computation of the period. It is averred that the two issues were not in issue in the previous suit.
4. The plaintiff/applicant filed his submissions on **28/10/2018** and the defendant/respondent on **18/10/18**.
5. The applicant relied on the case of **Benson Ngugi Vs Francis Kabui Kinyanjui and 3 Others Civil Appeal No. 1 of 1986** and **The Trustees of The Port of Aden Vs Gohra Bint Salem and Others 1959 EA 87**.
6. The respondent relied on the cases of **Gerishon Muindi Baruthi Vs Willays Gatinku Mukobwa and Another Civil Appeal No. 98 of 1998** and **William Gatuhi Murathe Vs Gakuru Gathimbi Civil Appeal Number 49 of 1996**.

DETERMINATION

7. What is evident in this suit is that the issue of whether the defendant may have allowed the plaintiff to continue with her stay on the land after obtaining judgment in her favour on **11/2/2014**. That is the fulcrum on which all the other issues will depend in this suit.
8. In the reply to the originating summons the fact of continued stay on the suit land has been denied. It would then have to be proved.
9. A claim for adverse possession is different from a claim for other rights which may be claimed only once in that it depends on possession, and that possession may continue after a determination has been made. The task that this court will have at the end of the hearing is to determine if continued possession, if proved, entitles the plaintiff to title by way of adverse possession.
10. The respondent's argument on the doctrine of *res judicata* would therefore have to be considered and determined only after the evidence has been adduced in this suit.
11. For this reason I find that there are new issues arising in the present suit different from those in the previous suit and *res judicata* is not an open and shut issue. The application dated **13/7/2018** therefore lacks merit. The same is dismissed. The costs shall be in the cause.

Dated, signed and delivered at Kitale on this 26th day of November, 2018.

MWANGI NJOROGE

JUDGE

26/11/2018

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the plaintiff/respondent

Ms. Arunga for Muniolo for defendant/applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/11/2018