



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 353 OF 2013**

**VINCENT GATIMU GITAKU.....PLAINTIFF**

**VERSUS**

**CHARITY WANGECHI NGARI.....DEFENDANT**

**RULING**

By his Originating Summons filed herein on 12th June 2008, the plaintiff citing the provisions of *Sections 37 and 38 of the Limitation of Actions Act* sought the following orders:

- 1. A declaration that the plaintiff is entitled to be registered as owner of a portion of land measuring 0.6 acres out of land parcel No. BARAGWE/KARIRU/186 which he has been in adverse possession since 1959 to-date for a period exceeding (12) twelve years immediately preceding the presentation of this suit which he has used openly and continuously as of right and in adverse possession and without any interruption from the defendant or her predecessors in the above title and that the defendant's title to the said portion of land has been extinguished in favour of the plaintiff under Section 33 and 38 of the Limitation of Actions Act Laws of Kenya.***
- 2. An order that the defendant do transfer a portion measuring 0.6 acres to the plaintiff in addition to 0.414 acre portion that he was awarded in KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE No. 237 of 1997 and in default the Deputy Registrar be authorized to sign all the necessary documents to effect the transfer.***
- 3. An order for costs.***

The Originating Summons was accompanied by a supporting affidavit in which the plaintiff deponed, inter alia, that the land parcel No. BARAGWE/KARIRU/186 (the suit land) is registered in the names of his deceased brother **NGARI GITAKU** although he settled in and occupies one (1) acre thereof with his family since 1959. That the suit land was the subject of **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE No. 237 of 1997** and thereafter **EMBU HIGH COURT CIVIL APPEAL No. 44 of 2003** (hereinafter the Succession Causes) where the Court dismissed his application to be given one (1) acre. The defendant however gave him a portion measuring 0.414 acres and so he is now claiming 0.6 acres to make one (1) acre.

The defendant filed a replying affidavit denying those averments and adding that the plaintiff has in fact been living on the suit land as a licensee of her deceased husband **NGARI GITAKU** who is the registered owner thereof and that the plaintiff had filed the Succession Causes and was granted a portion not as an adverse possessor but as a beneficiary under an alleged customary trust. However, that order was set aside on appeal and the suit land was awarded to her and her children and no appeal was filed

against that decision. Therefore all issues relating to the ownership of the suit land have finally, effectually and conclusively been determined.

On 26th August 2008, the defendant filed a Preliminary Objection against this suit on the following grounds:

- 1. That the Originating Summons dated 6th June 2008 was instituted by the plaintiff after he lost his claim to the suit land by a decree of the High Court in EMBU H.C.C.A No. 5 of 2000.**
- 2. That the Originating Summons dated 6th June 2008 is an abuse of the Court process.**
- 3. That the prayers sought in the Originating Summons are res-judicata.**
- 4. That the plaintiff is guilty of non-disclosure of a material fact that he lost his claim to the suit land in EMBU H.C.C.A No. 5 of 2000.**

One year later on 19th August 2009, the defendant filed yet another Preliminary Objection raising the following additional grounds:

- 5. The claim for adverse possession in respect of land parcel No. BARAGWE/KARIRU/186 is not available to the applicant against the defendant herein. The registered proprietor according to the Green Card VGG1 is NGARI GITAKU (deceased). The applicant's claim to the land, if any, died with the deceased and was finally determined in the Kerugoya Succession Cause No. 237 of 1997 and Embu H.C.C.A No. 5 of 2000.**
- 6. The affidavit of VINCENT GATIMU GITAKU sworn on 6th June 2008 in support of the Originating Summons is incurably defective. There is therefore no affidavit in support of the Originating Summons and the Originating Summons therefore becomes incompetent.**

The Preliminary Objection is the subject of this ruling and on 9th February 2016, it was directed that it be canvassed by way of written submissions which have now been filed both by **MR. MORRIS NJAGE** advocate for the defendant and **MR. JOE KATHUNGU** advocate for the plaintiff.

I have considered the Preliminary Objection, the pleadings and the submissions by counsel.

A Preliminary Objection as was well set out in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696** 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 had to be ascertained or if what is sought is the exercise of judicial discretion".***

Some of the issues raised by the defendant in the Preliminary Objection are not pure points of law strictly speaking. For instance, issues of material non-disclosure are matters of fact. Nonetheless, issues such as that this suit is res-judicata are matters of law and therefore can be argued as a Preliminary Objection. Indeed that is the only issue that this Court will consider in this ruling. I do not, for instance, see how this suit can be described as an abuse of the Court process. In **MUCHANGA INVESTMENTS LTD VS SAFARIS UNLIMITED (AFRICA) LTD & OTHERS (2009 e K.L.R)**, the Court of Appeal adopted the following definition of the term abuse of Court process as given in **BEINOSI VS WIYLEY 1973 (SA 721 (SCAJ))** as follows:

***"What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective"***

Abuse of the Court process must therefore include instances where a party is merely using the judicial process to irritate or annoy others, where a party files multiple suits over disputes already decided by competent Court or where a party is pursuing a claim without any iota of evidence etc. I do not see any evidence of that in this case where the plaintiff is pursuing a claim in adverse possession. Whether or not the claim will succeed is an issue for the trial Court.

On the issue of the supporting affidavit being defective, it has not been demonstrated in which respect the said affidavit is defective or in what manner, if any, it has prejudiced the defendant. In any case, the mere irregularity of a supporting affidavit which neither goes to the Court's jurisdiction nor prejudices the other party cannot be a ground for striking out a pleading. Invoking the provisions of **Article 159 (2) (d) of the Constitution**, a Court can allow a party to file a supplementary affidavit if need be. Further, the non-disclosure by the plaintiff about Embu H.C.C.A No. 5 of 2000 is not, in my view, fatal to the Originating Summons and again that is really a matter of fact and not pure law. So too is the claim that the plaintiff filed this suit after losing in the Succession Causes.

In my view, the only issue that I need to address in this Preliminary Objection is whether or not this suit is res-judicata in view of the orders made in the Succession Causes both at the Kerugoya Senior Resident Magistrate's Court Succession Cause No. 237 of 1997 and Embu H.C.C.A No. 5 of 2000.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following terms:

***“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”***

Before res-judicata can be invoked, the following conditions must be proved:

- 1. That the issue in disputes in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the doctrine of res-judicata is pleaded.***
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.***
- 3. The former suit must have been heard and finally decided.***
- 4. The Court or tribunal which determined the former suit must have been competent.***

See **KARIA VS ATTORNEY GENERAL 2005 1 E.A 83.**

It is of course correct that the suit land was the subject of the Succession Causes both in the subordinate Court at Kerugoya and in the High Court at Embu where it was finally decided that the suit land be distributed between the defendant and her children only. In those Succession Causes, the plaintiff was seeking a portion of the suit land as a protestor and beneficiary. The defendant's assertion is that following the decision of the High Court Embu in the Succession Cause, this suit is res-judicata. I do not think so because, the mandate of the Probate Court exercising its jurisdiction under the **Law of Succession Act** does not extend to determining a dispute involving a claim to land by adverse possession which is the plaintiff's claim in this suit. Such a claim can only be determined by this Court after full trial where parties give evidence in proof of such a claim. That is why **Rule 41 (3) of the Probate and Administration Rules** empowers a Court handling a Succession dispute to set aside any particular share of the Estate to abide the determination of proceedings such as this suit which is by Originating Summons as provided under **Order 37 Rule 7 (1) of the Civil Procedure Rules** which prescribes how a claim for adverse possession can be made and which is what the plaintiff in this case has done. It reads that:

***“Adverse possession: An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons”.***

The position in law therefore is that the Probate Courts that deal with the Succession Causes in which the suit land was a subject could not have ventured into the dispute based on adverse possession. That issue was not and could not have been determined by those Courts because the jurisdiction to do so lay elsewhere. Explanation (3) of Section 7 of the Civil Procedure Act states that:

***“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”***

It cannot therefore be the position, as required by Section 7 of the Civil Procedure Act, that the issue of adverse possession by the plaintiff was **“raised”** in the Succession Causes and was **“heard and finally decided”** by those Courts. And even if it was raised, those Courts would not have been in a position to determine it. In STEPHEN MUNENE GACHUIRI & ANOTHER VS

WAINOI KARANI C.A CIVIL APPEAL No. 273 of 2007 as consolidated with No. 274 of 2007, the issue that arose was whether a claim of adverse possession could be determined in a Succession Cause and the Court said it could not. It said:

***“There is mention of a Succession Case before the Kerugoya Magistrate’s Court. That being a Succession Cause regarding the 2nd Appellant’s father’s Estate, it is trite that a claim by the Respondent could not have been determined therein. This was a matter to set out the beneficiaries of the Estate and the assets that belonged to the deceased, the title was in the deceased name and the Respondent was not cited as a beneficiary. The Respondent’s claim was of a civil nature, it was not possible to determine within the Succession Cause”***

See also SERAH WANJIRU MBIRA VS KANYORE GACHUHI H.C.C.C No. 2826 of 1997 (NBI) where GITHINJI J. (as he then was) also took the following view:

***“The claim of land by adverse possession is based on statute - Section 38 of the Limitation of Actions Act. It is brought to Court through a different procedure from other suits (Order 36 Rule 3 Civil Procedure Rules). Plaintiff is required to prove different facts from the facts which constitute a trust. The claim based on adverse possession could not have been combined with the claim based on trust in H.C.C.C No. 4176/92. The claim based on adverse possession was not the subject matter in H.C.C.C No. 2029/79 (OS)”.***

It is also instructive to note that in her own replying affidavit in response to the Originating Summons, the defendant has averred in paragraph 4 as follows:

***“It is true I filed KERUGOYA SRM SUCCESSION CAUSE No. 237 of 1997 as the Petitioner and the Plaintiff herein protested. It is true he was awarded a portion of the land, not as an adverse possessor but as a beneficiary under an alleged customary trust”***

Clearly therefore, the issue of adverse possession was not determined in the Succession Cause and, on the authority of STEPHEN MUNENE GACHUIRI (supra), could not have been determined in those cases. In the circumstances, I find that the plea of res-judicata is not available to the defendant.

The up-shot of the above is that the defendant’s Preliminary Objection dated 20th August 2008 and 13th August 2009 are wholly un-meritorious. They are hereby dismissed with costs to the plaintiff.

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> JULY, 2017**

Ruling delivered, dated and signed in open Court this 28<sup>th</sup> day of July 2017

Ms Manyasa for Mr. Kathungu for Plaintiff present

Ms Wambui for Mr. Ngigi for Defendant present

Plaintiff also present

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> JULY, 2017**