



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 176 OF 2014

FORMERLY KERUGOYA ELC NO. 815 OF 2013

MARION KAARI MBUI.....PLAINTIFF

VERSUS

ELISHA MBOGO NTHIGA.....DEFENDANT

RULING

1. By an originating summons amended on 20th November 2013 and filed on 21st November, 2013 under section 38 of the Limitation of Actions Act (Cap 22) the Plaintiff sought determination of the following questions;

- a. Whether the Plaintiff has been in open, continuous and exclusive occupation, possession and use of land parcel Number Ngandori/Kiriari/453, which parcel has now been sub-divided into land parcels numbers Ngandori/Kiriari/4236, 4237 and 4238, for over twelve years.*
- b. Whether the Plaintiff has acquired the title to land parcel numbers Ngandori/Kiriari/4236, 4237 and 4238 which are resultant sub-divisions of land parcel number Ngandori/Kiriari/453 by law of adverse possession.*
- c. Whether the Defendant's title to land parcel number Ngandori/Kiriari/453 and the subsequent sub-divisions namely land parcel numbers Ngandori/Kiriari/4236, 4237 and 4238 have been extinguished.*
- d. What should be the orders as to costs.*

2. The said originating summons was supported by an affidavit sworn by the Plaintiff on 20th November 2013 which stated that she had been in possession of the properties in dispute for over 50 years openly and without any objection from the Defendant. It was further stated that the Defendant's father had secretly undertaken succession proceedings in 1969 in consequence of which the Defendant was registered as proprietor.

3. The Defendant filed a replying affidavit sworn on 7th August 2017 denying the Plaintiff's claim. In paragraph 7 thereof, the Defendant raised the following preliminary objections;

- a. That this court has no jurisdiction to hear and determine this matter having emanated from succession cause which has never been revoked or objected to (sic).*

b. *That this matter has also been dealt (sic) and determined.*

c. *That this matter does not disclose a cause of action in an abuse of the court process (sic) as the Plaintiff has never been in open, continuous and exclusive occupation of the parcel of land, the subject matter of this suit.*

d. *That this court has no jurisdiction to deal with the matter that has been dealt with under succession cause (sic).*

4. When the suit came up for hearing on 20th October 2017, Mr Okwaro Advocate for the Plaintiff informed the court that he was of the view that the said preliminary objections should be canvassed before the hearing of the suit. The Defendant's counsel was also of the same view. The court therefore granted both parties an opportunity to make oral submissions on the preliminary objections.

5. The Defendant's counsel submitted that the matter in dispute herein was determined in a previous succession cause filed in 1969. It was his submission that since the decision of the succession court was not challenged then the matter should be laid to rest. It was also the submission of the Defendant's counsel that the dispute herein emanated from a succession court hence the matter should be handled by that court. The Defendant considered the Plaintiff's suit to be an abuse of the court process and asked the court to strike out the entire suit.

6. The Plaintiff's advocate opposed the said preliminary objections and submitted that they had no merit at all. First, it was submitted that the preliminary objections raised were not pure matters of law as enunciated in the case of **Mukisa Biscuits Manufacturing Co Vs West End Distributors Ltd [1969] EA 696**. Second, it was submitted that the Plaintiff's claim was for adverse possession which could not have been dealt with by the succession court. It was also the Plaintiff's case that the elements of adverse possession could only be established at the trial upon evidence being tendered by the parties.

7. It was the Plaintiff's submission that a claim for adverse possession affects title to land and that the Environment and Land Court is the proper court to adjudicate on such disputes and not the succession court. Finally, it was submitted that the instant suit is not an appeal from the succession court as implied by the Defendant. The Plaintiff, therefore, urged the court to dismiss the preliminary objections as lacking merit.

8. In reply to the Plaintiff's submissions, the Defendant's counsel submitted that the Plaintiff had no serious case for adverse possession since the Defendant became registered as proprietor of the disputed properties in 2002 which was the same year the instant suit was filed.

9. The nature of the preliminary objection was well articulated in the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra) and I can do no better than quote the relevant paragraphs;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. It is also well settled that a preliminary objection cannot be raised where any fact has to be ascertained or when what is sought is the exercise of judicial discretion.

11. The 1st, 2nd and 4th preliminary objections state that this court has no jurisdiction to entertain the suit because the matter was conclusively determined by the succession court. That is really the gist of the Defendant's preliminary objection. The Defendant is probably suggesting that the instant suit is barred by virtue of the provisions of **section 7 of the Civil Procedure Act (Cap 21)** and the doctrine of *res judicata* in addition to the plain objection to the jurisdiction of the Environment and Land Court.

12. The court has considered the pleadings on record and the submissions of the parties on the said preliminary objections. The court is far from satisfied that the question of adverse possession was an issue directly and substantially in issue in the succession proceedings. The succession court may have dealt with matters of inheritance and other related matters falling within the scope of the **Law of Succession Act (Cap 160)**. It is doubtful if that court dealt with the claim under **section 38 of the Limitation of Actions Act (Cap 22)**. It should be remembered that at the time the succession proceedings were filed in 1969, the defendant was not yet the registered proprietor of the properties in dispute. The failure to challenge the decision of the succession court is not relevant for the purpose of a claim for adverse possession since different considerations apply in determination of a claim for adverse possession.

13. The court is also satisfied that it has jurisdiction to hear and determine claims for adverse possession under the provisions of **Article 162 (2) (b) of the Constitution of Kenya** and **section 13 (2) of the Environment and Land Court Act of 2011**. The court, therefore, rejects the Defendant's submission to the contrary as being without merit.

14. The 3rd preliminary objection stating that the Plaintiff has no cause of action because she had not been in open, continuous and exclusive possession of the subject property cannot surely constitute a preliminary objection as known to law. That is simply a defence to the substantive claim for adverse possession. It cannot form the basis of a preliminary objection since those are elements of adverse possession which can only be proved or disproved at the trial hereof.

15. The upshot of the foregoing is that the court finds no merit in the Defendant's points of preliminary objection and the same are hereby dismissed with costs to the Plaintiff.

16. The court shall fix a hearing date for the suit at the time of delivery of the ruling.

17. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **16th** day of **NOVEMBER, 2017**

In the presence of Ms Beth Ndorongo holding brief for Mr Okwaro for the Plaintiff and Mr Gekonge for the Defendant.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

16.11.17