



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ORIGINATING SUMMONS NO. 157 OF 2013 (O.S)

IN THE MATTER OF LAND PARCEL NO. NYAMBENE/KIRINDINE 'A' 4353 REGISTERED
IN THE NAME OF SAMWEL KAARIA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

ANDREW LIKAIBUA KATHUKU ALIAS

NGUNGA M'KAIBI.....PLAINTIFF/APPLICANT

VERSUS

SAMWEL KAARIA.....DEFENDANT/RESPONDENT

R U L I N G

This ruling relates to the application by the plaintiff dated 24.6.2013 and the grounds of opposition filed by the respondent dated 28th August, 2013. The application dated 24.6.2013 seeks the following orders:

1. ***THAT this Application be certified as urgent and be heard exparte in the first instance on account of its urgency.***
2. ***THAT this Honourable Court be pleased to issue an Order of Inhibition to inhibit any dealings with the Suit Land herein L.R. NO. NYAMBENE/KIRINDINE "A"/4353 until the hearing and/or until this suit is heard and determined.***
3. ***THAT an Order of temporary Injunction be issued restraining the Defendant whether acting on his behest from evicting the Applicant, or in any other way whatsoever interfering with the Applicant's user and occupation of L.R No. NYAMBENE/KIRINDINE "A"/4353 either by entering, cultivating, fencing building thereon or in any other manner interfering with the suit land, pending the hearing and determination of this Application.***
4. ***THAT an Order of Temporary Injunction be issued restraining the Defendant whether by himself, his agents, employees, legal representatives or any other person acting on his behest from evicting the Applicant, or in any other way whatsoever interfering with the Applicant's user and occupation of L.R/ NO. NYAMBENE/KIRINDINE "A" /435 either by entering, cultivating, fencing, building thereon or in any other matter interfering with the suit land, pending the hearing and determination of the suit herein (O.S)***

It is supported by the affidavit of Andrew Likaibua Kathuku and has the following grounds:-

- a. ***THAT the Applicant has been in exclusive occupation of the Suit Land for over 30 Years and has acquired a beneficial interest thereto under the doctrine of adverse possession***
- b. ***THAT the Applicant is about to be evicted as the Respondent wants to evict the Applicant in order to dispose off the suit Land.***
- c. ***THAT the Applicant has made substantial developments on the suit Land to wit, built permanent houses and has fenced and cultivated crops thereon for the last 30 years.***
- d. ***THAT it is only fair, just and equitable to preserve the suit Land and to prevent the eviction of the Applicant as he stands to suffer irreparable loss and damages if evicted or his user interfered with.***

The Grounds of opposition dated 28/8/2013 have the following grounds:

1. ***The entire suit is Res Judicata L.D.T No. 23 of 2007 and Maua CMCC No 60 of 2004.***
2. ***The applicant is an illegal trespasser on LR. NO. NYAMBENE/ KIRINDINE/4353.***

The Respondent has submitted that the issues being raised in this suit were canvassed and finalized in LDT NO. 23 of 2007 and in Maua C.M.C.C No. 60 of 2004. He submits that the entire suit should be struck out for being an abuse of due process and against public policy.

The Respondent further submits that the doctrine of adverse possession is not applicable unless there has been continuous occupation for an uninterrupted duration of 12 years. He says that in this case the Applicant has averred in his supporting affidavit that the original parcel of land was subdivided into 3 portions, two of which were sold, leaving one portion. He claims that this was interruption which rendered any adverse possession claim incompetent.

He further opines that the Applicant should not be afraid of being evicted as he is not the legal owner of the suit land.

The Applicant opposes the grounds of opposition and says that Maua P.M.C.C No. 60 of 2004 dealt with Land Parcel No. NYAMBENE/KIRINDINE/4093 while this suit concerns Land Parcel No NYAMBENE/KIRINDINE/4353. He contends that the subject matter is different and as such the doctrine of *Res Judicata* is not applicable. He also says that this suit is brought by way of originating summons and, therefore, its nature was different from Maua P.M.CC No 60 of 2004. He also says that the LDT Case dealt with Land Parcel NO. KIRINDINE "A" 3448 and 4093 whereas this suit concerns Land Parcel No. NYAMBENE/KIRINDINE "A"4353.

He argues that this suit raises issues which have never been adjudicated upon and that the issue or issues in this suit had not been substantially in issue in any previous suit. He concludes by urging this Court that the grounds of opposition must fail. By implication, if the grounds of opposition are found not to have merit, the Plaintiff/

Applicant's application dated 27th June, 2013 should be allowed.

This Court notes that what the Respondent filed were grounds of opposition. Grounds of opposition are just that. They oppose the postulations of the other party. They are part of the submissions by a litigant in opposition to the assertions of the other litigant.

Grounds of opposition should not be conflated with a Preliminary Objection (PO) on a point or points of law. A Preliminary Objection, if successful will have the effect of having a suit terminated. For a Preliminary Objection, there should not be in existence disputed or arguable points.

In this matter, it is alleged that the suit is Res Judicata a Previous suit. He who alleges must prove. In this matter, the Respondent has not annexed copies of determination in LDT No. 23 of 2007 and Maua CMCC NO. 60 of 2004. It is only after perusal of the Judgement/Award of the 2 cases that this Court would have made a definitive finding regarding the issue of Res-Judicata. I am Unable to do so. This issue can only be properly determined after hearing of the main suit.

I have already said that the Respondent's grounds of opposition dated 28th day of August do not constitute a Preliminary Objection on points of Law. Even if it did so, the 2nd ground laconically states: "The Applicant is an illegal trespasser on L.R. NO NYAMBENE/KIRINDINE/4353". Clearly this ground invites arguments as to in which way the Plaintiff/Applicant is a trespasser. This assertion can only be ascertained or debunked at the hearing of the main suit.

In matters dealing with interlocutory injunctions, I wish to be guided by the Court of Appeal which in the case of Mbuthia Versus Jimba Credit Corporation [1988] KLR1, opined as follows:-

"The correct approach in dealing with an application for an interlocutory injunction is not to decided the issues of fact, but rather to weigh up the relevant strength of each sides propositions. The lower Court Judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits".

I do not wish to make final findings with respect to disputed facts, including the claim by the Respondent that this suit is *Res Judicata* LDT No 23 of 2007 and Maua C.M.C.C No 60 OF 2004.

Having weighed the relative weights of the parties propositions, **I am inclined to allow the Plaintiff's application dated 24th June, 2013. It is allowed. The effect is that an order of inhibition to inhibit any dealing with Parcel No. NYAMBENE/KIRINDINE "A"/4353, until this suit is heard and granted is issued. Prayer 4 for an order of Temporary Injunction until this suit is heard and determined is also granted.**

Costs of this application shall be in the cause.

It is so ordered.

Delivered in Open Court at Meru this 9th day of July, 2015 in the presence of:-

CC: Daniel /Lilian

Parties not in Court.

P.M.NJOROGE

JUDGE