



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 136 OF 2009

BETWEEN

SARAH WANJIKU MUTU.....1ST APPELLANT

SAMUEL KIMANI MUTU.....2ND APPELLANT

ABRAHAM MWANGI MUTU.....3RD APPELLANT

AND

PHILOMENA NJAMBI MUTU..... RESPONDENT

(An appeal from Ruling/Decree of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 6th June, 2007

in

H.C.C.C. NO. 462 OF 2005)

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (**Ang'awa, J.**) whereby the High Court upheld a preliminary objection raised against the suit and proceeded to dismiss the suit.

By an originating summons dated 22nd April, 2005 the three appellants claimed from the respondent respective portions of Land Title No. Ndarugu/Gacharage/490 (**suit land**), by adverse possession. The affidavit to support the originating summons showed that the 1st appellant is the mother of the 2nd and 3rd appellants. The 1st appellant claimed in the supporting affidavit that the suit land was acquired by, and registered in the name of her deceased husband, **Mutu Kimani** but was subsequently and by fraud registered in the name of **Gathina Kungu** (deceased), after which it was registered in the name of **George Mutu Gathina** the son of George Mutu Gathina and thereafter, the respondent **Philomena Njambi Mutu** caused herself to be registered as proprietor of the land. The 1st appellant deposed that since 1958 she, her husband and her children have lived peacefully on the suit land.

The respondent filed a replying affidavit in which she deposed that prior to the year 2001, the suit land

was registered in the names of her husband George Mutu Gathina and that she was thereafter registered as proprietor through ***High Court Succession Cause No. 2807 of 1998***. She further deposed that her deceased husband exclusively lived in the suit land but in 1997, after the death of her husband, the 2nd respondent invaded the land. She also deposed that there has been several cases relating to the suit land and gave particulars of five cases.

The proceedings show that on 14th October 2005, **Osiemo, J.** directed that the originating summons (O.S) be treated as a plaint and the replying affidavit as a defence. Later the respondent's advocates filed grounds of objection dated 13th June 2005. In the grounds of objection the respondent's advocates claimed that the suit was misconceived, bad in law and an abuse of the court process; that the suit was *res judicata* and referred to five court cases and several cases before the Chief and the District Officer, Thika and Gatundu.

Ground 5 of the grounds of objection stated:

“THAT the plaintiffs/applicants have never exclusively been in possession and or occupied land parcel No. Ndarugu/Gacharage/490 peacefully and/or uninterruptedly.

At the hearing of the suit the respondent's counsel raised a preliminary objection based on the ground of objection. The respondent's counsel referred the court to a pending Civil Suit - HCCC No. 849/2001 filed by **Samuel Kimani** seeking the same prayers as the originating summons.

After the conclusion of the proceedings and before setting the date of the ruling the learned judge, apparently on her own motion, ordered various court files relating to the dispute to be produced in court. The matter was adjourned several times to ensure compliance with the order.

Ultimately, on 6th June 2007, the High Court delivered the Ruling appealed from. In the ruling the learned judge considered six case files and stated in paragraph 3 thus:

“From the records of these files succession cause 983/1995 had in effect finalized most of the disputes them (sic) and distributed the estate of Gathui (sic) Kungu. Nothing is therefore left.”

There are two grounds of appeal. In the first ground the appellants state that the learned judge erred “*in law in not finding that the point raised as a preliminary point of law did not amount to a preliminary point of law because without calling for the files from various courts on her own initiative and un-procedurally making them part of record was not proper in law.*”

In the second ground the appellants complain that the learned judge erred in law in not allowing the parties to address the court after collecting the court files.

It is submitted by **Mr. Ngala**, the appellants' counsel, *inter alia*, that a preliminary objection cannot be raised if the facts have to be ascertained and that the judge looked for evidence beyond what was before her.

Mr. Kamau, counsel for the respondent on the other hand submitted *inter alia*, that the preliminary objection was based on *res judicata* which is a point of law and that the trial judge had power to deal with issues of fact and call for any evidence.

In **Mukisa Biscuit Co. limited v West End Distributors Limited [1969] EA 696, Sir Charles Newbold P** said at **page 701 A-B**,

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all 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.”

In the instant case, the three appellants claimed the suit land by adverse possession through the procedure of O.S. The court converted the O.S to a plaint and the replying affidavit to a defence. In the replying affidavit the respondent stated that there have been several cases between the parties or parties’ representatives over the suit land. She mentioned four, namely; Thika Criminal Case No. 5804/95, High Court Succession Cause No. 983/95, High Court Civil Case No. 479 of 2005 and High Court Civil Case No. 3209/91. She annexed a copy of an order of interlocutory injunction in civil case No. 3209/91, charge sheet and judgment in Thika Criminal Case No. 5804/95, a certificate of succession in High Court Succession Cause No. 983/95, a copy of originating summons in High Court Civil Case No. 479 of 2005 and a copy of a Certificate of Succession in High Court Succession Cause No. 2807/95. However, she did not annex the proceedings and judgment in High Court Succession Causes No. 983/95 and 2807/95.

The learned judge called for six court files and from the records, came to the conclusion that most of the disputes were finalised in High Court Succession Cause No. 983/95.

The preliminary objection could only have been argued on the basis that the facts contained in the O.S and in the supporting affidavit were correct. The relevant proceedings and judgments in various cases which were relied on by the respondent to support the objection based on *res judicata* were not annexed to the replying affidavit of the respondent. The learned judge should have decided that preliminary objection on the basis of the material placed before the court by the parties, and should not have called for the court files to ascertain the facts.

The learned judge erred by looking for additional evidence and relying on such evidence to make a finding in favour of the respondent. The facts that the learned judge established from the perusal of court files, particularly High Court Succession Cause No. 983/95 were not recorded by the learned judge. We are thus unable to make a finding that the proceedings and judgment in that succession cause resolved all the disputes. Moreover, the record does not show that the respective advocates were given an opportunity to comment on what the court files contained.

Lastly, there is no evidence or finding that a claim to the suit land by adverse possession as framed in O.S had been determined by any court previously. The issue whether the appellants have been in exclusive or peaceful possession of the suit land could only be determined by oral evidence.

From the foregoing we have come to the conclusion that the preliminary objection was not properly raised and that the learned judge erred in upholding it.

Accordingly, the appeal is allowed. The Ruling of the High Court is set aside. The appellants are given the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of October, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR