



Kombo & 19 others v Ngilu & 3 others (Suing as the Personal Representative of the Estate of Michael Mwendwa Ngilu) (Environmental and Land Originating Summons E009 of 2023) [2024] KEELC 13279 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023
SM KIBUNJA, J
NOVEMBER 20, 2024**

BETWEEN

MBWANA MWIJUMA KOMBO 1ST APPLICANT

FATUMA SHABANI & 18 OTHERS 2ND APPLICANT

AND

CHARITY KALUKI NGILU 1ST RESPONDENT

LUNDE JEMI MWENDWA 2ND RESPONDENT

MWENDE KATETHIA MWENDWA 3RD RESPONDENT

SYALO NGILU MWEDWA 4TH RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MICHAEL MWENDWA NGILU**

(PRELIMINARY OBJECTION DATED 16TH APRIL 2024)

RULING

1. The respondents filed the preliminary objection dated 16th April 2024, to the applicants' suit, raising eight grounds summarized as follows:
 - a. That this suit is subjece Mombasa ELC No. E095 of 2022, between the same parties and over the same subject matter, and therefore contravenes sections 6 & 8 of *Civil Procedure Act*.
 - b. That this court is barred by section 5 of the *Civil Procedure Act* from trying this suit in light of sections 6 & 8 of *Civil Procedure Act*.
 - c. That this suit should be struck out with costs.



2. The court gave directions on filing and exchanging submissions on the 27th May 2024. The learned counsel for the respondents and applicants filed their submissions dated the 10th July 2024 and 21st August 2024 respectively. The counsel for the respondents then filed rejoinder submissions dated 13th September 2024. The court has considered all the submissions filed.
3. The following are the issues for the determinations by the court on the preliminary objection:
 - a. Whether the grounds on the preliminary objection raises any pure point of law that that can be determined without calling evidence, and if upheld would determine this suit.
 - b. Whether this suit is subjudice.
 - c. Whether the court is with jurisdiction in the matter.
 - d. Who pays the costs?
4. The court has carefully considered the grounds on the preliminary objection, submissions by the learned counsel, superior courts decisions cited, the record and come to the following findings:
 - a. The main thrust of the respondents’ preliminary objection is that this suit filed by the applicants is subjudice or in contravention of section 6 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya, in that there exists a previously filed suit between the same parties and over the same subject matter, being Mombasa ELC No. E095 of 2022. Section 6 of the said Act provides that;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In this instant suit commenced through the originating summons dated 12th June 2023 the applicants are primarily seeking for the respondents’ interests over subdivision 2427 (original no. 2402/5) section V1, Mainland North, measuring 1.41 acres to be extinguished, and be registered with the applicants for they have become entitled to it by adverse possession. The applicants and respondents are the defendants and plaintiffs respectively, in Mombasa ELC E095 of 2022, and there is no dispute that the subject matter/suit property is the same in both suits. The parties in the earlier suit have simply changed position in the latter one.
 - b. The doctrine of subjudice is important in litigations because it helps the court to deal the practice of filing multiple suits between the same parties, and over the same subject matter that if unchecked could lead to abuse of the court process, through courts coming up with conflicting decisions, over the same property. Looking at the applicants’ submissions dated the 21st August 2024, they do not deny that the two suits are between the same parties and the same subject matter. All they say is that their claim of adverse possession over the suit property could not have been filed through a counterclaim in Mombasa ELC No. E095 of 2022, but by way of a originating summons, and therefore the preliminary objection should be rejected. The applicants have however not shown the court that they presented their adverse claim as part of their defence and or counterclaim in the previous suit and they were directed to file it through originating summons before filing this suit.



- c. In any case, though initially adverse possession was known as a sword and not a shield, it is now trite as can be seen in the following superior courts decisions, that adverse possession can be used as both a sword and a shield, and the applicants' contention to the contrary is based on a wrong understanding of the law. In the case *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No. 26 of 2015, the Court of Appeal restated the law on adverse possession as follows:

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

- d. Similarly, in the case of *Chepkwony v Malenya* (Civil Appeal 90 of 2018) (2021) KECA 47 (KLR) the court noted that:

“As we have already alluded to above, it is evident from the record that the respondent's assertion of entitlement to the suit property was not founded on an originating summons but a defence and rebuttal in appellant's reply to defence.

It is also evident from the record that the respondent sought leave to amend the defence to include a counter claim, a position not objected to by the appellant. Leave was indeed granted to her the trial court to regularize that position but for reasons not borne out by record.....

In light of the above exposition, it is our view that the current jurisprudential position on this issue as gathered from the above case law is that a party claiming adverse possession founded on a defence is entitled to relief where such claim is well founded on evidence. It is in this same vein that we hold that on the record as laid before us, the respondent's claim for adverse possession was well founded in law. The learned Judge therefore fell in no error when he sustained that claim as presented in a defence and rebutted through a reply to defence as opposed to presentation by the way of originating summons.”

The claim by the applicants that they filed this suit merely because their adverse possession claim could not be pursued through the previously filed suit is based on quick sand and cannot be an exemption to the clear provision of section 6 of the *Civil Procedure Act*. Under section 5 of the *Civil Procedure Act*, the court is therefore without jurisdiction to proceed with a suit that is clearly subjudice Mombasa ELC No. E095 of 2022.

- e. The court has perused the originating summons and the supporting affidavit and noted there is no disclosure of the existence of Mombasa ELC No. E095 of 2022. That was it not for



the respondents raising the issue of that other suit through the preliminary objection, this proceeding could have continued alongside that other one exposing the courts to the high possibility of coming up with conflicting decision over the same suit property. The filing of this suit while well aware the same parties had another suit before a court of competent jurisdiction, though differently constituted, and over the same subject matter, amounts to abuse of court process.

- f. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where ordered otherwise by the court on good grounds. In this instance, I have no reason to order otherwise and the respondents are awarded costs.
5. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That the respondents' preliminary objection in this suit being subjudice is upheld.
 - b. The suit commenced through the originating summons dated the 12th June 2023, is hereby struck out.
 - c. The respondents are awarded costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:-

Applicants : Mr. Birir

Respondents : Mr. Isika for Wamithi

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

