Sile & another (Suing on Behalf of and as Administrators of the Estate of Stephen Baron Sisimwo) v Moss (Being Sued as the Administratrix of the Estate of Daniel Chepnoi Naibei Moss) (Environment & Land Case E004 of 2024) [2024] KEELC 7466 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7466 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E004 OF 2024

FO NYAGAKA, J

NOVEMBER 12, 2024

BETWEEN

SISIMWO SILAS SILE ..... 1ST PLAINTIFF

DAVID SISIMWO STEPHEN ..... 2ND PLAINTIFF

SUING ON BEHALF OF AND AS ADMINISTRATORS OF THE ESTATE OF STEPHEN BARON SISIMWO

AND

SUSAN MOSS ..... DEFENDANT

BEING SUED AS THE ADMINISTRATRIX OF THE ESTATE OF DANIEL CHEPNOI NAIBEI MOSS

RULING

1. The Plaintiffs sued the Defendants vide a Plaint dated 30/01/2024 and filed on the same date. They averred that the cause of action arose from a Notice of Eviction dated 02/11/2023. They averred that the suit land was part of the larger parcel of land which was a leasehold registered as LR. No 1948/10. It measured approximately 542.6629 acres. Subsequently, it was converted to freehold and registered as Endebess/Endebess Block 4/Koitobos/1, 2 and 3. They pleaded that the Notice was issued by the Defendant to the Plaintiffs. They prayed that the Eviction Notice be cancelled, and the Defendant be ordered to voluntarily sign all statutory forms for the transfer of 125 acres out of the total in the original parcel to the name of Stephen Baron Sisimwo.

2. They gave the history which, in summary, was that the late Stephen Baron Sisimwo and four other persons formed a group known as Museng Group. It bought 225 acres out of the said 542.6629 from the late Daniel Chepnoi Naibei Moss. Further, a dispute arose between the Group members and on

the 19/05/1998 the then SRM Kitale decreed that Stephen Sisimwo and Group 1 were entitled to 225 acres out of the land parcel LR. No. 1948/10 and maintained the existing boundaries as they were during the lifetime of Daniel N. Moss.

3. On 08/02/1991, the court ordered that the Defendant and her family comply with the order, and a survey was conducted. On the 16/12/1991 the court issued an eviction order by which it restrained the Defendant and her family from trespassing onto the land belonging to Museng Group. The Defendant and her family were evicted. Stephen Baron Sisimmwo and his partners had peaceful occupation of the land to date, through their legal representatives.

4. The late Stephen Baron occupied his respective portion with his family until his death on 12/06/1998. The portion comprised 125 acres. In 2011, the Defendant attempted to survey and distribute the suit land. The Plaintiffs moved his honorable court in Kitale ELC No. 111 of 2011 for a claim of adverse possession. They succeeded but the Court of Appeal sitting in Eldoret Civil Appeal No. 69 of 2015 overturned the decision. In the decision of the Court of Appeal the court observed, on 17/05/2018, that considering the decree dated 19/05/1988 in Kitale SRM' Court, the Appellant (now Defendant) could not have evicted the Musengi Group without breaking the law. For those reasons, the Court opined that the Respondent had failed to prove the claim of adverse possession. It allowed the Appeal, set aside the judgment and decree of the Environment and Land Court and dismissed their claim as was filed in the superior court.

5. They pleaded further that the Appellate Court did not, by the judgment, issue an eviction order against them as implied in the Notice of Eviction dated 02/11/2023, issued against them. Further, the Estate of the late Stephen Baron Sisimwo filed Succession Cause No. 89 of 2002 wherein the court made a determination over the suit land made an order how those 125 acres was to be distributed to the beneficiaries of the late Stephen Baron. They prayed for the following reliefs:-

    a. A declaration that the late Stephen Baron Sisimwo is entitled to 125 acres out of 225 owned by Musengi Group, from the land formerly known as LR No. 1948/10 now parcel No. Endebes/ Endebes Block 4/Koitobos/ 2 and 3.

    b. And declaration that he plaintiffs and their relatives and siblings are lawfully in occupation of part of the land (described above) as the legal administrators and beneficiaries of the estate of Stephen Baron Sisimwo hence the eviction Notice of 2nd November to. 2023 be cancelled under Section 152F (1) and (2) of the *Land Act*, 2016.

    c. An order directing the defendants to sign all statutory transfer forms of land described in (a) and (b) in default of which the Deputy Registrar of this Court to sign the same.

    d. Cost of this suit.

6. Upon being served with pleadings the Defendants filed an Application dated 21/02/2024. They brought it under Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Chapter 21 (sic) Laws of Kenya as well as all the enabling provisions of the law. The Application sought the following prayers.:

    1. spent

    2. That it is Honorable Court be pleased to set aside and or vary its order issued on the 5th of February 2024 ordering that status quo do maintain pending the hearing and determination of this suit.

    3. That the honorable court be pleased to dismiss this suit on the basis that the same is res judicata.

4. That this Honorable Court be pleased to allow and enforce the Eviction Notice dated 2nd of November 2023, with the assistance of the Deputy County Commander, Endebess Sub County, Trans Nzoia and The Officer Commanding Police Station Division Endebess Sub-County, Trans Nzoia County.

5. That's the Plaintiffs/Respondents, to bear the costs.

7. The Application was based on numerous grounds which are summarized hereunder. The estate of Daniel Chepnoi Naibei Moss are the registered owners of all that parcel of land known as LR 1948/10 and or LR. No. Endebess/ Endebess Block 4/ Koitobos/1, 2 and 3 measuring 542.6629 acres. The Plaintiffs suing as the Administrators of the Estate of Stephen Sisimwo are illegally in possession of and occupation of 125 acres being part of the suitland cited above. The Respondents filed Kitale ELC No. 111 of 2011 (OS). It was between Silas Sile Sisimwo & Another vs. Susan Moss. The matter was heard and determined in favour of the Respondents (herein), then Plaintiffs in the suit. The Applicant filed an appeal, being appeal No. 69 of 2015 against the judgment. The Court of Appeal overturned the decision.

8. The issue in question before the High Court was the ownership of property comprising the 125 acres, of by way of adverse possession. It was alleged that the 125 acres were sold to the Respondents' father with an agreement dated 02/02/1983. Further, the Respondents' claim for the suit land by way of adverse possession is res judicata hence an abuse of the process of this court and the same is incompetent and bad in law. The claim over the land on the basis of a sale Agreement dated 02/02/1983 is time-barred under the statute of Limitation of Actions hence it is equally incompetent and bad in law.

9. Further, that the claim by adverse possession presupposes that the land in question is registered in the name of the Applicant and that the Respondent is laying a claim hence in the absence of a successful claim the ownership remains intact and retained by the registered proprietor.

10. The order of status quo issued on 05/02/2024 is prejudicial to the Applicant since the Court of Appeal settled the question of ownership by adverse possession and the Court needed to not to pronounce itself on the question of ownership and/or on whom the land vests. The suit is incompetent and ought to be dismissed as there is no rightful claim by the Respondents. The Applicant has a right to issue the Notice of Eviction dated 02/11/2023, founded on Sections 152B, 152E and 152(I) of the *Land Act* 2016. The 90 days have lapsed under Section 152E. The eviction notice is competent and enforceable by the relevant offices and the Respondents be evicted from the suit land comprising of 125 acres.

11. The Application was supported by the Affidavit sworn by Susanna Moss on the 01/02/2024. By it she reiterated the contents of the grounds in support of the application save that she annexed and marked SM-1 (a) and (b) and SM-2 (a) and (b), copies of the High Court decision and Court of Appeal, and the Eviction Notice dated 02/11/2023 and the Affidavit of Service respectively.

12. The application was opposed through the Replying Affidavit sworn on the 06/03/2024 by Silas Sile. He deposed that he had authority from the 2nd Respondent to swear the Affidavit. He said the Application was incompetent and should be dismissed. There was no basis laid for the Court to vary or set aside the order of 05/02/2024. It was not disputed that he and his siblings were in occupation of the 125 acres and the court was yet to determine whether or not they were in unlawful occupation. Under Section 152F (1) and (2) of the *Land Act* 2016 they had a right to approach the court for it to determine whether or not they were legally in occupation. They deposed that they were in occupation as beneficiaries of the Estate of the late Stephen Baron Sisimwo. The order of maintenance of status quo or pending the hearing of the determination of this sort was proper and lawful. The suit was not res judicata.

13. Further, the claim before this court was not based on an adverse possession. The issues before the court were never substantially and exhaustively determined by the Court of Appeal in Eldoret in Civil Appeal No. 69 of 2015. The Court of Appeal pronounced itself in paragraphs 12 to 14 of its judgment. In essence, the Court of Appeal held the 2nd Respondent (now) could not have been in possession of the suit land in two capacities, that is to say, as individuals independent of their father. Further, the claim for adverse position would not run parallel to a claim of land and possession by virtue of purchase. The Court of Appeal held further, the Plaintiffs entered into the suit land by virtue of a purchase agreement, which was disputed but the High Court did not determine the validity of the agreement of sale.

14. Further, the Court of Appeal further to hold that there was no cross-appeal to determine the validity of themselves. The Court added that the entry onto their land by the Plaintiffs (herein) was not peaceful since the Applicant had tried to regain entry through Succession Cause No. 121 or 1988 and secondly there were now legal battles which culminated to suit Eldoret High Court No. 20 of 1988 against the decision of the Senior Resident Magistrate, which appeal was summarily dismissed.

15. As much as the Court of Appeal dismissed the Respondent's claim of adverse possession it appreciated that the decree of the Senior Resident Magistrate dated 19/05/1988 and that eviction of the Museng Group of whom Stephen Sisimwo was a member, without breaking the law. He deponed further, that the issue of the ownership of 225 acres of land was conclusively and exhaustively determined in Kitale Land Case No. 125 for 1986 to the extent that the Applicant herein and her family were evicted. The said Stephen Sisimwo was a member of the Museng Group whose 125 acres out of 225 was not a disputed fact.

16. The validity of this agreement dated 02/02/1983 was superfluous and the same had been overtaken by the decree of the SRM dated 19/05/1988. Further, the Respondent were only asking the court that they were now legally in occupation of the suit land and entitled to the 125 acres. The Motion was therefore misplaced, incompetent and an abuse of the process of the court. The court had not yet determined whether or not the eviction notice dated 02/11//2023 was enforceable.

17. After the Defendants filed the Application and it was opposed the parties filed submissions, with the Applicants filing theirs dated 04/04/2024 and the Plaintiffs/ Respondents, theirs dated 02/04/2024. This has carefully considered the submissions and will analyze and compare them with both the law and facts as it analyses the issues that commend themselves for determination.

ISSUE, ANALYSIS AND DETERMINATION

18. At the outset, it is important to point out that the phrase "all enabling provisions of the law" does not have any meaning in law in so far as it purports to confer an Applicant leeway to forge ahead under the (mistaken) belief that their application is brought under proper provisions. One ought to cite the correct provisions and, when submitting, explain clearly how those provisions apply to the facts of their case. The habit of citing provisions and leaving the court to search for their relevance should stop. It is sheer laziness or mere copying and pasting of content from precedents yet each ought to be 'customized' to the particular facts of the case.

19. That aside, the Defendants argued in the instant application that this suit is res judicata and therefore it should be dismissed and the orders of status quo issued herein on 05/02/2024 be vacated and or set aside. This brings this Court to the inquiry whether the Plaintiffs' claim as filed herein in their capacity as individuals or as the Estate of the late Stephen Sisimwo for the suit land when compared with the one of adverse possession in Kitale OS No. 111 of 2011 is res judicata. This can only be discerned from the annextures SM-1(a) and (b) being the judgments of the superior court and the Court of Appeal

since the Applicant did not give the Court the advantage of deducing them from pleadings by annexing them to the Supporting Affidavit.

20. In Annexture SM-1(a) the learned trial Judge, while analyzing the evidence and making the finding thereon, was clear in his conclusion that the two claimants were Administrators of the Estate of Stephen Baron (deceased). The Court then found that they had proven their claim for adverse possession. The Court of Appeal, while finding at paragraph *12* that the claim for adverse possession failed, found at paragraph *13*, regarding the capacity, that indeed the two Plaintiffs therein claimed the land as personal representatives of the deceased. Their Lordships' issue with the Judgement of the superior court was its finding in favour of the two Plaintiffs therein in two capacities, one being as individuals and the other through their father. I now turn to the merits of the application herein, and I begin with the analysis of the law.

21. The concept of res judicata is provided for under Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. The provision reads as follows:

> " 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."

22. It is clear from the provision above that the court that determined the previous matter(s) should have been of competent jurisdiction, the findings it made were on merit on issues between same parties litigating under same title, and the same was on merits. The import of that is that even where a party purports to change the capacity or title in the subsequent suit, it does not change the character and application of the law in that regard. The elements apply as one inseverable whole or package. This calls on courts to be vigilant to discern the wiles of subtle parties. Thus, the plea of res judicata fails immediately one of the elements in the bundle given in the provision is not established: it cannot succeed in absence of any one of them.

23. That aside, courts have rendered themselves clearly regarding the doctrine. Thus, in Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR the Court of Appeal stated as follows:

> " To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

24. In the case of Uhuru Highway Development Ltd v Central Bank of Kenya (1999) eKLR the court listed the important ingredients of the res-judicata and follows:-

    a. The former judgment or order must be final.

    b. The judgment or order must be on merits.

    c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and

    d. There must be between the first and the second action identity of the parties, of subject matter and cause of action."

25. In Mwangi v Mokaya (Environment and Land Appeal 13 of 2023) [2023] KEELC 18642 (KLR) (6 July 2023) (Ruling) this Court added one more specific element when it held:

> " The elements of res judicata are therefore that the
>
> 1. issue being tried the second time was previously tried and determined
> 2. issue being tried was the same, directly or substantially in issue as in the former proceeding
> 3. court that tried it had competent jurisdiction
> 4. determination was on merits and not on a technicality hence conclusive on the issue
> 5. parties in the former proceeding were the same or litigated therein under the same title."

26. My understanding and interpretation of the law on the plea, as elucidated in the above cited decisions, is that all the elements envisioned must be fulfilled in order for the plea to succeed. In the instant suit, the Applicant's contention is that the issue of ownership of the 125 acres was determined and settled by the Court of Appeal in Eldoret Civil Appeal No. 69 of 2015. They argue that in its Judgment the Court of Appeal analyzed that of the superior Court arising from the determination in Kitale ELC No. 111 of 2011 (OS) and arrived at the conclusion that the claim by the Respondents herein and in the Appeal and Plaintiffs in the OS for adverse possession, was not merited. It allowed the Appeal. On that basis they argue that the Plaintiffs' claim for the suit land is not tenable, is incompetent, bad in law and an abuse of the process of the court.

27. It is not denied that in Kitale ELC No. 111 of 2011 (OS), the Plaintiffs therein sued the Defendant, Susan Moss, in her capacity as the Administrator of the Estate of Daniel Naibei Moss. The learned judge made a finding on the merits of the Originating Summons but it was overturned on appeal. The decision on appeal was merit-based, just as in the superior court. What is the issue then? It is whether the issues in the matter at the two levels were determined on merits as to lead to the conclusion and effect, therefore, that the Plaintiffs' claim herein was determined and therefore giving basis for the issuance of the Eviction Notice dated 02/11/2023 issued by the Defendants herein against the Plaintiffs.

28. I have carefully considered the contents of the judgments in Kitale ELC No 111 of 2011 (OS) and the Court of Appeal in Eldoret Civil Appeal No. 69 of 2015 and in comparison, with the pleadings in the instant claim regarding the aspect of determination on the merits of the issues in the previous suits. What is in issue in the instant suit and application is whether the determination by the Court of Appeal, as given in its judgment dated 17/05/2018 conclusively determined the issue of ownership of the suit land.

29. One thing is clear to me, that in the judgment the Court of Appeal stated that the learned trial Judge erred in making a finding that the Plaintiffs had proved their claim for adverse possession of the suit property. It found therefore that the Appeal succeeded. While doing so, their Lordships and Ladyship made very pertinent legal observations that can only be addressed by this court or any other of competent jurisdiction in a substantive hearing. They found that the Respondents in the Originating Summons, then Appellants, that is to say, the Applicants in the instant application, could not have evicted the Plaintiffs (now Respondents) without breaking the law.

30. Therefore, what does the finding of the Court of Appeal mean regarding the Notice of Eviction dated 02/11/2023? Further, what does that mean to this court, when faced with a similar step by the Defendants herein to evict the Plaintiffs through a Notice issued pursuant to Sections 152B, 152E and 152(I) of the *Land Act* 2016 before enacted, bearing in mind that the finding of the Court of Appeal was regarding issues and facts that arose way before the provisions relied on by the Applicants were enacted?

31. To my mind, it means that any court faced with an intended eviction of the Plaintiffs subsequent to the finding on appeal has to ask itself whether such eviction is lawful at that later time, if by the time the Court rendered itself, and even from the previous period(s) which the Court looked at, it was unlawful to evict the same parties. Thus, the question the Court is to grapple with at the trial is, when did the eviction become lawful currently for the Court to give it effect now and not then? Put differently, why was it unlawful regarding the time the Respondents in the OS tried to enforce it but now it is?

32. Further, did the learned Judges of Appeal make, in their finding that the claim of adverse possession failed, a definitive determination as to the ownership of the suit land, more so that it was the Defendants/Applicants? In my humble view, they did not, and neither did they declare it to be for the Plaintiffs. They did not, not particularly so when at paragraph *9* they stated, "Since therefore the administration dates back to the time of death, the contention by the Appellant that the land had no owner until the Appellant was granted Letters of Administration in 2011 is not valid. In any case, the documents at the trial show that the appellant was issued with a Grant of representation on 7th December, 1988..."

33. Again, it becomes pertinent for the Court to consider, at the trial and not at the interlocutory stages as this, the import of the judgment on appeal when the Judges, referring to the decree in Kitale SRM's Court Land Case No. 25 of 1988, stated as follows; "The decree... shows that the Plaintiff was "Moss and family" while the Defendant was "Stephen Sisimwo & Group". The decree gave "Stephen Sisimwo & group" 225 acres and further ordered that the boundary of 225 acres and the remaining land belonging to the "Moss and family" be as it was during the late D.C.N. Moss' lifetime....The eviction order on which the Respondents relied again ordered "Moss Family" to be evicted from the portion of 225 acres belonging to "Stephen Sisimwo and his group.... [13] It follows and we hold from the foregoing, and we hold, that, up to 12/06/1998 when the Respondents' father died, the Respondent entered into possession of the part of the suit land with permission of their father who, in turn, was in possession pursuant to a disputed agreement of sale and also pursuant to a decree of Senior Resident Magistrate's court dated 19/05/1988... [14] ... In light of the decree in the Senior Resident Magistrate's court, Kitale dated 19/05/1988, the Appellant could not have evicted the Museng Group without breaking the law."

34. From the excerpts of the judgment of the Court of Appeal in that matter (annexture SM-1(b) herein), it is beyond peradventure that the Court was clear in its mind that the "Museng Group" part of which the Plaintiffs' deceased father was a member was entitled not to be evicted from the land, by virtue of the law: protected pursuant to the decree issued on 19/05/1988. Can that happen now? That is an issue calling for this Court to determine, more so, given that there were period(s) the Plaintiffs (and by extension the Estate of the late Stephen Sisimwo) resided on or occupied the suit land for an uninterrupted period of more than 12 years, which period is contemplated by Sections 7 and 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. This is because the two provisions limit an owner of land from filing a claim for its recovery where the occupier has been in possession thereof for a continuous period longer than 12 years and thereby extinguishing the owner's title after the period. Could this legal position have been the one the Court of Appeal had in mind by its finding as summarized above? This is one other issue which can only go to trial and not for summary

determination at an interlocutory stage proceeding as in the instant application. The other issue would be the size of the land the Plaintiffs occupy since the survey was ordered by the subordinate court in those years referred to by both the superior court and the Court of Appeal.

35. In any event, a plain reading of the reliefs the Plaintiffs seek shows that they are basically declarations and not in any way near a claim for adverse possession. Further, the Plaintiff's pleadings and the reliefs sought point to, by necessary implication, that the question on whether the Applicants intend to adduce evidence that the Defendant cannot claim the suit land by way of any eviction notice or otherwise or not hence they be entitled to some or all the declarations. Those are weighty issues that place the instant application at an extremely vitiated position as to bear any merits.

36. The best this Court can do, which I hereby do, is to dismiss it with costs to the Respondent and maintain the orders of status quo as made on 05/02/2024.

37. The parties are directed to comply with Order 11 of the Civil Procedure Rules, 2010 within the next 14 days by filing their trial bundles and exchanging them. This suit shall therefore be mentioned on 17/12/2024 for directions in terms of the said provisions.

38. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM THIS 12TH DAY OF NOVEMBER, 2024.

HON. DR. IUR F.NYAGAKA,

JUDGE, ELC KITALE

In the presence of :

Kaosa Advocate holding brief for Barongo Advocate...for the Plaintiffs

Mutuma Advocate...for the Defendants