



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyi v Mwangi (Environment & Land Case E022 of 2022)  
[2023] KEELC 17473 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE E022 OF 2022**

**JM MUTUNGI, J**

**MAY 18, 2023**

**BETWEEN**

**CHRISTOPHER MUKUNGA MUNYI ..... PLAINTIFF**

**AND**

**PETERSON KABUITU MWANGI ..... DEFENDANT**

**RULING**

1. The defendant on June 22, 2022 filed a Notice of Preliminary Objection dated June 21, 2022. Inter alia the defendant raised the following grounds in support of the preliminary objection:-
  1. That the Suit is res judicata on account of Nyeri ELC No. 494 of 2014 where the parties were the same and similar issues as in the present suit arose and were decided.
  2. That the plaintiff was precluded by virtue of section 8 of the *Civil Procedure Act* and Order 24 rule 7(1) of the *Civil Procedure Rules* from instituting the present suit as the same issues were directly and substantially in issue in Nyeri ELC No. 494 of 2014 which abated and revival of the same was declined.
  3. In the alternative the defendant contended the suit was time barred by virtue of section 4(1) and 27(1) of the *Limitation of Actions Act* as it was based on a contract entered into on 4/5/1978 and 3/2/1991.
  4. That the agreement dated 3/2/1991 was void abinitio by reason of section 45 and 82 of the *Law of Succession Act*.
2. On 21/7/2022 the parties agreed to have the preliminary objection disposed first and the court directed that the preliminary objection be canvassed by way of written submissions. Both the plaintiff and the defendant filed their submissions in compliance with the court's directions.



3. The defendant in his submission contended that his father before his death was the Administrator of the estate of Kinogu Mukiria (deceased) in Nyeri HC Succession Cause No. 174 of 1999. He stated his father had prior to his death subdivided the suit land Kiine/Ruiru/646 to his sons and daughters but passed away before the process was completed. The defendant stated he was substituted to replace his deceased father in the Succession Cause and when the matter came up for Summons for Confirmation of Grant the plaintiff objected to the proposed distribution of the estate and that he filed a protest together with two other protestors that led to the Judgment delivered in the Succession Cause on February 24, 2022. In the Judgment the Judge held that the protestors were claiming ownership of land parcel Kiine/Ruiru/646 which the High Court lacked the jurisdiction to determine. The Judge stayed proceedings in the Succession matter pending the determination of the ownership dispute before a court of competent jurisdiction.
4. The plaintiff in his filed submissions denies the present suit is resjudicata and/or he is barred by reason of the *Limitation of Actions Act*, cap 22 Laws of Kenya from instituting the suit. The Plaintiff asserted that what was dismissed in Nyeri ELC No. 494 of 2014 was an application for substitution principally because the character of the suit property had allegedly changed as the suit property had been subdivided and the subdivisions transferred to 3<sup>rd</sup> parties who were not parties to the suit. The Plaintiff without providing any details avers in the submissions that the court cancelled the illegal subdivisions being Kiine/Ruiru/1978,1979,1980,1981,1982,1983 and 1984 and the title reverted to the original title Kiine/Ruiru/646.
5. The plaintiff in response to the averment that the suit was time barred contended that the matter has been in active litigation from 1999 vide Nyeri HC. Succession Cause No. 174 of 1999 where the Court rendered a Judgment on protestations respecting the confirmation of grant on 24<sup>th</sup> February, 2022 staying the proceedings in the matter pending determination of the ownership claim pitying the plaintiff on the one part, and the estate of Kinogu Mukiria (deceased) represented by the Defendant on the other part. The defendant has argued that the Ruling in the Succession Case did not give the Plaintiff leave to file the suit and maintains the suit is resjudicata and barred by Limitation. Further, the defendant argues Nyeri ELC No. 494 of 2014 having abated as against the defendant's estate since no substitution was done for the defendant within the prescribed period, the plaintiff is precluded by virtue of Order 24 Rule 7(1) of the Civil Procedure Rules from instituting a fresh suit.
6. I have carefully considered the rival arguments in support of and in opposition to the preliminary objection. It is evident that the facts in the suit are seriously contested and that the Court would undoubtedly need to take and consider the evidence to verify the facts. Where the facts pleaded by the parties are contested, a preliminary objection would not lie. See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the Court of Appeal as per Sir Charles Newbold, P observed as follows:-  
  
“---- A preliminary objection is in the nature of what used to be a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop.”
7. The plaintiff in the present suit claims to have purchased 3 Acres out of land parcel Kiine/Ruiru/646 in 1978 and was put in possession and has resided on the portion ever since and allegedly has effected extensive developments on the portion. The Plaintiff claims to have acquired ownership of the said



portion of land on account of being a purchaser and having been in continuous and uninterrupted possession over a long period of time.

8. The defendant in his defence denies that the plaintiff was ever put in possession of the suit property by Kinogu Mukiria (deceased) and/or that the plaintiff has effected any developments on the land. The defendant denies that the plaintiff has acquired any registrable interest over the suit property. It is the plaintiff's contention that he had acquired overriding interests that did not require any registration. In the face of these contested issues, a preliminary objection would not be sustainable as the court would need to take evidence in order to ascertain the veracity of the contestations of the parties.
9. To the extent that the plaintiff has premised his suit on the ground that he had acquired overriding rights that entitled him to be registered as the owner of the portion of 3 acres out of the suit property, the doctrine of resjudicata in my view would not be applicable. It is noteworthy that the pleadings in Nyeri ELC No. 494 of 2014 were not furnished by any party, and it was not possible for the court to determine what issues were raised in the suit. The Ruling by L. N. Waithaka, J dated 21<sup>st</sup> June, 2018 related to an application for substitution. In determining the application the Judge observed as follows:-

“..... The suit property ceased to exist after subdivision and distribution of the resultant parcels among the beneficiaries of the estate of Elias Mwangi Kinogu. I agree with the respondent that it will serve no purpose to substitute him as a defendant in the current suit as the original parcel no longer exists and he is not the only registered owner of the subdivisions of the original parcel of land. If the Applicant has interest in any of the other parcels, then his cannot be against the Respondent alone.”

10. It is clear what drove the Judge to decline to substitute the plaintiff was because the original parcel of land had been subdivided and distributed. The plaintiff has averred that the alleged subdivisions were cancelled and the original title restored in the name of Kinogu Mukiria (deceased). A copy of a certificate of search dated 17<sup>th</sup> May, 2022 included in the Plaintiff's bundle of documents shows Kinogu Mukiria as still the present registered owner which would discount the assertion that the parcel of land was subdivided. The High Court Succession Case being Nyeri HC Succ Cause No. 174 of 1999 also indicates the land the subject of the proceedings was land parcel Kiine/Ruiru/646 (the original parcel of land).
11. In the circumstances I am unable to sustain the preliminary objection and I accordingly dismiss the same for lacking in merit. I order that the costs occasioned by the preliminary objection will abide the outcome of the suit.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 18TH DAY OF MAY 2023.**

**JOHN M. MUTUNGI**

**JUDGE**

