



**Kianjoya Enterprises Limited & another v Kimani & 4 others (Environment & Land Case E25 of 2023) [2023] KEELC 18645 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18645 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E25 OF 2023  
A OMBWAYO, J  
JUNE 29, 2023**

**BETWEEN**

**KIANJOYA ENTERPRISES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**NINE SISTERS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAMUEL MACHARIA KIMANI ..... 1<sup>ST</sup> DEFENDANT**

**JUDY NJERI THUO ..... 2<sup>ND</sup> DEFENDANT**

**JOHN NG'ANG'A GITHII ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH MWANGI WAITHAKA ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiffs Notice of Motion application dated 5<sup>th</sup> April 2023 expressed to be brought under Articles 50(1), 159 (2) of *the Constitution* of Kenya, Section 19 of the *Environment and Land Court Act* and Section 7 of the *Civil Procedure Act* which sought the following orders;
  - a. Spent
  - b. That this honourable court be pleased to order that the plaintiffs/applicants are the legitimate and lawful owners of the suit premises known as Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 and 1413 (Kianjoya 'D').
  - c. That this honourable court do issue a temporary injunction to restrain the defendants/respondents by themselves, their agents, employees from trespassing into, encroaching onto or interfering with the plaintiffs/applicants quiet possession of the suit premises and in any way dealing with the suit premises pending hearing and final determination of this suit.



- d. That costs be in the cause.
2. The grounds on the face of the application are that the 1<sup>st</sup> plaintiff had always been the registered owner of LR number 4630/7,8,8 and 8851/2 which parcels were converted and registered under the [Land Act](#) in 1996. That as a result of the subdivision, the 1<sup>st</sup> Plaintiff was issued with Miti Mingi/Mbaruk Block 8 which it sold to various buyers. That other portions were reserved for future developmental use that included Miti Mingi/Mbaruk Block 8/1400 (Kianjoya D) while others were for sale that included Miti Mingi/Mbaruk Block 8/1401 to 1413 (Kianjoya D). That sometime in November 2018, the plaintiff's farm manager informed the managing director of both plaintiffs that persons had encroached onto the suit properties. That the matter was reported to Mwariki Police Station vide OB number 21/2/11/2018. That the plaintiff filed Nakuru ELC No. 59 of 2019 (Kianjoya Enterprises vs Samuel Macharia Kimani & 4 Others) which was not determined on merit but was dismissed for want of prosecution. That the plaintiffs were apprehensive that they were being condemned unheard for the reason the defendants had proceeded to lift the cautions that they had put in place to protect their interests.
3. The application was supported by the affidavit of Maina Wanjigi the plaintiffs managing director. He reiterated the grounds on the face of the application and deposed that he conducted a search on all the parcels of land known as Miti Mingi/Mbaruk Block 8(Kianjoya 'D') and confirmed that the parcels of land that included Miti Mingi/Mbaruk Block 8/1401 to 1413 (Kianjoya D) were registered under the plaintiffs name. That after persons had gone to claim the suit properties in the year 2018, he instructed his farm manager to conduct searches at the Naivasha registry and that he was shocked to learn that not only had the suit properties been transferred to the defendants but that there was also duplicity of green cards. That the parcels of land that had duplicate green cards were 1400, 1410, 1411 and 1413. That the plaintiffs have never had any dealings with the defendants and so it was evident that the office of the 5<sup>th</sup> defendant orchestrated the fraudulent transfer of the suit properties. That the provisions of Section 7 of the [Civil Procedure Act](#) do not apply because the suit earlier filed by the 1<sup>st</sup> plaintiff which was Nakuru ELC No. 59 of 2019 was dismissed for want of prosecution and was not heard and/or determined on merit.
4. In response to the application, the 1<sup>st</sup> to 4<sup>th</sup> defendants filed a preliminary objection to the application dated 4<sup>th</sup> May 2023 on the same date. The preliminary objection is on the following grounds;
- a. That the Application is Res-Judicata to a similar Application filed in Nakuru ELC Civil Case No. 59 of 2019: Kianjoya Enterprises Limited Versus Samuel Macharia Kimani & 4 Others, which was heard and dismissed on merits and on costs to the Respondents herein by this Honourable Court.
- b. That the suit is Res-Judicata to Nakuru ELC Civil Case No. 59 of 2019: Kianjoya Enterprises Limited Versus Samuel Macharia Kimani & 4 Others, which was heard and dismissed on merits and on costs to the Defendants herein by this Honourable Court, hence a gross violation of Section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
- c. That the purported Application and suit herein by the Applicants is itself a non-starter, defective in law and incurable incompetent having been filed outside the time limitation contained under Sections 4(2), 7 & 26 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya and the same cannot be a basis of, nor sustain, any interlocutory or final orders whatsoever.
- d. That the purported suit herein by the Plaintiffs is itself a non-starter, defective in law and incurably incompetent its Verifying Affidavit thereof having been filed without the requisite



authority(ies) mandated under Order 4 Rule 1(4) of the [Civil Procedure Rules, 2010](#) Laws of Kenya and the said suit cannot be a basis of, nor sustain, any final orders.

- e. That the Application and the suit are otherwise a gross violation and abuse of the process of this Honourable Court and should be dismissed in limine.
5. The 1<sup>st</sup> to 3<sup>rd</sup> defendants also filed grounds of opposition to the application dated 15<sup>th</sup> May 2023 and filed on 18<sup>th</sup> May 2023 which were on the following grounds;
  1. The application is an abuse of the court process.
  2. The applicant seeks to dispense of suit vide a motion which suit in itself is res judicata.
  3. The application is brought malafides with intent to restrict the respondents right to their own property.
  4. The instant application ought to be dismissed with costs.
6. The plaintiffs filed a supplementary affidavit sworn by Maina Wanjigi. He reiterated that Nakuru ELC No. 59 of 2019 Kianjoya Enterprises vs Samuel Macharia Kimani & 4 others was dismissed for want of prosecution. He deposed that in the said matter the advocate representing the 1<sup>st</sup> plaintiff failed to comply with Order 11 of the [Civil Procedure Rules](#) and failed to also join the 2<sup>nd</sup> plaintiff so the matter could not proceed for hearing on 15<sup>th</sup> March 2022. He also deposed that on the said date the matter was dismissed for want of prosecution. That he knows that the mistake of an advocate cannot be visited upon an innocent litigant. That the petitioners have a strong case with high chances of success. That the present suit was not res judicata since it was never determined on merit and that no prejudice will be occasioned to the respondents if the application was allowed.

### Submissions

7. The plaintiffs filed their submissions dated 9<sup>th</sup> May 2023 on 12<sup>th</sup> May 2023 while the defendants did not file any submissions. The plaintiffs identified the following issues for determination;
  - a. Whether this suit is res judicata.
  - b. Whether this suit was determined on merit.
  - c. Whether this suit is a gross violation and abuse of the process of this honourable court.
  - d. Whether the suit is time barred.
8. On the first issue, the plaintiffs relied on Section 7 of the [Civil Procedure Act](#) and submitted that the previous suit was never heard or determined on merit and therefore it was not res judicata. The plaintiffs then relied on the cases of Tee Gee Electrics and Plastics Company Limited vs Kenya Industrial Estates Limited [2005] KLR 97, [Moses Mbatia vs Joseph Wamburu Kibara \[2021\]](#)eKLR and [Cove Investments Limited v Juhana Kiprotich Rono & 2 Others \[2021\]](#) in support of their arguments.
9. On the second issue, the plaintiffs reiterated that the suit was never heard on merit and relied on the case of Raila Odinga vs IEBC & Others [2013] eKLR.
10. With regard to the third issue, the plaintiffs submitted that the present suit was not tantamount to an abuse of the court process as they were not accorded an opportunity to be heard. The plaintiffs relied on the case of [Kenyariri vs Salama Beach \[2017\]](#)eKLR in support of their arguments.



11. On the fourth issue, the plaintiffs submitted that the course of action in this matter arose in the year 2018 and so the plaintiffs were not guilty of laches. The plaintiffs then sought that they be given an opportunity to prosecute their claim.

### **Analysis and determination**

12. After considering the application, the responses thereto and the submissions, the following issues arise for determination;
  - a. Whether the application under consideration and the suit are res judicata to Nakuru ELC Civil case No. 59 of 2019.
  - b. Whether the application and the suit were filed outside of the time limitation under Sections 4(2), 7 and 26 of the *Limitations of Action Act*.
  - c. Whether the plaintiff is entitled to the orders sought in the application.
  - d. Who should bear costs of the application.

#### **a. Whether the application under consideration and the suit are res judicata to Nakuru ELC Civil case No. 59 of 2019.**

13. The 1<sup>st</sup> to 4<sup>th</sup> defendants alleged that the present suit and the application under consideration were res judicata to Nakuru ELC Civil case No. 59 of 2019. The plaintiffs on the other hand argued that Nakuru ELC Civil case No. 59 of 2019 was dismissed for want of prosecution and was not heard and determined on merit.

14. Section 7 of the *Civil Procedure Act* provides as follows;

No court shall try any suit 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 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.”

15. The doctrine of res judicata was explained in the case of *Independent Electoral and Boundaries Commission -v- Maina Kiai & 5 Others (2017)*eKLR and the court stated as follows;

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
- b) The former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”



16. The court in the case of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014]* eKLR held as follows;

I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.”

17. The issue of res judicata cannot be raised by way of a preliminary objection as it requires the examination of pleadings for the court to determine whether the matter is res judicata. This ground of the 1<sup>st</sup> to 4<sup>th</sup> defendants’ preliminary objection therefore fails.

**b. Whether the application and the suit were filed outside of the time limitation under Sections 4(2), 7 and 26 of the Limitations of Action Act.**

18. The 1<sup>st</sup> to 4<sup>th</sup> defendants alleged that the suit was filed outside of the time limitation under Sections 4(2), 7 and 26 of the *Limitations of Actions Act*. The plaintiffs on the other hand argued that the course of action arose in the year 2018 and so the matter was not statute barred. Apart from the Notice of Preliminary Objection and grounds of opposition, the 1<sup>st</sup> to 4<sup>th</sup> defendants have not filed any pleadings. Only the 5<sup>th</sup> defendant filed its statement of defence where it denied the plaintiffs claim.

19. Section 4 (2) of the *Limitation of Actions Act* provides as follows;

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

20. Section 7 of the *Limitation of Actions Act* provides as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

21. The court in the case of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Mubindi [2019]* eKLR held as follows;

13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial.

22. On this see the case of *Oruta & Another vs. Nyamato [1998]* KLR 590, where the court held that limitation of action:-

“...could only be queried at the trial but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”



14. See also the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:
23. It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act...*”
24. Other than alleging that the suit and application were filed outside the time limitation, the 1<sup>st</sup> to 4<sup>th</sup> defendants did not file any other pleadings to substantiate the same. Further, a defence on limitation of time should be determined at trial and cannot be dealt as a preliminary objection. This ground on the preliminary objection also fails.

**c. Whether the plaintiff is entitled to the orders sought in the application.**

25. The plaintiffs under prayer no. (2) of their Notice of Motion application are seeking that an order be issued that they are the legitimate and lawful owners of the suit properties. It is my view that such a prayer is not capable of being granted at this stage of the proceedings as it can only be determined at the hearing of the main suit.
26. The court in the case of James Ndung’u Kero v Chief Land Registrar, Director Of Survey & Attorney General (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling) held as follows;
27. The prayer that sought for the applicant to be declared as the bona fide registered owner of the land was couched in the manner of a final prayer warranting a final order. There was no prayer that could be issued at an interlocutory stage. In issue was conclusive of proof of ownership, the court could not grant orders relating to ownership at an interlocutory stage...”
28. The plaintiffs are also seeking for an interlocutory injunction to restrain the defendants from trespassing or dealing in any way with the suit properties.
29. The guiding principles for the grant of orders of temporary injunction are set out in the case of Giella Versus Cassman Brown (1973) EA 358 and reiterated by the court of appeal in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)* eKLR where it was held as follows;
- in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
30. These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.



31. The Plaintiff/Applicant has to first demonstrate that he has a prima facie case. The court in the case of Mrao Ltd Versus First American Bank of Kenya Ltd [2003] eKLR stated as follows on what constitutes a prima facie case;

... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

32. In the present matter, the plaintiffs have in support of their application annexed copies of certificates of search of the suit properties that indicate that they are registered in the names of the defendants herein. The plaintiffs have also annexed a letter dated 21<sup>st</sup> December 2018 addressed to Mugweru & Company Advocates from the District Land Registrar.

33. It is my view that the Plaintiffs have not established a prima facie case for the court to grant the order of injunction sought.

34. Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 held as follows;

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”

35. The Plaintiffs have consequently not made a case for grant of the orders of injunction sought.

36. In conclusion therefore, the plaintiff’s application dated 5<sup>th</sup> April 2023 and the 1<sup>st</sup> to 4<sup>th</sup> defendants preliminary objection lack merit and are hereby dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**A. O. OMBWAYO**

**JUDGE**

