Gichina v Njonge & another (Environment & Land Case E020 of 2022) [2023] KEELC 18307 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18307 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE E020 OF 2022

BM EBOSO, J

JUNE 14, 2023

BETWEEN

EVANSON KURIA GICHINA ..... PLAINTIFF

AND

JAMES NGANGA NJONGE ..... 1ST RESPONDENT

ESTATE OF DOUGLAS NGANGA NJONGE ..... 2ND RESPONDENT

RULING

1. What falls for determination in this ruling is the 1st respondent's notice of motion dated 9/1/2023 through which he seeks an order dismissing this suit on the ground that the suit is res judicata. For proper identification, I will, in this ruling, refer to Evanson Kuria Gichina [the applicant in the originating summons] as "the plaintiff". I will refer to James Nganga Njonge as "the 1st defendant. The estate of Douglas Nganga Njonge will be referred to as "the 2nd defendant."

2. The suit was initiated through an originating summons dated 8/6/2022 and taken out on 8/6/2022. Through the originating summons, the plaintiff seeks the following verbatim orders against the defendants:

    1. That a declaration that the title Douglas Nganga Njonge and James Nganga Njonge holding in trust for Michael Ndungu Njonge to the land parcel Karai/ Gikambura/1915 (suit land) has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act* [sic].

    2. That the applicant has become entitled to adverse possession to the suit land Karai/ Gikambura/1915 and registered under the *Land Act* in the name of the Defendant [sic].

    3. That an order that the Land Registrar Kiambu register the applicant as absolute proprietor of land parcel number Karai/ Gikambura/1915 n place of the respondent [sic].

4. That the Land Registrar Kiambu be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the respondent to the applicant.

5. Costs of the suit.

3. The case of the plaintiff is that he entered into an agreement for purchase of the suit property from one Michael Ndungu Njonge in January 1995. The said Michael Ndungu Njonge died in August 1995 and his wife, Grace Wanjiru Ndungu, agreed to proceed with the sale at a sale price of Kshs 260,000. He paid Kshs 45,000 and deposited the balance with his lawyer, pending completion. He then entered into possession of the suit property in 1996. However, Grace Wanjiru Ndungu died before completing the transfer. He has been in exclusive possession of the suit property since 1996, hence he has acquired title to it through adverse possession.

4. Upon being served with the originating summons, the 1st defendant filed a preliminary objection dated 19/7/2022, through which he invited this court to strike out the suit on the ground that the suit is res judicata because the dispute in the suit had been heard and determined by the Principal Magistrate Court at Kikuyu in Kikuyu PMCC Case No 43 of 2012. On 21/1/2022, the court directed the 1st defendant to ventilate the issue of res judicata through a formal application that would enable him place before the court the pleadings and determination relating to the previous suit. The 1st defendant subsequently brought the application dated 9/5/2023 which now falls for determination in this ruling.

5. The application was supported with the 1st defendant's affidavit sworn on 9/1/2023. The 1st defendant exhibited proceedings and judgment relating to Kikuyu PMCC Case No 43 of 2012. He did not, however, exhibit the pleadings relating to the said suit. The application was canvassed through written submissions dated 13/2/2023, filed by M/s Mbuthia Kinyanjui & Co Advocates. The case of the 1st defendant is that the plaintiff filed Kikuyu SPMCC Case No 43 of 2012 and fully ventilated the issue of ownership of the suit property. The 1st defendant contends that the appellant's attempt to ventilate the same issue under the doctrine of adverse possession is untenable under section 7 of the *Civil Procedure Act*.

6. The plaintiff presented an undated replying affidavit filed on 24/1/2023, and written submissions dated 16/2/2023, filed M/s Muhuhu & Co Advocates. The case of the plaintiff is that the key elements of res judicata do not exist in the present suit because: (i) in Kikuyu SPMC Civil Case No 43 of 2012, he sought an order compelling the executive officer of the court to endorse, the transfer forms which the defendant had refused to endorse while in the present suit, he seeks orders of adverse possession; and (ii) Lucy Wambui Ndungu who is one of the parties in the present suit was not a party in Kikuyu SPMCC Case No 43 of 2012.

7. I have considered the application; the response to the application; and the parties' rival submissions. The 1st defendant has invited this court to make a finding that this suit is res judicata. The key issue that falls for determination in the application is whether this suit is res judicata.

8. The common law doctrine of res judicata has been legislated into statute law under section 7 of the *Civil Procedure Act* which provides 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."

9. The Parliament of Kenya went a step further to enact the following explanatory notes as part of the statute:

Explanation (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

10. What is logically discernible from the above legal framework and explanatory notes is that, a party seeking a finding to the effect that a suit is res judicata is expected to place before the court the relevant pleadings and determination relating to the previous suit, to enable the court discern what the precise issues were in the previous suit and relate those issues to the suit that is contended to be res judicata.

11. The 1st defendant did not exhibit the relevant pleadings. This court does not have all the precise issues that arose out of the pleadings that were filed in Kikuyu SPMCC Case No 43 of 2012. This court cannot therefore make a conclusive or definitive finding on the question of res judicata without the said pleadings.

12. In the circumstances, the court will strike out the notice of motion dated 9/1/2023 on the ground that the 1st defendant (applicant in the notice of motion) failed to place before the court the relevant pleadings. The 1st defendant will, however, be at liberty to bring a competent application and ventilate the issue of res judicata if he so desires. The 1st defendant will bear costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the presence of:

Ms Ngigi for the Plaintiff

Mr Kinyanjui for the 1st Defendant

Court Assistant: Ms Osodo