



Mutugi (Suing as the Legal Representative of Mutugi Kimara - Deceased) & another v Kimara (Environment & Land Case E028 of 2022) [2023] KEELC 18748 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E028 OF 2022**

JM MUTUNGI, J

JULY 18, 2023

BETWEEN

**JOYCE MUTHONI MUTUGI (SUING AS THE LEGAL REPRESENTATIVE OF
MUTUGI KIMARA - DECEASED) 1ST PLAINTIFF**

**NANCY THIGITI KIMARA (SUING AS THE LEGAL REPRESENTATIVE OF
FRANCIS NGAIRE KIMARA DECEASED) 2ND PLAINTIFF**

AND

JAMES THIGITI KIMARA DEFENDANT

RULING

1. The plaintiff instituted the present suit vide an originating summons dated July 28, 2022 and prayed for the following orders:-
 - a. The plaintiffs be declared to have become entitled by adverse possession of over 12 years to one Acre each comprised in the title No. Mwerua/Kiandai/210.
 - b. There be declaration that the defendant holds in trust for himself and for the plaintiffs land parcel No. Mwerua/Kiandai/210
 - c. There be a declaration that the awards of and decree issued in land Dispute Tribunal Case No. 12 of 2008 before Baricho Tribunal Court, Nyeri Appeal Committee Land Dispute No. Kirinyaga 16/2009 and Baricho Resident Magistrates Land Dispute Tribunal Case No. 14 of 2008 respectively be declared null and void as the said Tribunal had no Jurisdiction to deal with title registered under the Registered Land Act, Cap 300 (now repealed).
 - d. The Land Registrar, Kirinyaga County do register the plaintiffs as proprietors over one (1) Acre each in respect of land parcel No. Mwerua/Kiandai/210 and the remainder of one decimal six (1.6) Acres to the names of the defendant.



- e. The defendant be ordered to pay cost of this suit to the plaintiffs.
2. The Originating summons was supported on the supporting Affidavit sworn by Joice Muthoni Mutugi, the 1st plaintiff herein.
3. The defendant swore a Replying Affidavit dated August 11, 2022 filed in court on August 18, 2022 in opposition to the originating summons. The defendant further on October 4, 2022 filed a Notice of preliminary objection dated September 28, 2022 raising the following grounds;
 1. That the entire suit is res judicata.
 2. That the suit is filed contrary to section 7 of the *Civil Procedure Act*, 2010 and therefore this Court lacks jurisdiction to entertain the said suit and grant the orders prayed for.
 3. That the suit is an abuse of the Court process and should be dismissed forthwith with costs.
4. The court on 14/2/2023 directed that the preliminary objection be argued by way of written submissions. Both parties filed their submissions.
5. In his submissions the defendant contended that the present suit is res judicata as there has previously been a suit involving the same subject matter and involving the same parties that has been determined. The defendant explained that the dispute relating to land parcel Mwerua/Kiandia/210 was handled by the Ndia Land Disputes Tribunal in 2008 who made an award that the suit land be subdivided into 3 portions such that Mutugi Kimara Thigiti got 1 Acre, Francis Ngaire Kimara 1 Acre and the remainder of 1.6 Acres was to go to James Thigiti Kimara. The Respondent herein being dissatisfied with the Tribunal's award appealed the decision before the Provincial Tribunal Appeals Committee. The Provincial Appeals Committee rendered its award on June 29, 2011 and as per the record the Appellant agreed to share the suit land which was registered in his name as follows:-
 - Mutugi Kimara Thigiti - ½ Acre.
 - Francis Ngaire Kimara - ½ Acre.
 - David Mbui Thigiti - ½ Acre.
 - Engimo Munene Thigiti - ½ Acre.
 - Boniface Muthui Thigiti – ½ Acre.
 - Festus Muriithi Thigiti – ½ Acre.
 - James Thigiti Kimara - 0.6 Acre
6. The Respondent contends that following the decision of the Provincial Appeals Committee the award was implemented and the suit land was subdivided in terms of the Mutation Form dated 29/10/2013 attached to the Respondent's Replying Affidavit.
7. The defendant submits that the present suit is res judicata as the issue of ownership of the suit property was determined in the earlier litigation. The defendant in support of his submission relied on the Cases of *IEBC –vs- Maina Kiai & 5 Others* (2017) eKLR; *E. T –vs- Attorney General & Another* (2012) eKLR and *Gurbachau –v- Yowani Ekori* (1958)EA 450.
8. The plaintiffs in their submissions opposed the Preliminary Objection and contended that the issues raised in the present suit are different and distinct from the issues that were raised before the Land Disputes Tribunal. The plaintiffs argued that in the present suit the plaintiffs seek a declaration that the defendant holds land parcel Mwerua/Kiandia/210 in trust for themselves and himself. The plaintiffs



contend that the awards issued by both the District Land Disputes Tribunal, and the Nyeri Provincial Appeals Committee and the decree issued by the Baricho Resident Magistrate's Court were null and void as the Tribunals had no jurisdiction to deal with registered land under the Registered Land Act, Cap 300 Laws of Kenya. The plaintiffs submitted that the doctrine of resjudicata was inapplicable since the Tribunal had no jurisdiction to deal with the matter that went before them.

9. The Court of Appeal in the IEBC –vs- Maina Kiai & 5 Others case set out conditions that have to be satisfied in order for the doctrine of res judicata to be held to be applicable. The Court held as follows:-

“Thus, for the bar of resjudicata to be effecting 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”.

10. The rationale for the resjudicata doctrine is that litigation has to come to an end and that parties that have had a litigation that has been concluded should not be allowed to open a new front of litigation before another court on the same issues that have previously been litigated before another court. If parties were to be allowed to file fresh suits on issues that have been concluded before another court, litigation would never come to an end and a successful litigant would never take a deserved rest as he would not be assured the litigation would not be reopened in another court. The court in the Case of ET –vs- Attorney General & Another (2012) eKLR stated as follows:-

“The Courts must always be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi –vs- National Bank of Kenya Ltd & Others (2001) EA 177 the Court held that, ‘Parties cannot evade the doctrine of resjudicata by merely adding other parties or causes of action in a subsequent suit’. In that case the Court quoted Kuloba, J, in the case of Njangu –vs- Wambugu & another HCCC No. 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of resjudicata.’”

11. In the present case, the plaintiffs are the widows of the brothers of the defendant. Their respective husbands during their lifetime referred the dispute relating to land parcel Mwerua/Kiandai/210 which was family land to the Land Disputes Tribunal for arbitration in 2008. The plaintiffs husbands were the claimants at the Tribunal. The Divisional Land Disputes Tribunal gave an award in favour of the claimants which the Baricho Magistrate's Court endorsed on 10/12/2008. The Respondent/Objector (now defendant) appealed to the Provincial Appeals Committee at Nyeri against the award. During



the Appeal hearing before the Appeals Committee, the plaintiffs deceased husbands and the defendant were present and the award made on 29/6/2011 shows the Appeal was settled by consent as the Appellant is recorded to have willingly agreed to share the suit land provided his sons were included in the shares. The award set out the shares and these were the shares that were approved at the time of partition as per the Mutation Form dated 29/10/2013. The record further shows the defendant applied for and obtained the Land Control Board's Consent to subdivide the land into 7 portions on 17/10/2013 to give effect to the decision of the Provincial Appeals Committee.

12. The husband of the 1st plaintiff, Mutugi Kimara Thigiti (deceased) as per the Adlitem grant died on 13th January, 2017 while the husband of the 2nd plaintiff, Francis Ngage Kimara (deceased) as per the Adlitem grant died on 6th April 2015. The plaintiffs lay claim to the suit land through their said deceased husbands. Their husbands were parties to and participated in the litigation before the Land Disputes Tribunal and before the Provincial Appeals Committee. They were infact, the claimants before the Tribunal. The plaintiff's deceased husbands did not appeal against the decision of the Appeals Committee. The decision/award by the Appeals Committee as per the record appears to have been with the consent of the plaintiffs deceased husbands as the panel made a finding that the defendant had willingly agreed to share the land with his brothers on the basis that they each get ½ Acre equivalent to his sons. The plaintiffs husbands were content with the decision and never raised any issue up till they died.
13. I am satisfied that the issues that were deliberated on at the Disputes Tribunal and at the Appeals Committee and whose decisions were eventually adopted by the Baricho Magistrate's Court, related to ownership and distribution of land parcel Mwerua/Kiandai/210. That, in my view is the same issue that arises in the present suit. The plaintiffs in my view appear to be taking advantage of the death of their husbands to have the matter reopened and litigated afresh, perhaps in the hope they could better the award their late husband got. The decision of the Appeals Committee was not challenged in the manner provided for by the law and it is apparent that in the present suit, the plaintiffs are merely coating and rebranding the matter with a new cause of action but the matter unmistakably remains the same matter that was litigated before the Disputes Tribunal and before the Appeals Committee.

Section 8(8) (9) of the *Land Disputes Tribunals Act*, Cap 303A Laws of Kenya (now repealed) provides:-

- “8(8) The decision of the Appeals Committee shall be final on any issue of fact and no Appeal shall lie therefrom to any Court.
- (9) Either party to the Appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within Sixty days from the date of the decision complained of.”

No party preferred any Appeal against the Appeals Committee decision as provided and consequently the decision became final. In the premises, the plaintiffs cannot properly raise the issue of jurisdiction of the Land Disputes Tribunal, the Appeals Committee and the Magistrates Court at this stage. The issue ought to have been raised by way of Judicial Review when the matter was before the Disputes Tribunal and/or Appeal to the High Court following the decision of the Appeals Committee. This was not done and consequently, the decision of the Provincial Appeals Committee became final in all respects.

14. In the premises I am persuaded the present suit is res judicata and cannot be sustained. If parties were to be allowed to litigate over matters that have been litigated and finalised, there would be no end to litigation. This matter has been litigated and finalised between the same parties and over the same



subject matter. The plaintiffs following the demise of their respective husbands through whom they claim, want to reopen the same matter for another round of litigation. The court will not allow that.

15. The net result is that I find merit in the defendant's preliminary objection. I uphold the same and order that the plaintiffs suit be struck out in its entirety.
16. As I note this matter relates to family members I will in exercise of my discretion award no costs and each party shall bear their own costs of the suit.

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

J. M. MUTUNGI

JUDGE

