



REPUBLIC OF KENYA



KENYA LAW
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**Gachema v Wambui (Environmental and Land Originating Summons
9 of 2023) [2023] KEELC 18760 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2023**

JG KEMEI, J

JULY 13, 2023

BETWEEN

GLADYS WANJIRU GACHEMA PLAINTIFF

AND

GRACE WAMBUI DEFENDANT

RULING

1. Before me is a Notice of Motion dated 9/3/2023 seeking the following orders:-
 - a. Spent
 - b. That pending hearing and determination of this application interpartes, this honourable court be pleased to grant a temporary order of injunction restraining the defendant whether by herself, her employees, servants, agents from doing any of the following acts that is to day from demolishing and pulling down the building structures, both permanent and temporary, belonging to the Plaintiff, evicting, selling, disposing of or otherwise howsoever, taking possession, leasing, letting, charging or otherwise howsoever interfering with the Plaintiffs' occupation and possession of and title to all that parcel of land known as Kiambaa/Karuru/T.1147 situate in Kiambu County.
 - c. That pending hearing and determination of this suit, this honourable court be pleased to grant a temporary order of injunction restraining the defendant whether by herself, her employees, servants, agents from doing any of the following acts that is to say from demolishing and pulling down the building structures, both permanent and temporary, belonging to the plaintiff, evicting selling, disposing of or otherwise howsoever, taking possession, leasing, letting, charging or otherwise howsoever interfering with the Plaintiffs' occupation and possession of and title to all that parcel of land known Kiambaa/Karuru/T.1147 situate in Kiambu County.



- d. The costs of this application be provided for.
2. The application is based on the grounds annexed thereto and the supporting affidavit of Gladys Wanjiru Gachema the defendant/respondent.
3. In brief the applicant avers that she has lived on the suit land since 1987. That she has constructed a matrimonial home where she lives to date.
4. She depones that the suit property belongs to her father in law namely; Ngugi Kimani (Deceased). That the land was registered in the name of Stephen Njoroge Ngugi (Deceased), the husband of the Respondent and brother of her husband (Michael Karanja Ngugi) (Deceased).
5. It is her case that the Respondent has caused the suit land to be registered in her name by way of transmission, following the successful petition of the estate of Stephen Njoroge Ngugi (Deceased). That the Respondent has issued her with eviction notice from the suit land. That she stands to suffer loss and damage if evicted. That she is likely to be rendered destitute in the circumstances. The court was urged to allow the application.
6. In opposing the application, the respondent filed a notice of preliminary objection on 21/3/2023 on the following grounds; the application and the claim is res judicata; the application is curably defective bad in law and does not lie; the application is misconceived, incompetent, defective and bad in law as it raises issues of trust and adverse possession; the application is an abuse of the court process and ought to be dismissed.
7. The application is further opposed vide the replying affidavit of Grace Wambui sworn on 24/3/2023. The respondent avers that she is the registered proprietor of parcel No. Kiambaa/Karuri/T1147, a subdivision of parcel No. Kiambaa/Karuri/T34. That following the death of her husband Stephen Njoroge Ngugi the suit land was transmitted by Certificate of Confirmation of Grant. That the Applicant is the widow of Michael Karanja Ngugi who was a party in previous cases relating to the suit land. Some of the cases affecting the suit land were enumerated as; Land Dispute Tribunal No. 16/2014 of 1998; the Provincial Land Dispute Appeal Committee in SPM Court No. 24 of 1998 – Kiambu; Judicial Review Misc. Appl. 556 of 2003 and Nairobi Civil Appeal No. 359 of 2006; Succession Cause No. 258 of 2011 CMCC Kiambu; CMCC Misc. Appl. 65 of 2018.
8. That the Appeal was dismissed and the stay orders earlier granted in favour of Michael Karanja Ngugi lapsed. That the applicant was served with notice to vacate the suit land vide a letter dated 13/12/2022 which notice she has elected to ignore. That litigation should come to an end to allow her enjoy the fruits of her case. Further the Respondent avers that her application and the suit is now res judicata, the applicant's husband having litigated previously over the suit property. in the main that the application is an abuse of the process of the court and the applicant is guilty of non-disclosure of material facts. The court was urged to dismiss the application with cost.
9. I have considered the written submissions filed by the parties. The applicants submissions were filed by the firm of Gichuki Kingara & Co. Advocates on 21/3/2023. The Respondent's submissions were filed on 27/3/2023 by the firm of Gatitu Wang'oo & Co. Advocates. There are two issues for determination:
 - a. Whether the suit is res judicata.
 - b. Whether the application dated 9/3/2023 is merited.
10. The factual background of this suit is premised on the originating summons dated 9/3/2023 wherein the plaintiff sought adverse possession over the suit land on the ground that she has been in occupation



of the land since 1987, a period in excess of 12 years. Secondly, that the suit land is family land which was registered in the name of Stephen Njoroge Ngugi to hold in trust for himself and the family of Mzee Kimani Ngugi, her father in law. That she has a legitimate and bonafide interest over the suit land and ought to be declared a joint owner together with the Defendant having been in uninterrupted possession of the suit land in excess of 30 years.

11. Is the suit Res Judicata? In answering this question, the court will consider the provisions of section 7 of the [Civil Procedure Act](#), 2010 which states as follows:-

“Nocourt 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 can 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.”

12. I have reviewed the history of litigation in this matter as contained in the replying affidavit of the respondent filed on 27/3/2023. In SPM No. 24 of 1998 the original suit land Kiambaa/Karuri/T34 was shared between Gitau Mbatia and Stephen Njoroge Ngugi in two equal shares. Similarly, status quo was ordered to be maintained according to the Ruling pertaining to the Succession Cause. It is the case of the respondent that the eviction orders were issued against the applicant’s husband in SPM No. 24 of 1998 and as such the suit filed herein amounts to relitigation of the issues already determined by the court for which the applicant has acknowledged inform of previous suits and eviction order issued therein.
13. I have already alluded that the suit before this court seeks orders of adverse possession in the suit land. The court notes that the respondent did not annex the proceedings in SPM No. 24 of 1998 to enable the court appreciate the claim of the parties in that suit. The respondent has annexed a decree issued on 19/6/2003. It is trite that for a party to successfully advert or prosecute an objection on res judicata, the same ought to be raised by way of a Notice of Motion to enable the party annex the complete pleadings and the Judgment of the previous suits. In this case the Respondent failed to do so.
14. Having reviewed and considered the pleadings together with the annexures of the respondents placed before the court, the court finds that the issue with respect to adverse possession and family trust has not been decided. Consequently, the court finds that the issues raised in the instant suit being a claim of adverse possession and trust are not directly and substantially in issue in the former suits between the deceased’s husbands of the parties.
15. It is therefore the holding of this court that this suit is not res judicata. I say this with circumspection because no proceedings have been placed before this court to support the doctrine of res judicata.
16. On the second issue the Court relies on the decision of *Giella v. Cassman Brown Ltd* [1973]EA 358 where the court stated as follows:-

“Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide the application on the balance of convenience.”

17. On whether the applicant has demonstrated *prima facie* case, unchallenged affidavit evidence was led by the applicant that she has occupied the property since 1987. Photographs of her matrimonial home were exhibited which on the face appear quite aged. The court finds that the applicant has



demonstrated a prima facie case. Her occupation of the suit land appears to be the reason why the respondent has issued eviction notice requiring her to vacate the suit land.

18. With respect to irreparable damages, it is trite that the applicant must demonstrate that she is likely to suffer harm that cannot be quantified in monetary terms or which cannot be cured. The applicant avers that she has developed her matrimonial home on the suit land, lived with her deceased husband and raised all her children on the suit land. This position was not challenged by the Respondent. The court finds that the sum total of her evidence reveals the establishment of a sentimental value in favour of the Applicant for which damages cannot be an effective remedy.
19. Whether does the balance of convenience lie? The court not being in doubt, the balance of convenience lies in the preservation of the suit property. The court relies on the provisions of section 63 of the Civil Procedure Act read together with Order 40 (1) (a & b) of the Civil Procedure Rules so as to preserve the substratum of the suit.
20. With respect to costs of the application the parties being related the Court orders each to bear the cost of the application.
21. Final orders for disposal:-
 - a. The Notice of Preliminary Objection dated 20/3/2023 is unmerited, it is dismissed.
 - b. The Notice of Motion dated 9/3/2023 be and is hereby allowed.
22. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ndungu for Plaintiff/Applicant

Gatitu for Defendant/Respondent

Court Assistant – Phyllis

