



**Njacami v Mue & 2 others (Environment & Land Case
E038 of 2022) [2023] KEELC 18764 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E038 OF 2022**

JM MUTUNGI, J

JULY 13, 2023

BETWEEN

FRANCIS MUIGA NJACAMI PLAINTIFF

AND

PIUS MUTUNGA MUE 1ST DEFENDANT

LUCAS MAINA NG'ANG'A 2ND DEFENDANT

POLINE WANJIRA KARUCI 3RD DEFENDANT

RULING

1. The 2nd and 3rd Defendants on 16th November 2022 filed a Notice of Preliminary Objection dated 14th November, 2022 setting out the following grounds:-
 1. The suit is an abuse of the process of the Court.
 2. The issues raised in the Originating Summons were heard and determined by a Court of competent jurisdiction in Kerugoya Chief Magistrate's Civil Case Number 90 of 2014. The suit is therefore res-judicata.
 3. The suit should be dismissed with costs as it is based on dishonesty and misleading statements of fact.
2. In opposition of the Originating Summons and in support of the Preliminary Objection the 2nd and 3rd Defendants filed a Replying Affidavit dated 14th November, 2022 sworn by the 3rd Defendant. The Defendants exhibited various documents to support their assertion that the instant suit was *res judicata*. In particular, the Defendants annexed various pleadings and orders issued by the Court in Kerugoya CMCC No. 90 of 2014 and the abstract of title in respect of land parcel No. Kiine/Rukanga/2167 (now subdivided to create subtitles Kiine/Rukanga/7211 and 7212).



3. The Court on 13th February 2023 directed that the Preliminary Objection be disposed first as it concerned the issue of *res judicata* which ostensibly questioned the jurisdiction of the Court to entertain the suit. The Court directed the parties to canvass the Preliminary Objection by way of written submissions. The 2nd and 3rd Defendants filed their submissions in support of the Preliminary Objection on 21st March 2023 while the Plaintiff filed his submissions on 2nd May 2023.
4. The 2nd and 3rd Defendants submitted that the issue of ownership of the suit property was in issue in Kerugoya CMCC No. 90 of 2014 and the issue was determined. The 2nd and 3rd Defendants have argued the Plaintiff was a party, albeit as an Interested Party in the said suit while the Defendants were all parties in the suit. The Defendants argue that the Plaintiff is precluded from bringing the instant suit as it is *res judicata* and in contravention of Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya.

Section 7 of the [Civil Procedure Act](#) 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.”

5. The 2nd and 3rd Defendants have in support of their Preliminary Objection placed reliance on the Case of *C.K. Bett Traders Ltd & 2 Others –vs- Kennedy Mwangi & Another* (2021) eKLR and *The IEBC – vs- Maina Kiai & 5 Others* (2017) eKLR.
6. The Plaintiff in his response to the Defendants submissions maintained that the previous suit did not raise similar issues as in the present suit. The Plaintiff asserted that the 1st Defendant as Plaintiff sued the 3rd Defendant in Kerugoya CMCC No. 90 of 2014 seeking removal of caution registered over title number Kiine/Rukanga/2167 or Alternatively refund of the purchase price. The Plaintiff claimed that he was only joined in the suit as an Interested Party in the suit and that by the time of the joinder a consent Judgment in the suit had been entered. It was the Plaintiff’s position that adverse possession was never an issue before the Magistrate’s Court and was never decided upon by the Court. Hence the Plaintiff contends the doctrine of *res judicata* was inapplicable in the circumstances of this case.
7. The singular issue for determination is whether having regard to the previous suit the present suit is *res judicata*. In the Case of [C. K Bett Traders Ltd & 2 Others –vs- Kennedy Mwangi & Another](#) (*supra*) cited and relied upon by both parties, E. C. Mwita, J aptly captured the rationale of *res judicata* at Paragraphs 32 and 33 of his Judgment as follows:-
 32. The provision is on the fundamental doctrine that there should be an end to litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estopped. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
 33. *res judicata* is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, *res judicata* will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or



substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

The Case of *I.E.B.C –vs- Maina Kiai & Others*(*supra*) set out the ingredients that ought to be satisfied for the doctrine of *res judicata* to be held to be applicable. The Court of Appeal in the Case held: -

“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 rendered not in disjunctive but conjunctive terms: -

- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. The 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.
8. I have perused and considered the copies of pleadings availed by the 2nd and 3rd Defendants in regard to Kerugoya CMCC No. 90 of 2014. The pleadings that originated the suit were not availed but it is apparent the Plaintiff was joined in the suit as an Interested Party in 2017. From the pleadings availed, it is clear that the issue of the Plaintiff being an adverse possessor was never pleaded. There is no reasoned Judgment or Ruling to show and/or illustrate the issues that were considered and determined by the Court. Section 38 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya and Order 37 Rule 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya prescribes how a claim for adverse possession where an Applicant claims to have become entitled to be registered as owner of land on account of adverse possession may be instituted. The Chief Magistrates Court could not in my view have competently entertained a claim of adverse possession within the suit that had been brought before the Court.
9. I therefore hold and find that the issue of adverse possession was not an issue that was directly and substantially in issue before the Magistrate’s Court in Kerugoya CMCC No. 90 of 2014 and was not and could not have been finally determined. The preliminary objection lacks any merit and the same is ordered dismissed with costs to the Plaintiff.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 13TH DAY OF JULY 2023.

J. M. MUTUNGI

JUDGE

