



Nyamatura v Land Registrar, Nyamira County & 3 others (Environment and Land Appeal E001 of 2023) [2023] KEELC 20278 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**JM KAMAU, J
SEPTEMBER 27, 2023**

BETWEEN

RICHARD NYAMATURA APPLICANT

AND

LAND REGISTRAR, NYAMIRA COUNTY 1ST RESPONDENT

THE COUNTY LAND SURVEYOR, NYAMIRA 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

DANIEL OMBACHI MOGENI DEFENDANT

*(Being an Appeal from the Ruling of the Magistrate's Court at Nyamira
by Hon. M.C. Nyigei – PM delivered on the 9th day of November,
2022 or 26/11/2022 in Nyamira CMC ELC Case No. 74 of 2019)*

JUDGMENT

1. The Appeal before the Court Stems from the Judgment of the Honourable M. Nyigei in a Ruling dated 01/03/2023 in Nyamira CM Court ELC Case No. 74 of 2019 where the said Learned Trial Magistrate found that the issues before her had been determined in Kisii High Court Civil Case No. 349 of 1996 and Kisumu Civil Appeal No. 281 of 2011 with finality. The Grounds of Appeal are as follows: -
 1. The Learned Trial Magistrate erred in law and in fact by making a finding that the issues raised in Nyamira ELC Case No. 74 of 2019 had been determined in Kisii High Court Civil Case No. 349 of 1996 and Kisumu Civil Appeal No. 281 of 2011 with finality.



2. The Learned Trial Magistrate erred in law and in fact by finding that the subject matter, the parties and the cause of action in Nyamira ELC No. 74 of 2019 are identical to those in Kisii High Court Civil Case No. 349 of 1996 and Kisumu Civil Appeal No. 281 of 2011.
 3. The Learned Trial Magistrate erred in law and fact by disregarding the Appellants' Submissions.
2. The Appeal was canvassed by way of written submissions which were highlighted in Court and which I have considered.
 3. What were the issues in Nyamira CMCC Case No. ELC 74 of 2019 and who were the parties. Richard O. Nyamatura sued the Land Registrar, county Surveyor, Nyamira as well as the Attorney General and one Daniel Ombachi Mogeni claiming that he, being registered owner of LR. no. West Mugirango/Siamani/2257 and the 4th Defendant, the proprietor of West Mugirango/Siamani/2256 which neighbours each other he was ordered to vacate West Mugirango/Siamani/2256 in Kisii HCCC No. 349 of 1996. This followed a Survey Report which was adopted by the court and the Plaintiff was evicted. He unsuccessfully attempted to review the said Judgment and his residential building was demolished. He therefore prayed for a Declaration that the Surveyor's Report dated 05/02/1997 was erroneous and an order of eviction against the 4th Defendant from West Mugirango/Siamani/2257, Special and General Damages, Interest and Cost.
 4. Although no records of Kisii High Court Case No. 349 of 1996 and Civil Appeal No. 281 of 2011 were not exhibited, it is clear from the References in the Plaintiffs' suit in Nyamira CMCC Case No. 74 of 2019 there was a case between the Plaintiff and the 4th Defendant in Nyamira Case. From the pleadings therein and in particular the Complaint, the Appellant says that the issue of the boundary between West Mugirango/ Siamani/2256 and 2257 was in dispute in HCCC NO. 349 of 1996 in Kisii High Court, the same was determined and execution of the Decree was carried out. The Appellant was dissatisfied with the Survey Report dated 05/02/1997 which he says was erroneous and which formed the basis of the Judgment in the High Court. He now wants it declared erroneous, an issue he should have raised in the High Court. He also prayed for the eviction of the 4th Respondent from West Mugirango/ Siamani/2257 which was also an issue in the High Court Case and even if it had not been, the same should have been litigated thereat as is provided for under Section 7 of the *Civil Procedure Act*:-

“7. *Res judicata* - 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.

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.”

5. I therefore agree with the Trial Magistrate Honourable Nyigei that the issues in the suit filed in Nyamira CMCC NO. 74 of 2019 are substantially in issue in Kisii HCCC No. 349 of 1996 which is a competent court to try the said issue i.e. the Survey Report dated 05/02/1997 and that a Judgment was pronounced and even unsuccessfully appealed against in the Court of Appeal in Civil Appeal No. 281 of 2011 Kisumu and therefore Nyamira CMCC No. 74 of 2019 is *Res judicata*. I need say no more other than that this Appeal is equally dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF SEPTEMBER 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Applicant: N/A

Respondents: Mr. Omwoyo for the 4th Respondent

