



**Gibiti v Waigoge & 3 others (Environment & Land Case E15 of 2020)
[2023] KEELC 21824 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E15 OF 2020
MN KULLOW, J
NOVEMBER 29, 2023**

BETWEEN

MUNIKO SIMION GIBITI PLAINTIFF

AND

JOHN NYAHIRI WAIGOGE 1ST DEFENDANT

MATINDE THOMAS WAIGOGE 2ND DEFENDANT

GATI DANIEL WAIGOGE 3RD DEFENDANT

EDDY GICHURU OKETCH 4TH DEFENDANT

RULING

1. The Applicants/Defendants herein filed a Notice of Motion Application dated 3rd March, 2023 seeking the following orders: -
 - a. Spent
 - b. That this suit be dismissed for being an abuse of the process of this Honourable Court and for want of jurisdiction as the suit offends the provisions of Sections 7 and 8 of the *Civil Procedure Act*, being that the subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues which were already heard and determined in Kisii High Court Civil Case No. 112 of 1993 where a Decree was given on 24/01/1996 and issued on 08/02/1996.
 - c. That a Permanent Order of Injunction do issue against the Plaintiff/ Respondent, her agents, employees, representatives, assigns and workers, barring them from trespassing onto and/or interfering with the Defendants quiet possession of Land parcel No. Bugumbe/ Mabera/ 1935 and Bugumbe/ Mabera/ 1936 in any way.



- d. That the costs of this Application be provided for.
2. The Application is premised on 5 grounds on its face and on the 1st Applicant's Supporting Affidavit sworn on even date, on his own behalf and on behalf of his Co-Applicants. The Applicants aver that the suit as filed offends the provisions of sections 7 and 8 of the *Civil Procedure Act*; that the subject matter, facts, parties and the issues directly and substantially in dispute in the instant suit are similar to the subject matter, facts, parties and issues which were already heard and determined vide Kisii High Court Civil Case No. 112 of 1993, a Decree was thereafter issued on 08/02/1996 and which has since been executed through eviction. A fact which they contend was admitted by the Plaintiff/ Respondent when testifying in court on 22/11/2022.
 3. He further stated that his deceased father filed the suit against the Plaintiff/ Respondent and his deceased father sometimes in the year 1993. By consent made on 24/02/1995, the matter was referred to Arbitration which was to be presided over by the District Officer Suba-Kuria and 4 other elders. The matter was heard at the tribunal and an award was made; declaring his deceased father, Waigoge Nyahiri Sinda, as the rightful owner of the land parcel No. Bugumbe/Mabera/ 307. The said award of Arbitration was confirmed, adopted and entered as the Judgment of the court.
 4. Consequently, upon being issued with the Decree on 08/02/1996, the family of Gibiti Wanyancha and Antoni Ntori Gibiti were evicted from the said suit land in the year 2003, in execution of the decree and which eviction was never challenged in court.
 5. It is further his contention that upon the death of their father; they instituted succession proceedings in respect to the suit land and a Confirmed Grant was issued on 27/06/2014 to that effect. Pursuant to the said succession process, it is his claim that on 05/03/2015; the 1st – 3rd Applicants/Defendants were duly registered by transmission as the proprietors of the original suit land No. 307. The said original parcel was thereafter subdivided into 2 portions; Bugumbe/ Mabera/ 1935 and 1936 on 14/10/2016.
 6. That on 21/09/2017; the 1st – 3rd Defendants/ Applicants transferred parcel No. 1936 measuring 8Ha to the 4th Defendant/ Applicant who had lawfully purchased the same, and a vacant possession was handed over to him. He thus urged the court to dismiss the suit for being res judicata.
 7. The Application was opposed; the Plaintiff/ Respondent filed a Replying Affidavit dated 14.06.2023. It is his claim that he commenced the instant suit against the Defendants vide Originating Summons dated 30/11/2020 and maintained that prior to filing the suit, he had not filed any other suit against the defendants.
 8. He further contended that the parties in the Kisii High Court Civil Suit No. 112 of 1993 as evidence in the annexed Decree; are Waigoge Nyahiri Sinda and Anton Ntori Gibiti, who are absolutely different from the parties in the instant suit.
 9. It was also his claim that the issue that was determined in the previous suit was on the issue of ownership of land parcel No. Bugumbe/ Mabera/ 307 whereas the issue of ownership by registration is not an issue under consideration in the present suit. He maintained that he affirmed in his pleadings that the Defendants are the registered owners of the suit properties.
 10. It was his contention that the main issue in dispute in the instant suit is whether he has acquired title to the suit land by adverse possession and whether the Defendants' title over the suit parcels have been extinguished by effluxion of time. He thus claimed that it was clear from the Decree that the issue of adverse possession was never an issue for determination in the former suit neither was it part of the judgment. He thus maintained that the suit is not res judicata as the issues in the instant suit were



neither directly nor substantially in issue in the former suit and the parties hereto are not the same as the parties in the former suit.

11. The Application was canvassed by way of written submissions. The Defendants/ Applicants filed their written submissions dated 17.07.2023 together with authorities which I have read and considered. However, at the time of writing this judgment, the Plaintiff/Respondent had not filed any submissions despite being given time to file the same. Be that as it may, I will proceed to give my ruling on the same.
12. The sole issue for determination before me is whether the Notice of Motion dated 3rd March, 2023 is merited on account of res judicata and I will proceed to discuss it as hereunder;
13. The Applicants/ Defendants have sought the dismissal of the Plaintiff's/ Respondent suit vide the Originating Summons dated 30/11/2020 on the account of Res Judicata. It is their claim that the suit as filed contravenes the provisions of section 7 and 8 of the *Civil Procedure Act*, since the subject matter, facts, parties and the issues directly and substantially in dispute are similar to the subject matter, facts, parties and the issues directly and substantially in dispute in the former suit Kisii High Court Civil Case No. 112 of 1993, which has been heard and finally determined.
14. Section 7 of the *Civil Procedure Act* on res judicata defines what amounts to res judicata 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.”
15. From a reading of the above-mentioned section, the salient features that must be demonstrated for doctrine of res judicata to hold are that; the issues raised in the present suit must be directly and substantially in issue as the issues raised in the former suit that has been heard and finally determined by a competent court. The same must be between the same parties over the same subject matter.
16. Applying the foregoing to the present case, it is the Applicant's assertion that the subject matter, facts, parties and issues in dispute in the present suit are the same as those in Kisii High Court Case No. 112/1993 which was heard and determined vide a Judgment and Decree dated 08/02/1996 and further that the said Decree has since been executed through eviction.
17. The Respondent on the other hand has maintained that from a look at the said Judgment, the issue of adverse possession was never directly and substantially in issue in the previous suit and thus the instant suit cannot be said to be res judicata. He further stated that the parties in the previous suit are not similar as those on the instant suit.
18. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
 - (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) 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.”

19. I will proceed to carefully analyze the copies of the proceedings and the Award of the Arbitration Committee filed in Kisii High Court Civil Case No. 112 of 1993 and the Decree issued on 24/01/1996 produced as Annexures 4 and 5, to ascertain the allegations made by the Respondent. From the Decree it is clear that the Court made a determination that the Plaintiff in that case, Waigoge Nyahiri Sinda, was the sole registered proprietor and rightful owner of the suit land and consequently issued an order of permanent injunction and eviction of the Defendant Anton Ntori Gibiti, from the suit land.
20. I have also keenly looked at the proceedings before the Arbitration Committee and I do note that the main issue for determination was whether there was a valid sale between the Plaintiff therein and the Defendant’s father and whether the subsequent registration of the suit land in the name of the Plaintiff was valid and lawful. After hearing the witnesses of both parties; the committee made a determination that the suit land was legally sold to the plaintiff therein, who paid money in exchange of the land and found that the plaintiff is the rightful owner.
21. The instant suit on the other hand is primarily hinged on the issue of adverse possession; by virtue of the Plaintiff’s possession and occupation of the suit land Bugumbe/ Maberu/307 and which has since been subdivided into L.R. No’s. Bugumbe/ Maberu/ 1935 and 1936, for a period of over 12 years since the year 1973. The Defendants in their responses reiterated that they are the actual and registered owners of the suit land. They denied the possession and occupation claims made by the Plaintiff and maintained that the Plaintiff was evicted from the suit land.
22. From an analysis of both suits; it is common ground that the subject matter in question is original parcel of land No. Bugumbe/ Maberu/307, now subdivided into Bugumbe/ Maberu/1935 and 1936, is the same. However, what appears to be directly and substantially in issue in both suits is different in my humble opinion. While the Plaintiff in the previous suit sought a declaration that he is the actual and registered proprietor of the suit property vide a sale between the Defendant’s father and himself and he is the rightful legal owner, the Plaintiff in the present suit is seeking a declaration that he be registered as the proprietor of suit land Bugumbe/ Maberu/307, by virtue of adverse possession, having been in possession and occupation of the said portion for a period of over 12 years.
23. Applying the foregoing to the present case, it is clear that even though in both suits the issue of ownership arises; the issues directly and substantially in issue are not similar. The issue of adverse possession and the prerequisites thereto were not heard and finally determined on merit in the previous suit Kisii High Court Case No. 112/1993. The doctrine of res judicata as alleged does not therefore apply in the instant suit.
24. The upshot of the foregoing analysis is that the notice of motion application dated 3rd March, 2023 is not merited and is hereby dismissed with costs to the Respondent/ Plaintiffs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 29TH DAY OF NOVEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

