



**Mbogo v Kanyaki & another (Environment & Land Case 6 of 2020)  
[2023] KEELC 22589 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22589 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 6 OF 2020  
A KANIARU, J  
NOVEMBER 28, 2023**

**BETWEEN**

**DOMINIC D MBOGO ..... PLAINTIFF**

**AND**

**NAZARIO NJAGI KANYAKI ..... 1<sup>ST</sup> DEFENDANT**

**ALFRED MURIITHI NJIRU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff - Dominic D. Mbogo - filed this suit on 26.04.2021 by way of Complaint against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants – Nazario Njagi Kanyaki and Alfred Muriithi Njiru.
2. The plaintiff has sought orders for a declaration that the award in Minister’s Appeal Case No.36 of 2007 was unlawful, null and void, and that the same be set aside and an order for cancellation of title deeds that arose from parcel No. Kagaari/kanja/1038 and which are currently registered in the name of the defendants respectively revert to the name of the plaintiff; a permanent injunction against the defendants barring them, their servants, agents or anyone claiming through them from interfering with the plaintiff’s quiet possession, occupation, cultivation, and enjoyment of the land previously registered as land parcel No. Kagaari/kanja/1038 which the plaintiff had been in occupation of and had continuously used for over 30 years; plus costs and interest of the suit.
3. The plaintiff’s claim is that he was at all material times registered as the proprietor of suit land parcel No. Kagaari/kanja/1038. That on or about the year 2007, the 1<sup>st</sup> defendant filed an appeal to the minister vide Ministers Appeal no. 36 of 2007 claiming transfer of the suit land from the plaintiff’s name. The appeal was allowed. That the land was divided into four parcels Being Kagaari/kanja/9570, Kagaari/kanja/9569, Kagaari/kanja/9568 and Kagaari/kanja/9567. He avers that the said award was a nullity as the District Commissioner representing the Minister in the said appeal did not have jurisdiction to adjudicate on land registered under Registered Land Act. He denies being informed of the decision



and says that he only came to learn about it around 2010 when he tried to dispose of the property. That the 1<sup>st</sup> defendant also sold 1 acre out of his share to the 2<sup>nd</sup> Defendant.

4. The defendant opposed the suit by way of a Defence dated 17.06.2021 and filed on the same date. It was his case that the Plaintiff had been registered with the said parcel of land as a trustee for the family and that the said trust was terminated through a decree of the Court in Land Disputes Tribunal case No. 36 of 2007 issued in the Chief Magistrate's Court in Embu. That title deeds were issued to all interested parties including the plaintiff who got a share of 4.5 acres out of the total acreage of 7 acres and that the 1<sup>st</sup> Defendant got 1 acre being land parcel No. Kagaari/kanja 9569. That since the decree the Court in Land Disputes Tribunal Case No. 36/2007 was issued and executed, the plaintiff has never bothered to set aside the same or appeal against it and hence the orders he is seeking have been overtaken by events. He disputes the plaintiff's claim that he was not aware of the decision of the Land Disputes Tribunal as he says the same was read and adopted in the presence of the parties on 25.10.2007. It is his case further that the suit herein is Res-Judicata as there exists a judgement in ELC High Court No. 23 of 2015 and Embu SPMCC 46/1998.
5. The suit was set down for hearing. PW1 was Dominic D. Mbogo, the plaintiff in the suit. He adopted his witness statement and his bundle of documents as evidence in the suit. He testified that the original parcel of land was Kagaari/Kanja/1038 which belonged to his grandfather. That he was given the land in 1960 and got title to the same in 1980. That his father was not given land by his grandfather. He was told to be given land by the clan which gave him land parcel T 109. That in the year 2007, the 1<sup>st</sup> Defendant who is his brother filed a case before the Land Disputes Tribunal - Kianjo Koma concerning the suit land. That the Tribunal decided that the 1<sup>st</sup> Defendant get one acre, his late brother Thomas Njagi was to get one acre, his father was to get half acre and the plaintiff was to get 4.5 acres. That the plaintiff decided to come to court and filed Judicial Review No. 24 of 2007 which was dismissed because the court said it had delayed; he then decided to file this case. That the 1<sup>st</sup> Defendant sold the one acre meant for him to the 2<sup>nd</sup> Defendant.
6. On cross examination by the 1<sup>st</sup> Defendant, he admitted that he was at the tribunal but denied having being involved when the land was subdivided. He also testified that the 1<sup>st</sup> defendant sold the suit land to the 2<sup>nd</sup> Defendant to make it difficult for him to claim it.
7. DW1 was Nazario Njagi Kanyaki the 1<sup>st</sup> defendant. He adopted his witness statement as evidence in his case. He testified that the plaintiff is his brother whereas the 2<sup>nd</sup> Defendant is his friend. That he has lived on the suit land for 60 years with his siblings and that is the only place they call home; that the plaintiff didn't tell the court that their late father was living on the land also. That their late father had two parcels of land; one piece of land was given to him by the clan and the other he bought it himself. That the plaintiff was not given the land for himself but on his and other beneficiaries behalf as a trustee. That the tribunal ordered that they share the land as set out by the plaintiff and that his father transferred his one acre to him before he died because he was living with him. That the plaintiff did not appeal the decision of the tribunal and that he himself sold his one acre because it was his own.
8. DW2 was Alfred Muriithi Njiru, the 2<sup>nd</sup> Defendant. He adopted his witness statement as evidence in his case. He testified that he knows the plaintiff but has no relationship with him. That he also knows the 1<sup>st</sup> Defendant who sold a portion of the land in dispute to him. He sold him one acre at the cost of Kshs. 1.75 million in the year 2019. He testified further that he was taken to the land to view it in 2019 just before he bought it. He was not informed that there was a case pending in court but was told of a case that had been concluded. That he has cultivated on the said land.



## Submissions

9. The suit was canvassed by way of written submissions. The plaintiff filed submissions on 24.05.2023. He gave brief facts of the case and identified three issues for determination. The first was whether the Plaintiff held the suit land in trust; whether the Tribunal had the jurisdiction to cancel the plaintiff's title and order subdivision of the same; whether the plaintiff is entitled to the prayers sought. It was his submission that the 1<sup>st</sup> Defendant has not produced any evidence to prove that the land was held in trust by the plaintiff as required; that the Land Disputes Tribunal did not have jurisdiction to determine disputes revolving around ownership of land as it did because it acted beyond the scope outlined in Section 3(1) of the *Land Disputes Tribunal Act*; that the Plaintiff was not involved in the cases before the Tribunal and subsequently the Chief Magistrates Court in Embu therefore he was deprived his title to land before being heard against the rules of natural justice; that the defendant therefore got a title tainted with fraud hence he cannot rely on the doctrine of bona fide purchaser.
10. He cited the cases of *Njenga Chogera v Maria Wanjira Kimani & 2 others* (2005) eKLR, *Juletabi African Adventure Limited & Anor v Christopher Michael Lockley* (2017) eKLR, *Joseph Malakwen Lelei & Anor v Rift Valley Land Disputes Appeals Committee & 2 others* (2014) eKLR, *M'marete v Republic & 3 others*, Court of Appeal Nyeri, Civil Appeal 259 of 2000 (2004) eKLR, *James N.Wa Wambu v Republic & 7 others* (1995) eKLR, *Barasa W. Wabomba & Another v Omunyin Kituyi & 2 others* (2016) eKLR among others.
11. The defendants filed their submissions on 25.09.2023. They submitted that the plaintiff has not filed his case with clean hands as he has failed to disclose that apart from the two defendants herein, he has also sold a portion of his land to a third party; that the plaintiff's prayer for an order of injunction against land parcel No. Kagaari/Kanja/1038 cannot be granted as the land does not exist. He asks the court to dismiss the case on the grounds of being res judicata and also that the plaintiff has never appealed against the Chief Magistrates award No. 36 Of 2007 which issued and signed the decree in respect of the suit land. He also said that the plaintiff has not sued all the parties who are beneficiaries of the subdivisions of the suit land.

## Analysis and Determination

12. I have considered the pleadings, the evidence, and the submissions by the parties. I find the issues for determination to be;
  - a. Whether the suit herein is Res –judicata
  - b. Whether the plaintiff is entitled to an order of injunction.

The law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“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.”

The court set out the ingredients to be satisfied when determining *Res Judicata* in the case of *Christopher Kenyariri v Salama Beach* (2017) eKLR, as cited in *Alfred Sagero Omweri v Kennedy Omweri Sagero* (2021) eKLR as follows;

“...the following elements must be satisfied...in conjunctive terms;



- a) The suit or issue was directly and substantially in issue in the former suit.
- b) Former suit between same parties or parties under whom they or any of them claim.
- c) Those parties are litigating under the same title.
- d) The issue was heard and finally determined.
- e) The court was competent to try the subsequent suit in which the suit is raised.”

13. The plaintiff in this case has instituted suit seeking to challenge the decision of the Land Disputes Tribunal in case no. 36 of 2007. In his pleadings, the plaintiff refers to the said decision as the Ministers decision which is erroneous as the matter was heard before the Land Disputes Tribunal and not the before the Minister. This court has not been given an opportunity to look at the said impugned decision as the plaintiff did not make it available to the court. But from the proceedings and the material on record, I have gathered that the 1<sup>st</sup> Defendant, his two siblings, and their father, had sued the Plaintiff in SPMCC No. 46 of 1998 seeking to terminate the alleged trust over the suit land herein in order to obtain their share of the same.
14. The said suit was struck out by the Magistrate’s Court on the ground that it lacked the jurisdiction to deal with trust concerning land. That being dissatisfied, they proceeded to the Embu District Land Disputes tribunal which heard their case and made an award in their favour. That by the said award, the Plaintiff was to get 4.5 acres, his father was to get ½ an acre whereas his two siblings the 1<sup>st</sup> Defendant and a Kelvin Murimi were to get one acre each. The award of the Tribunal was adopted by the Chief Magistrates Court at Embu in Award case No. 36 of 2007 and the said decree was executed and the suit land subdivided accordingly.
15. The Plaintiff then made an application for Judicial Review in this court being ELC Case No. 23 of 2015 seeking to quash the decision of the Tribunal which was said to be issued on 22.08.2007 on the ground that the Tribunal lacked jurisdiction. The court heard the said application and found no merit in the same and thereby dismissed the application on the grounds that; one of the parties in the application was deceased and there had been no substitution. Therefore the court was reluctant to condemn the party unheard. There was also no proper service of the application on all the parties affected and the suit property which was the subject of the parties was no longer in existence. The court was of the position that the award of the Tribunal and consequent decree had been fully executed and perfected as at the time of making the application.
16. The plaintiff’s allegation that his application for Judicial Review was dismissed due to delay is therefore not true as the same was heard to conclusion. It is also as clear as bright daylight that the plaintiff herein is seeking the same orders that he had sought in the Judicial review Application. The only difference now is that he has brought this suit by way of a plaint whereas in the Judicial Review Application he had moved the court by way of Notice of Motion. The orders sought are the same as he is seeking to challenge the decision of the Tribunal on the basis that it lacked jurisdiction to make the determination that it made which orders were declined by a court of equal and competent jurisdiction.
17. The 1<sup>st</sup> Defendant was a party in the Judicial Review application but now the plaintiff has brought on board the 2<sup>nd</sup> defendant which makes no difference as the subject matter of the case did not change. For this reason, the plaintiff’s case cannot be sustained as the same falls squarely on the doctrine of Res-Judicata. This court cannot re-open the issue of whether the Tribunals Award was lawful or not since



as has been mentioned before, a court of competent jurisdiction already made a determination on the same. As the court rightly held, the said decision had already been fully executed and perfected and therefore the plaintiff's case has been overtaken by events. Again, the plaintiff during the hearing of this case admitted that he participated in the proceedings in the Tribunal. If aggrieved by the decision of the Tribunal or the circumstances under which it was made, he ought to have appealed against that decision at the time it was issued and before it was adopted as a decree. He made an attempt to have the decision quashed but it was already too late. There is no way to rescue him now.

18. The plaintiff has also made a prayer for permanent injunction to issue against the defendants from interfering with the quiet possession of the land previously registered as Kagaari/kanja/1038 which he says he has been in occupation of for over 30 years.

In the case of *Wanyoike v Karanja* (Environment & Land Case 18 of 2022) [2023] KEELC 16410 (KLR) (23 March 2023) (Judgment) citing the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR the court expressed itself thus;

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

The court went on further to say;

“Essentially a party should travel beyond the three fold principles established in *Giella v Cassman Brown Co. Ltd* 1973 EA. 358, and prove his case on a balance of probability. This is in light of the fact that a permanent injunction is conclusive based on evidence adduced.” Underlining mine.

19. In this case, the plaintiff is seeking a permanent injunction as against the defendants in favour of the land previously referred to as land parcel Kagaari/Kanja/1038. Before he can be granted the said orders, he has to prove on a balance of probability that he is the owner of the suit land in question in order to be entitled to the orders sought. As has come out clearly, the suit land has already been sub divided and titles issued to other parties. Therefore the land previously known as Kagaari/Kanja/1038 is no longer in existence and therefore this court cannot issue orders over land that does not exist. The plaintiff has not succeeded in his claim for the suit land herein which means that he has not proved his case on a balance of probability. He is therefore not entitled to the orders sought. This case is clearly *Res Judicata* also.
20. The upshot of the foregoing I find that the plaintiff has not proved his case to the required standard and therefore dismiss it.
21. Each party to bear their own costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**



In the presence of Plaintiff, 1st and 2nd defendant, Mugane for Ms Mureithi for plaintiff, Court Assistant -  
Leadys

**A.K. KANIARU**

**JUDGE**

**28/11/2023**

