



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. E075 OF 2021

EUNICE CHEMUTAI.....PLAINTIFF

VERSUS

SULEIMAN KARUGA NJOROGE.....DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Defendant's Notice of Motion application dated 19th November 2021. The said application is expressed to be brought under Section 3A and 7 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules.

2. The application seeks the following orders:

i) That the court be pleased to find that the Plaintiff's suit is res judicata, scandalous, frivolous or vexatious and dismiss it with costs.

ii) That the cost of this application be provided for.

3. The application is based on the grounds on its face and supported by the affidavits sworn by Suleiman Karuga Njoroge on 19th November 2021.

FACTUAL BACKGROUND.

4. It is necessary to offer a brief background of the events and circumstances giving rise to the present application which seeks, substantially, orders to dismiss the suit for the reason that it is res judicata.

5. This suit was filed on 28th September, 2021. The Plaintiff avers that in the year 1996 she acquired land parcel known as NAKURU/KAPSITA/1133 measuring 4.0 hectares (Approximately 10 acres) which was unsurveyed.

6. The Plaintiff avers that in 1997 the land was surveyed and she was issued with a title. The Plaintiff avers that demarcation and mappings were done after the allotted persons were settled on the entire land and that this led to confusion on the maps.

7. It is her averment that she was neighbours with one Mary Chepkurui whose land was registered as NAKURU/ KAPSITA/1131 and that this parcel was sold to the Defendant vide a sale agreement dated 25th May, 2004.

8. The Plaintiff contends that the two parcels of land have variances in area and their physical location on the ground do not correspond with the Registry Index Map for NAKURU/ KAPSITA and that there is need for rectification of the register and amendment of the Registry Index Map.

9. The Plaintiff avers that there is no other suit and that there have been no previous proceedings in any court between her and the Defendant save for Nakuru HCC No. 72 of 2007 between Suleiman Karuga Njoroge vs. Henry Amai and Joseph Chacha, adding that the plaintiff herein was not a party.

10. The Plaintiff seeks orders of permanent injunction against the Defendant an order that the Nakuru Land Registrar causes to be amended the Registry Index Map for NAKURU/ KAPSITA on parcels No. NAKURU/ KAPSITA/1131 and NAKURU/ KAPSITA/1133.

11. I will now proceed to interrogate the application, affidavits in support, annexures and response thereto.

DEFENDANT /APPLICANT'S CONTENTION.

12. The Defendant/Applicant contends that the issues raised in this suit were previously raised in **Nakuru HCCC No. 72 of 2007 Suleiman Karuga Njoroge Vs Henry Amai and Joseph Chacha** and that the issues were heard and determined.

13. It is the Defendant/Applicant's contention that no Appeal was filed from the said judgment or numerous decisions that were made by the court.

14. The Defendant/Applicant further states that he is the registered owner of Nakuru/Kapsita/1131 and has annexed a copy of the title deed.

15. He deposes that the Plaintiff is the owner of Nakuru/ Kapsita/1133 and is not his neighbour. He has annexed a copy of the RIM map.

16. The Defendant/ Applicant deposes further that he filed a suit i.e. Nakuru **HCCC No. 72 of 2007** against the **Henry Amai and Joseph Chacha** and judgment was entered in his favour on 12th October, 2010.

17. The Defendant/Applicant states that the 1st Defendant in Nakuru **HCCC No. 72 of 2007** was the caretaker of the Plaintiff property i.e. NAKURU/ KAPSITA /1133.

18. The Defendant/Applicant deposes that in aforementioned suit, the Plaintiff herein executed a power of Attorney in favour of Davis Chelogi and that the said David Chelogi filed an application dated 4th November, 2014 seeking orders for determination on a boundary between NAKURU/KAPSITA/1131 and 1133. A copy of the said application is annexed.

19. It is the Defendant/Applicant's deposition that on 12th June, 2016 an order was issued to the Nakuru County District Land Surveyor and one Wahome Werugia a Licensed Surveyor to prepare a joint survey report. The report dated 9th November, 2016 was prepared and is annexed.

20. The Defendant/Applicant deposes that a survey report dated 24th December, 2014 by the District Surveyor's office which the Plaintiff seeks to rely on with disregarded by the court.

21. The Defendant/Applicant further deposes that on 31st January, 2019 the court ruled on the Defendant's application dated 4th November, 2014 and Henry Amai was directed to remove his structures from the Plaintiff's (Suleiman Karuga Njoroge; the Defendant/Applicant herein) parcel.

22. It is the Defendant/Applicant's deposition that subsequent to the ruling of 31st January 2019, Henry Amai was directed to remove his structures for the Plaintiff's parcel.

23. It his further deposition that subsequent to the ruling on application dated 4th November, 2014, the Plaintiff and one Mary Chepkurui filed another application dated 28th February, 2019 and the said application which sought orders for stay of execution of the orders of 31st January, 2019 was dismissed on 23rd September, 2021.

24. The Defendant/Applicant deposes that shortly after these events, the Plaintiff herein filed the present suit.

25. It is the Defendant/Applicant's contention that the plaintiff herein has approached the court with unclean hands adding that he has never been on NAKURU/KAPSITA/1133, the said parcel of land belongs to the Plaintiff and that this suit is unnecessary.

26. The Defendant/Applicant contends that the boundary issue was raised in HCCC No. 72 of 2007 by the Plaintiff's donee of the Power of Attorney.

27. He ends by stating that this suit is *Res judicata* and should be struck out with costs.

RESPONDENT'S RESPONSE.

28. As at the time of settling down to write this ruling, I had not seen the response of the Respondent.

29. The court record of 7th December, 2021 shows that counsel for the Defendant/Applicant confirmed that they had received a response from the Plaintiff.

30. The court intimated to counsel for the Plaintiff that the said response was not in the court file. Counsel promised to avail a copy to court but didn't.

31. I have had to check with the registry to confirm the fact of filing any response to this application. The registry didn't have a copy but the Respondent availed her copy to court on 31st January, 2022 after follow up by the registry.

32. The response by the Respondent is that she is not aware and was never made aware of the suit **HCCC No. 72 of 2007**, she was not a party to the proceedings and was not served with the pleadings.

33. It is her deposition that she only became aware of the suit at the point of execution and filed an application to be enjoined which application was dismissed.

34. It is her deposition that she could not Appeal against the judgment because she was not a party and didn't have locus.

35. The Respondent has attached a decree in the Nakuru **HCCC No. 72 of 2007** as evidence of the fact that this suit involves land parcel no NAKURU/KAPSITA/1133 while the decree annexed is for L.R. NAKURU/KAPSITA/1131.

36. The Respondent deposes that NAKURU/KAPSITA/1133 and L.R. NAKURU/KAPSITA/1131 share a common boundary and that the Applicant has since obtaining judgement in HCCC No. 72 of 2007 has taken advantage of the orders to try and displace her.

ISSUES FOR DETERMINATION

37. The Defendant/Applicant and Plaintiff/Respondent filed their submissions. The submissions are dated 17th January, 2022 and 17th January, 2022 respectively.

38. The Defendant/Applicant has brought my attention to the provisions of section 7 of the Civil Procedure Act.

39. The Defendant has also relied on the judicial decisions of **The Independent and Boundaries Commission — Maina Kiai & 5 others [2017] eKLR** and **E.T – Attorney General & Another [2012] eKLR**.

40. The Plaintiff/Respondent in her submissions identifies the following issues for determination:

- a. *Whether the Plaintiff was a party to the case.*
- b. *Whether the legal doctrine is applicable.*
- c. *Whether the property in issue is same to the one being adjudicated. (sic)*

41. The Plaintiff/Respondent has also relied on the judicial decisions in **INVESCO Assurance Company Ltd & 2 others. Auctioneers Licensing Board & Another[2020] eKLR** and **Pangea Holdings LLC & Another – Hacienda Development Ltd & 2 Others.[2020] eKLR**.

42. After perusal of the Application, Supporting Affidavit, annexures to the affidavit in support of the application, the Submissions filed in respect of this Application, my considered view is that the following are the issues for determination:

- a) **Whether this suit is *Res judicata*.**
- b) **Whether the suit should be struck out.**
- c) **Which party bears the cost of the application?**

ANALYSIS AND DETERMINATION

A. Whether this suit is *Res judicata*.

43. The law relating to *Res Judicata* is found in section 7 of the Civil Procedure Act. The wording of the sections is as follows:

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.

This legal doctrine has been explained in a plethora of legal decisions in and outside of Kenya. The Defendant Applicant has made reference to the decision in **Independent Electoral and Boundaries Commission Maina Kiai and 5 others, Nairobi CA No. 105 OF 2017 [2017] eKLR**. This decision sets out the elements that must be satisfied for a bar of *Res judicata* to be effectively raised and upheld. We are reminded that the elements are not in disjunctive but conjunctive terms- meaning that they must be read together. They are:

a) The 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.

44. As rightly observed in that decision, the doctrine of *Res judicata* is intended to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.

45. The decision in **Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR** also offers useful guidance on the element of *Res judicata*. It rendered the elements as;

(a) The former judgment or order must be final;

(b) The judgment or order must be on merits;

(c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; an

(d) There must be between the first and the second action identity of parties, of subject matter and cause of action.

46. Therefore, in order for a bar of *res judicata* the Defendant Applicant must meet the criteria set out in section 7 of the Civil Procedure Act read together with numerous decisions that have been rendered by the Kenyan courts on this matter.

47. The first criterion is that matters directly and substantially in issue in the former suit must be directly and substantially in issue in the present suit.

48. The Defendant/Applicant has referred me to Nakuru HCCC No. 72 of 2007 and ELC 361 OF 2013 as former suits and that matters in these former suits and applications filed therein, are directly and substantially in issue in this suit.

49. The orders sought in the Plaintiff in Nakuru HCCC No. 72 of 2007 were as follows:

a) An order of permanent injunction restraining the 1st and 2nd Defendant for tilling, subdividing or in any way interfering with the Plaintiff's quiet possession and use of NAKURU/ KAPSITA/ 1131

b) An order of eviction of the 2nd Defendant from LR NO. NAKURU/ KAPSITA/ 1131

c) Cost of suit and interest.

50. The orders sought in this application are

i) An order that the NAKURU COUNTY LAND REGISTRAR to amend/ rectify or cause to be amended the Registry Index Map (RIM) for NAKURU/ KAPSITA on parcels of land known as NAKURU/ KAPSITA/ 1131 and NAKURU/ KAPSITA/ 1133 to conform and concur with the ground positioning of the 2 parcels involved to reflect the true position on the ground

ii) A temporary injunction pending the hearing and finalisation of this suit restraining the Defendant, his agents, servants and

others whosoever and howsoever from evicting, taking possession of, entering into, demolishing structures, trespassing upon, selling, alienating, transferring, cultivating, continuing to cutting down trees, develop or construct structures thereupon and/ or dealing in any manner with all those parcels of Land known as NAKURU/ KAPSITA/ 1131 and NAKURU/ KAPSITA/ 1133 situated within KAPSITA, Nakuru County in the Republic of Kenya.

iii) A permanent injunction pending the hearing and finalisation of this suit restraining the Defendant, his agents, servants and others whosoever and howsoever from evicting, taking possession of, entering into, demolishing structures, trespassing upon, selling, alienating, transferring, cultivating, continuing to cutting down trees, develop or construct structures thereupon and/ or dealing in any manner with all those parcels of Land known as NAKURU/ KAPSITA/ 1131 and NAKURU/ KAPSITA/ 1133 situated within KAPSITA, Nakuru County in the Republic of Kenya.

iv) Cost and interest of this suit.

51. Having set out the orders sought in both suits, it is evident that the orders sought in either suit are substantially orders of permanent injunction and that these orders are in respect of land parcel NAKURU/KAPSITA/1131 in the 2007 suit. The subject matter in the present suit is Nakuru/Kapsita/1133 and Nakuru/Kapsita 1131..

52. The Respondent has attached a decree in the Nakuru HCCC No. 72 of 2007 in an attempt to support her proposition that the present suit involves land parcel no NAKURU/KAPSITA/1133 while the decree annexed is for L.R. NAKURU/KAPSITA/1131.

53. I have gone through judgment and the ruling delivered on 31st January, 2019 and the assertions by the plaintiff/Respondent are not representative of the factual position. The ruling of 31st January, 2019 at paragraph 5 states as follows:

Considering the averments in the supporting affidavit and the replying affidavit as well as in the submissions filed by all parties, a licensed land surveyor was ordered to move onto the suit property and determine the extent of the 10 acres bought by the 1st Defendant and the Plaintiff's extent of entitlement of the suit land and to determine the boundaries, on the ground between the two properties Nakuru/Kapsita/1131 and 1133

54. The said ruling of 31st January, 2019 continues to make reference to the two parcels of land at paragraph 2, 8 and 10 and finally makes a determination reinforcing the orders of eviction issued against the 1st defendant (the caretaker of the Plaintiff herein).

55. The seemingly new prayer sought in the present suit is the one directing Nakuru county land registrar to amend/ rectify or cause to be amended the Registry Index Map (RIM) for NAKURU/ KAPSITA on parcels of land known as NAKURU/ KAPSITA/ 1131 and NAKURU/ KAPSITA/ 1133 to conform and concur with the ground positioning of the 2 parcels in order to reflect the true position on the ground. My finding, however, is that even this prayer is not new.

56. An application was filed 4th November, 2014 and the affidavit in support of the said application was sworn by Henry Amai and Davis Chelogoi. One of the orders sought was that the Land Surveyor and/or authorised public officer do determine the boundaries of the neighbouring properties. This order was granted and two surveyors filed their report dated 24th December, 2014. This survey report formed the basis for the ruling dated 31st January, 2019. Importantly the survey report revealed that the land parcel no. 1131 and 1133 were not contiguous and in fact, separated by 7 other parcels. The import of this is to show that the prayers in the present suit pertaining to survey were already heard and determined by the said application and is therefore *Res judicata*.

57. Explanation 4 to section 7 of the Civil Procedure Act offers further guidance on this subject. It provides:

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.

58. The preceding paragraphs sufficiently demonstrate that the first criteria for raising a bar of res judicata has been met by the Defendant/Applicant.

59. The Plaintiff herein had every opportunity to ensure that the issues raised in the present suit were raised, heard and determined in the former suit. She didn't. She is barred from doing so now.

60. I am persuaded enough to deem the issues being raised in the present suit as having been directly and substantially in issue in the former suit.

61. The second criterion is that the suit must be between the same parties, or between parties under whom they or any of them claim.

The parties in Nakuru HCCC No 72 of 2007 are Suleiman Njoroge (Plaintiff) and Henry Amai (1st Defendant) & Joseph Chacha (2nd Defendant). Subsequently the Plaintiff in the present suit (Eunice Chemutai) and Mary Chepkurui filed an application dated 28th February 2019 to be allowed to be joined in the suit as an interested party.

62. In the affidavit in support of the application, the Plaintiff describes herself as the owner of Parcel No NAKURU/KAPSITA/1133 and that Henry Amai is her caretaker.

In my view, therefore, judgement was delivered against the Henry Amai and by extension the Plaintiff herein. In any event the Plaintiff

herein admitted that Henry Amai is/was her caretaker and worker and was in occupation of the suit parcel.

While it is true that the application by the Plaintiff herein to be enjoined to the suit was dismissed, the Plaintiff did not Appeal against that ruling. I am of the considered view that she is precluded from stating that she was not party to the former suit. Her agent, Henry Amai, continued to act in her interest and for her benefit.

63. The third criterion is that the judgement in the former suit must be final. The finality of the decision in Nakuru HCCC No. 72 of 2007 is not in doubt.

The Judgement in Nakuru HCCC No. 72 of 2007 was delivered on 12/5/10. Attempts to stay execution of this judgment by the 1st Defendant (agent of the Plaintiff in this suit) were futile. The court further ordered that he (the 1st Defendant in the former suit) removes the offending structures from the Plaintiff's parcel (the Defendant herein) and that if he didn't do so within 30 days, the Plaintiff (the Defendant herein) would be free to execute the judgment against him.

64. The fourth is that the judgment or order must be on merits.

The Judgement in Nakuru HCCC No. 72 of 2007 was delivered on 12th May, 2010. In his judgment, the Learned Judge notes that the Defendants were served but did not appear to defend the suit; either personally or through counsel. The Plaintiff testified, his testimony was uncontroverted and orders of eviction were issued against the 1st Defendant. (Henry Amai who is was caretaker of the Plaintiff herein) and a perpetual injunction against the 2nd Defendant (a surveyor contracted by the 1st Defendant to survey the land for purposes of subdividing it.)

65. The fifth criterion is that the judgement must have been rendered by a court having jurisdiction over the subject matter and the parties;

Judgment was rendered by the High court. The High court at the time had jurisdiction. In any event, there was no objection raised as to the competence of the court to hear and determine the dispute. Parties submitted to the jurisdiction of the said court.

66. In the decision of **The Independent and Boundaries Commission — Maina Kiai & 5 others [2017] eKLR**, The Court explained the role of the doctrine of Res judicata and stated:

“...The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice...”

67. For the reasons set out in the foregoing paragraphs, I find that this suit is *Res judicata*. Litigation must come to an end. The Defendant herein is needs closure. It has been many long years in the corridors of justice and in search for justice.

B. Whether this suit should be dismissed.

68. On account of my finding on *Res judicata*, there is no doubt in my mind that this suit should be dismissed.

C. Which party bears the cost of the application?

69. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

DISPOSITION.

70. The Upshot of the foregoing is that the court finds that this suit is resjudicata. Consequently, this suit is dismissed with costs to the Defendant.

71. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF FEBRUARY 2022

L. A. OMOLLO

JUDGE

IN THE PRESENCE OF: -

MISS WANGARI FOR THE DEFENDANT/APPLICANT.

MR. MONGERI FOR MISS MOENGA FOR THE PLAINTIFF/RESPONDENT.

COURT ASSISTANT; JENIFFER.