



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**ENVIRONMENT AND LAND COURT**

**CIVIL CASE NO.136 OF 2011**

**CHARLES MWANGI RINGURU & 3 OTHERS.....PLAINTIFFS**

**VERSUS**

**NANCY WANGARI MATHENGE & 6 OTHERS..... DEFENDANTS**

**CONSOLIDATED WITH**

**HIGH COURT CIVIL CASE NO. 122 OF 2010 (O.S)**

**WAMBUI MATHENGE & 3 OTHERS.....PLAINTIFFS**

**VERSUS**

**RACHAEL KARUNGARI KING'ORI.....DEFENDANT**

**R U L I N G**

On 21/3/2013 Nyeri High Court Civil Case No.122 of 2010 and Nyeri High Court Civil Case No.136 of 2011 (*hereinafter referred to as subsequent suits*) were consolidated by the consent of the parties and the running file was Nyeri High Court Civil Case no 136 of 2011. Mr. Nyaanga appeared for the plaintiff in Nyeri High Court Civil Case No.122 of 2010 whilst Mr. Wahome appeared for the defendant. In Nyeri High Court Civil Case. No.136 of 2011, Mr. Wahome appeared for the plaintiff while Mr. Nyaanga appeared for the defendant.

Mr. Wahome raised a preliminary objection that the issues in Originating Summons are *res judicata*. The claim in the Originating Summons is based on *adverse possession* to land Ref. No.Thegenge/Karia/38 which was subsequently subdivided into 3596 – 3602. Mr. Wahome referred to the decision of Justice Ang'awa on 16/12/1993 in Nyeri High Court Civil Case No 165 of 1988(*hereinafter referred to as the former suit*) in which the plaintiff was Paul Mathenge Muchemi before being substituted by his son Joseph Mwangi Mathenge and the defendant was Rachael Karungari Kingori. Mr Wahome further submitted that the defendant in the *former suit* is the first defendant in the *Originating Summons* herein and that the four plaintiffs in therein are children of the plaintiff in the *former suit* and that prayers 4 of the plaint *the former suit* capture the issue of adverse possession. The prayers sought in the plaint of the former suit are similar to the prayers sought in the originating

summons of the subsequent suit. He submitted further that the ruling by Justice Okwengu on 16/2/2006 in the former suit is relevant in this matter and that Justice Kasango held that justice delayed is justice denied. The ruling of Justice Osiemo was set aside by justice Kasango. Moreover Justice Serگون made a ruling on 26/2/2010 whose import is that the matter is spent. He relied on the decision in **Pil K Ltd Vs- Opong [2009] KLR 442.**

Mr. Nyaaga on his part argued that for the principle of ***res judicata*** to apply to same parties have to be in court and therefore it does not apply as the the plaintiffs have never been in court before.

Moreover, he submitted that the matter in issue in the present suit must have been the same, and, in issue, in the other suit, directly or substantially so to speak. He argues that in the amended Originating Summons, the first prayer was whether the title has become extinguished by virtue of the provision of Limitation of Action Act and therefore the prayer cannot be adverse possession as it is an independent claim and stands alone. He referred to Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya and Section 17 of the said Act.

He submits that in ***former suit*** there is no question regarding extinguishing of title and adverse possession and argues that adverse possession is never claimed by plaintiff but by Originating Summons. He submitted that Nyeri High Court Civil Case No. 136 of 2011 the plaintiff prayed for eviction and therefore Justice Angawa never decided the matter of eviction. He refers to the decision as in **Canatra -vs- Canatra[2007]1EA 76HCK** which is relevant on the issue of ***res judicata***.

The principles of ***res judicata*** are now settled hence this court does not need to belabor on the same. **Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya** 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 or the suit in which such issue has been subsequently raised, and has been heard and and finally decided by such court. In Kenya, this is the basis of the principle of ***Res Judicata*** which applies in ***threefold thus*** that there is former suit or proceedings in which the same parties as in the subsequent suit or proceedings litigated, ***secondly***, that the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and ***lastly***, that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.

The parties in the subsequent suits are ***Wambui Mathenge, Daniel Gichuki Mathenge, Nancy Wangari Mathenge, Purity Muthoni Mwangi as the plaintiff*** and ***Racheal Karungari Kingori*** as the defendant. The Originating Summons was later amended to add Defendants nos 2 -7.

This court at this juncture asks itself a question as to whether the parties in the former suit or proceedings are the same parties in the Originating Summons . I have had the advantage of having all the files before me and having perused the former suit, I do find that the plaintiff was Paul Mathenge Muchemi and defendant was Racheal Karungari Kingori. It was submitted by Mr. Wahome that the plaintiffs in the Originating Summons are children of the plaintiff in the ***former suit*** whilst the 2nd to 7th defendants are the sons of the 1st defendant in the said suit who has subdivided and transferred the property to them as gifts which submissions Mr. Nyaaga did not controvert. I have perused the files and do find that the plaintiffs in High Court Civil Case NO. 122 of 2010 (O.S) are the children of the plaintiff in ***former suit*** and that the 2nd to 7th defendants in the (O.S) are children of the 1st Defendant and do find that the parties in the ***Originating Summons*** are basically the same as the parties in ***former suit*** and as for the plaintiffs in the O.S, their father was litigating on their behalf in the former suit as a plaintiff and I do find that the parties are the same and do hold that the defendants herein have satisfied the 1st limb of the principle.

The second question is as to whether the matters in issue the subsequent suits were directly and substantially in issue in the former suit. The court summarizes the issues before it in the ***Originating Summons*** as amended on 22nd March 2012 as follows:

**1. Whether the defendant's titles have become extinguished by virtue of the provision of the Limitation of Action Act Cap 22 Laws of Kenya.**

**2. Whether having been in continuous, quiet and uninterrupted possession and occupation of the parcel of land in dispute for a period of excess of 12 years, the plaintiffs have acquired prescriptive rights to the title thereto by adverse possession.**

**3. Whether the Land Registrar Nyeri should be ordered and directed to delete the names of the defendants from the register and register the names of the plaintiffs as owners and proprietors of the suit property.**

**4. Whether the defendants jointly and severally should meet the costs of the suit.**

The Originating Summons was based on grounds that the plaintiffs have each enjoyed open, peaceful, continuous, quiet and un interrupted possession and occupation of the parcel of land. The said possession and occupation was at all material times adverse and hostile to the title and/or interests of the registered proprietor and all other persons through whom she claims the said title and that the said registered proprietor of the parcel of land is barred by the Limitation of Actions act (Cap 22 of the Laws o Kenya) from commencing an action to recover it since twelve years have ended from the date on which the right of action accrued to her and/or to the persons(s) through whom she claims as her title is permanently extinguished. She has totally failed to exert and/or establish her rights over the suit land and has not instituted any suit for its recovery. The plaintiff raised their families on the suit land and the 1st plaintiff has been in possession and occupation for a period exceeding 49 years and therefore It is now desirable to have the names of the plaintiffs entered in the register of land as proprietors of the suit land and that of the defendant deleted.

The plaintiff's father Paul Mathenge Muchemi in the former suit, sued the 1st defendant and prayed for a declaration and order that he was the owner of the parcel of land Thegenge/Karia/38 due to the fact that he bought the same and also for having occupied it **uninterrupted for about 27 years**. He further prayed for an order that the defendant being the administratrix and the beneficiary of the estate of Kingori Mahogo do transfer the parcel of land to the plaintiff and costs of the suit.

This court finds that it will be an attempt to split hairs to argue that the matters directly in issue in the former suit are not the same as the matters directly in issue in the Originating Summons. The claim by the plaintiff the former suit and the claim by the plaintiffs in the originating summons are claims based on Limitation of Actions Act Cap 22 Laws of Kenya. Though the terms adverse possession were not used in the former suit, the claim was based on the principles of adverse possession. This court finds that the matters in issue in the subsequent suits, were directly and substantially in issue in the former suit. Though Mr. Nyaanga argued that the claim was not based on adverse possession and that it was commenced by plaint, and , justified his argument by stating that adverse possession can only be commenced by way of Originating Summons, this court finds that though in Mr. Nyaanga is right ,the issue of commencement of the claim based on Limitation Of Actions Act by way of plaint was not raised by the plaintiffs or defendants in the former suit ,and parties proceeded as if the matter was properly before court and therefore it is deemed to have been a matter directly and substantially in issue in the suit though not addressed by the court, parties are estopped from relying on this technicality now. Section 7 of the Civil Procedure Rules, **explanation (4) provides** that:- “ **Any matter which might or 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 a suit**”.

This means that since the issue of commencement of the claim based on adverse possession by plaint was not raised in the former suit, then parties are estopped from raising the issue in the subsequent suits and the said issue is deemed as having been decided in favour of the plaintiff in the former suit.

Last is the issue as to whether, in the former suit , a court competent to try the matter had heard and finally decided the matter in controversy between the parties in the current suit. The former suit was commenced in 1988 by way of plaint. A statement of defence was filed on 22/11/1988 and the matter

was placed before Justice Abdalla on the 28/9/1989 whereupon the parties agreed to maintain status quo and referred the dispute to the District Officer Nyeri and ordered appointment of Elders to assist him. The award was to be filed within 90 days.

On the 10/7/1990 the award was read to the parties in the presence of Justice Tunoi and objection if any was to be filed within 30 days. The plaintiff died and was substituted on 14/3/91 by Joseph Mwangi Mathenge. On the 19/8/91, a second consent was recorded between the parties that the matter in dispute be referred to the District Officer Nyeri Municipality who would be assisted by 4 elders and each party was to appoint 2 elders. The award was to be filed within 150 days. The award was filed on 7/4/92 and read out on 14/8/92 to the parties. An application to set aside the award was filed and the issue of res-judicata was raised. Justice Ang'awa held that the suit was res-judicata and also the aspect of the eviction from the land was res-judicata and the 2nd award was set aside. The import of this decision is that the first award that the land belonged to the defendant absolutely was the position on record. On the 31/7/1996, Justice Osiemo dismissed an application to strike out the plaint by virtue of the suit being res-judicata due to the earlier decided cases thus RMCC No. 36 of 1973 and RMCC No. 3 of 1973 and appeared to contradict the decision of Justice Ang'awa.

After being informed of the decision by justice Ang'awa, the Honourable Justice H. M. Okwengu In her ruling dated 16th February, 2006 declined to make further findings in the matter and set aside proceedings of 24/1/2006 as the same were irregular.

On the 14/11/2007 the court, sitting Justice, Mary Kasango set aside the decision of Justice Osiemo made on 31/7/1996 and dismissed the suit for being res-judicata. On the 26/2/2010 Justice Sergon held that this suit was *spent* and the court was rendered *functus officio*. The decision by Justice Sergon was delivered on 26/2/2010. This court finds that the former suit having been dealt with substantively by the High Court by different judges at different times, was adjudicated by a court competent to try it. The decision of Justice Ang'awa on the 16th day of December 1993 still stands in respect of the 1st award that the defendant is the absolute owner of the property.

The plaintiffs in the Originating Summons amended on the 22nd day of March 2010 are children of the deceased plaintiff in the former suit. This court finds that the subsequent suits are res judicata and is barred to try the same as the matters directly and substantially in issue have been directly and substantially in issue in the former suit between the same parties and or parties under whom they claimed, litigating under the same title in a court competent to try the subsequent suit, and lastly, that the matter has been and finally decided by the court.

The upshot of the above is that the preliminary objection is upheld and the Originating summons amended on 22/3/2012 is hereby dismissed with costs to the defendant therein.

***Dated, signed and delivered at Nyeri this 28th day of February 2014.***

**A. OMBWAYO**

**JUDGE**