



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO. 33 OF 2017

(FORMERLY NAKURU HCCC. NO. 264 OF 2007 (O.S))

JULIUS DAUDI GATAMBIA.....1ST PLAINTIFF

PETER NJOROGE KAGUAI

(as the legal Representative of the estate of the late

AMOS KAGUAI NJOROGE).....2ND PLAINTIFF

VERSUS

MARY WANJIRU MACHARIA

(sued as the legal Representative of the estate of the late

JAMES MACHARIA GICHURE.....1ST DEFENDANT

CHEGE MUTUA.....2ND DEFENDANT

PETER KARIMI KAMAU

PETER KARIGI GITAU

STEPHEN KIBE MWAURA

PETER KIMANI WAMBUI

CHARLES MURUGAMI WANGUNYU

(sued as trustee of NEW BEGINNING WITH GOD SELF HELP GROUP....3RD DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 26th October, 2007 brought under **Sections 13 (1), 37 & 38 of the Limitation of Actions Act (Cap. 22) and Order XXXVI of Rule 3D of the former Civil Procedure Rules**, the Applicants sought determination of certain questions relating to adverse possession of **Title Nos. Nyandarua/Kirima/713 and Nyandarua/Kirima/714 (previously known as Plot No. 668 Kirima Scheme)**. In particular, the 1st Plaintiff sought adverse possession of 2.25 acres out of Parcels 713 and 714 (*the suit properties*) whereas the 2nd Plaintiff sought 3 acres.

2. The originating summons was supported by 2 supporting affidavits sworn by Julius Gatambia and Amos Kagwai Njoroge on 30th November, 2007 in which they detailed the basis of their respective claims. They contended that they had been in open, peaceful and uninterrupted possession of their respective portions of the suit property for periods exceeding 12 years. They contended that the right of the

registered owners of the suit properties had become extinguished by operation of law and that they had become entitled to be registered as proprietors thereof by virtue of adverse possession.

B. THE DEFENDANTS' APPLICATION

3. By a notice of motion dated 2nd July, 2021 grounded upon **Section 7 of the Civil Procedure Act (Cap. 21), Order 2 Rule 15 (1), (d) and 3 of the Civil Procedure Rules, 2010 (the Rules)**, the 1st and 2nd Defendants sought the following orders:

(a) That this case is *res judicata* and it should be struck out with costs.

(b) That the Plaintiffs have abused the court process by filing this suit.

(c) That costs of the application be borne by the Plaintiffs.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Amon Chege Mutua on 2nd July, 2021. It was contended that there have been various previous suits by the parties over the suit properties which were determined with finality. It was contended that the suits by the Plaintiffs or persons through whom they claim were dismissed while the ones by the Defendants were successful.

5. The Defendants enumerated the following suits which were said to have been determined:

(i) NAKURU H.C.C. NO. 236 OF 2007 (O.S.)

JULIUS GATAMBIA V JAMES MACHARIA GICHURE & CHEGE MUTUA

(ii) NAKURU H.C.C.C. NO. 33 OF 1990

AMOS KAGUAI NJOROGE & JULIUS GATAMBA V ERAM KAMAU, JAMES MACHARIA GICHURE

(iii) NAKURU H.C.C. NO. 129 OF 2005

AMON CHEGE MUTUA V AMOS KUAGAI & JULIUS GATAMBIA

(iv) NAKURU H.C MISC. CIVIL APPLICATION NO. 125 OF 2017 (E.L.C.)

JULIUS GATAMBIA & AMOS KAGUAI NJOROGE V JAMES MACHARIA GICHURE & AMOS CHEGE MUTUA

(v) NAKURU H.C.C. NO. 214 OF 2005 (O.S)

AMOS KAGUAI NJOROGE & JULIUS GATAMBIA V CHEGE MUTUA

(vi) NAKURU H.C.C.C NO. 70 OF 2003

JAMES MACHARIA GICHURE V AMOS KAGUAI NJOROGE & JULIUS GATAMBIA

7. It was contended that the Plaintiffs had previously filed **Nakuru HCCC. No. 33 of 1990** seeking cancellation of the Defendant's titles to the suit properties and seeking for transfer of 2 ½ acres and 3 acres respectively to them. It was contended that the suit was dismissed upon a full hearing. It was further contended that **Nakuru HCCC NO. 70 of 2003** by one of the Defendants sought an eviction of the Plaintiffs from **parcel 714** which suit was successful.

8. The 2nd Defendant contended that suit his in **Nakuru HCCC No. 129 of 2005** for an eviction order from **Parcel 713** was fully heard and the same allowed by the High Court vide a judgment dated 10th May, 2011. The Defendants further contended that **Nakuru HCCC No. 214 of 2005 (O.S)** was withdrawn whereas **Nakuru HCCC No. 236 of 2007 (O.S)** was dismissed for want of prosecution since it was never heard within 90 days as directed by the High Court on 10th May, 2011. The Defendants therefore considered the instant suit to be *res judicata* and an abuse of the court process.

C. THE PLAINTIFFS' RESPONSE

9. The 1st Plaintiff filed a replying affidavit sworn on 19th October, 2021 on his own behalf and on behalf of the 2nd Plaintiff in opposition to the application on several grounds. First, that **Nakuru HCCC No. 33 of 1990** was not determined on merit since it was dismissed on account of lack of service of court process. Second, that **Nakuru HCCC No. 70 of 2003** abated due to the death of one of the parties. Third, that in **Nakuru HCCC No. 129 of 2005**, it was specifically directed that the Plaintiffs' claim for adverse possession be heard within 90 days but the same could not be heard as the court file went missing for a long period of time. Fourth, that the Plaintiff's claim for adverse possession has never been heard and determined on merit hence the instant suit was not *res judicata*.

D. DIRECTIONS ON SUBMISSIONS

10. When the application was listed for hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the Defendants filed their submissions on 11th January, 2022 whereas the Plaintiffs filed theirs on 25th January, 2022.

E. THE ISSUES FOR DETERMINATION

11. The court has considered the Defendants’ application dated 2nd July, 2021, the Plaintiffs’ replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether or not the instant suit is *res judicata*.

(b) Whether or not the instant suit is an abuse of the court process.

F. ANALYSIS AND DETERMINATION

(a) Whether or not the instant suit is *res judicata*

12. The court has considered the material and submissions on record on this issue. Although there are several previous suits involving the same parties or those through whom they claim over the suit properties, it is evident from the material on record that the Plaintiffs’ claim for adverse possession has never been canvassed on merit. It is only the Defendants’ claims which appear to have been adjudicated upon on merit.

13. The court has noted that although the High Court in its judgment dated 10th May, 2011 considered that it would have been appropriate and convenient for the Plaintiffs’ claim for adverse possession to have been canvassed as a counter claim, it nevertheless allowed the Plaintiffs to canvass the same by way of a separate suit. That is the reason why the court directed that the O.Sin **Nakuru HCCC No. 236 of 2007** be prosecuted within 90 days in default of which the same was to stand dismissed.

14. The Plaintiffs’ explanation for failure to prosecute their claim for adverse possession within 90 days was that the original court file went missing for a long time in consequence whereof they were constrained to apply for reconstruction. The Defendants did not dispute that the court file went missing at the material time as averred by the Plaintiffs. There is no material on record to demonstrate that the Plaintiffs’ application for reconstruction of the court file was disallowed as alleged by the Defendants. The Defendants did not annex a copy of the ruling or order dismissing the said application. They only attached a copy of the application. It would further appear that the instant suit i.e. **Nyahururu ELC No. 33 of 2017** is not a fresh suit but is the same originating summons which is dated 26th October, 2007. The new case number appears to have resulted from transfer of the case file from the High Court at Nakuru to the Environment and Land Court at Nyahururu.

(b) Whether or not the instant suit is an abuse of the court process

15. It is apparent from the Defendants’ application and submissions that the main reason why they considered the suit to be an abuse of the court process is because they contended that it was *res judicata*. Since the court has already found that the Plaintiffs’ suit is not *res judicata*, then it would follow that there is no material on record from which it may be concluded that the suit is an abuse of the court process. Abuse of the court process essentially entails misusing the machinery of the court or using it for ulterior purposes. There is nothing on record to demonstrate that the Plaintiffs’ claim for adverse possession of portions of the suit property is an abuse of the court process.

G. CONCLUSION AND DISPOSAL

16. The upshot of the foregoing is that the court finds no merit in the Defendants’ notice of motion dated 2nd July, 2021 hence the same is hereby dismissed. Costs of the application shall be in the cause. The parties shall take a hearing date immediately upon delivery of the ruling.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 17TH DAY OF MARCH, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Ekesa for the Plaintiffs

Mr. Karanja for the 1st and 2nd Defendants

No appearance for the 3rd Defendant

CA - Carol

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Y. M. ANGIMA

JUDGE