



**Francis & 6 others v Mwai & another (Environment & Land Case
212 of 2018) [2022] KEELC 3077 (KLR) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 212 OF 2018**

BM EBOSO, J

MAY 23, 2022

BETWEEN

MBURU KARANJA FRANCIS 1ST PLAINTIFF
NJOGU NJOROGE 2ND PLAINTIFF
ANN WANJIRU KIARIE 3RD PLAINTIFF
MWANGI MACHARIA 4TH PLAINTIFF
JOEL NJOROGE MWANGI 5TH PLAINTIFF
JOHN NJENGA THOMAS 6TH PLAINTIFF
DAVID MBUGUA KINYANJUI 7TH PLAINTIFF

AND

JOSEPH KINYANJUI MWAI 1ST DEFENDANT
JAMES GATHANWA MUKOMA 2ND DEFENDANT

RULING

1. On July 17, 2018, the plaintiffs took out an originating summons dated July 10, 2018 against the 1st defendant. They sought a declaration that land parcel number Limuru/Kamirithu/201 [the suit land] belongs to them pursuant to rights acquired under the doctrine of adverse possession. They further sought an order directing the 1st defendant to transfer the suit land to them. Lastly, they sought an order directing the deputy registrar of this court to execute relevant documents vesting the land in them. They contended that they had been in adverse possession of the suit land since 1963. They exhibited a certified copy of a land register showing that the 1st defendant was registered as proprietor of the land on June 25, 1993.



2. The 1st defendant opposed the originating summons through a number of responses: an undated document which he described as “respondents”; an affidavit sworn on August 23, 2018; an affidavit sworn on April 25, 2019 and a further affidavit sworn on August 29, 2019. His case is that he is the registered proprietor of the suit land. He contends that in the year 2014, the plaintiffs illegally occupied the suit land. He adds that in November 2015, he issued the plaintiffs with notices to vacate the suit land. It is his case that the suit land is the subject of litigation in Nairobi ELC Case No 929 of 2014 where he sued the Attorney General and various Government Departments for unlawfully occupying the land.
3. The 2nd defendant was joined to this suit pursuant to an application dated May 26, 2021, brought by the plaintiffs. They exhibited two parallel parcel registers relating to the same parcel of land, both purportedly opened on August 28, 1958. One parcel register indicates that the suit land previously belonged the Native Land Trust Board, the precursor to The County Council of Kiambu and was on March 8, 2019 registered in the name of the 2nd defendant pursuant to a decree issued in Nairobi ELC Case No 187 of 2015(OS). The other parcel register shows that the 1st defendant was registered as proprietor of the suit land on June 25, 1993. It does not reflect the previous proprietors of the suit land.
4. Subsequent to being joined as a party to the suit, the 2nd defendant brought a notice of motion dated December 8, 2021, seeking an order striking out the suit on the ground that the issue of ownership of the suit land had been the subject of litigation and determination in a Judgment delivered on September 12, 2018 in Nairobi ELC Case no 187 of 2015. The said application dated December 8, 2021 is the subject of this ruling.
5. The application was canvassed through written submissions dated February 4, 2022, filed by M/s J M Njega & Co Advocates. Counsel for the 2nd defendant argued that should this court continue hearing this suit, it will be dealing with an issue that has been determined by another court of competent jurisdiction and this is likely to lead to judicial embarrassment. Counsel contended that if the plaintiffs have a valid claim over the suit land, they should move the court that rendered the existing judgment. Counsel added that the 2nd defendant having obtained his title through a judgement in Nairobi ELC Case no 187 of 2015 (OS), the only way he can lose the title is through an order setting aside the said Judgment.
6. The plaintiffs responded to the application through written submissions dated February 9, 2022, filed through the firm of Mwaura Shairi & Co Advocates. Counsel for the plaintiffs submitted that the 2nd defendant had not tendered any evidence to demonstrate that the plaintiffs were aware of the existence of Nairobi ELC Case no 187 of 2015. Counsel faulted the 2nd defendant for not joining the plaintiffs as parties to the said suit. Counsel further submitted that the doctrine of *res judicata* was not applicable in the circumstances of this suit because the parties who litigated in Nairobi ELC Case no 187 of 2015 are not the same as the parties litigation in the instant suit. Counsel added that by the time the 2nd defendant was registered as proprietor of the suit property, the plaintiffs had already acquired title to the land under the doctrine of adverse possession.
7. The court has considered the application together with the parties’ respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The single question falling for determination in the application is whether this court can effectually adjudicate and settle the parties’ claims in this suit while the judgment in Nairobi ELC Case no 187 of 2015 is still in force and before the question of validity of the parallel titles held by the two defendants is resolved by the court that was seized of Nairobi ELC Case no 187 of 2015.
8. The case of the 2nd defendant is that the question of ownership of the suit land was the subject of litigation in Nairobi ELC Case no 187 of 2015 and a binding judgment was rendered in the said suit,



culminating in the registration of the 2nd defendant as proprietor of the suit land. The 2nd defendant contends that were this court, which is a court of concurrent jurisdiction to proceed, to adjudicate this suit and come to a contrary finding on the question of ownership of the suit land, there will be two parallel and contradicting Judgments of courts of concurrent jurisdiction on the same question.

9. What has emerged from the materials presented to this court at this stage is that parties are waving two parallel land registers and two parallel titles relating to the same property. One register purports to reflect the 1st defendant as the legitimate registered proprietor of the suit land while the other register reflects the 2nd defendant as the registered proprietor pursuant to the judgment rendered by Bor J in Nairobi ELC Case no 187 of 2015. The judgment does not reflect the 1st defendant as having been a party to the said suit. Similarly, the plaintiffs were not parties to the said suit. Further, there is no indication that the judge was made aware of the existence of parallel parcel registers and titles at the time she rendered the judgement in Nairobi ELC Case no 187 of 2015.
10. Against the above background, the plaintiffs have invited the court to make pronouncements on their claim as adverse possessors. In my view, for the claim of adverse possession to be effectually and completely adjudicated upon and answered, the question of validity of the two parallel land registers and the two parallel titles will have to be determined first. Because, there exists a valid Judgment of a court of competent and concurrent jurisdiction, the forum where the question of validity of the parallel parcel registers and titles should be determined is the cause in which the subsisting judgment was rendered. The plaintiffs and the defendants have a right to make an application in Nairobi ELC Case no 187 of 2015 and place before the court the parallel registers and titles together with the plaintiffs' claim in the present suit. The court will consider their application and pronounce itself on it. Needless to say, if unsatisfied, they will have the right of appeal.
11. Given the above unique circumstances, I entirely agree with counsel for the 2nd defendant that it is untenable for this court to proceed to entertain this dispute while the above judgment and parallel parcel registers and parallel titles subsist. The result is that I will strike out this suit and direct the plaintiff and the 1st defendant to apply to be joined as parties to Nairobi ELC Case no 187 of 2015 where the judgment vesting the suit property in the 2nd defendant [in relation to one of the parallel parcel registers] was rendered. Because the plaintiffs were not made parties to the said suit and there is no evidence to suggest that they were aware of the said suit at the time they initiated the present suit, there will be no order as to costs of this suit.
12. In the end, the 2nd defendant's notice of motion dated December 8, 2021 is disposed in the following terms:-
 - a) The suit herein is struck out and the plaintiffs and the defendants are directed to ventilate the issues relating to parallel parcel registers, parallel titles and adverse possession in Nairobi ELC Case No 187 of 2015 so as to avoid contradictory judgments by courts of concurrent jurisdiction.
 - b) Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Jeremy Njenga for the 2nd defendant

Court assistant: Ms Lucy Muthoni

