



REPUBLIC OF KENYA



KENYA LAW
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**Mahinda & 2 others v Mahinda & 2 others (Environment & Land
Case 26 of 2019) [2022] KEELC 3343 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 26 OF 2019**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

**MAURICE MURIITHI MAHINDA 1ST PLAINTIFF
MARY WAMBUI MURIITHI 2ND PLAINTIFF
WILSON KIAMA MURIITHI 3RD PLAINTIFF**

AND

**ELIZABETH WANGECHI MAHINDA 1ST DEFENDANT
DAVID MWANGI MAHINDA 2ND DEFENDANT
WINNIE NGIMA MAHINDA 3RD DEFENDANT**

RULING

1. By an Originating Summons dated September 2, 2019, Maurice Muriithi Mahinda, Mary Wambui Muriithi and Wilson Kiama Muriithi (the plaintiffs) pray for a declaration of the following:
 - (a) That the plaintiffs have acquired title by adverse possession to the whole of land reference no Ruguru/Chieni/277 measuring approximately 0.73 Ha (1.803 acres) situate in Mathira Sub-County, Nyeri County;
 - (b) That the said (land) reference no Ruguru/Chieni/277 be registered in the names of the plaintiffs in trust for themselves and other members of their family (the family of Maurice Muriithi Mahinda) in place of the defendants and the 1st defendant do sign all necessary papers of transfers and in default the deputy registrar of the court do sign the same;
 - (c) (That) the costs of this suit be provided for;
2. Elizabeth Wangechi Mahinda, David Mwangi Mahinda and Winnie Ngima Mahinda (the defendants) are however opposed to the grant of the orders sought by the plaintiffs. In a Replying Affidavit sworn



on their behalf by the 1st defendant on September 15, 2019 and filed herein on September 19, 2019, the defendants assert that LR no Ruguru/Chieni/277 belongs to the 1st defendant and that the plaintiffs are in forceful occupation thereof and have refused to leave despite the existence of a lawful decree issued in HC P&A no 308 of 2014; In the Matter of the Estate of Eustace Wamurira Mahinda.

3. The defendants aver that all matters deposed to at paragraphs 2 to 21 of the Supporting Affidavit to the Originating Summons were brought in evidence in the said High Court probate and administration cause and the arguments were dismissed after the cause was heard in full and eviction orders were issued against the plaintiffs.
4. Subsequent to their response to the Originating Summons, the defendants filed herein a Notice of Preliminary Objection objecting to the proceedings herein on the grounds:
 1. That by virtue of the provisions of sections 6, 7 and 89 of the Civil Procedure Act, this court lacks jurisdiction to entertain, hear and/determine the Originating Summons dated September 2, 2019;
 2. That all issues raised in the Originating Summons herein are issues directly and substantially in issue in Nairobi Succession Cause no 308 of 2014; In the Matter of the Estate of Eustace Wamuria Mahinda (deceased) and as such, the present suit and the Originating Summons are an affront and fragrant disregard of the mandatory provisions of sections 6 and 7 read together with section 89 of the Civil Procedure Act;
 3. That the reliefs/orders sought in the Originating Summons herein were the same reliefs/orders sought in the said Nairobi Succession Cause no 308 of 2014; In the Matter of the Estate of Eustace Wamuria Mahinda (deceased) by the same parties litigating the same title and a ruling dismissing the same by Hon Asenath Ongeru J was delivered on June 17, 2019; and
 4. That the Originating Summons has been overtaken by events as the plaintiffs were on December 11, 2019 evicted from the suit property title no Ruguru/Chieni/277.
5. Following directions issued herein on June 28, 2021, it was agreed that the preliminary objection be dispensed with first by way of written submissions. I have accordingly carefully perused and considered the pleadings filed herein as well as the submissions and authorities placed before me by the learned advocates representing the parties herein.
6. The preliminary objection by the defendants is largely predicated under the doctrine of *res judicata*. That doctrine as set out under section 7 of the Civil Procedure Act ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
7. A close reading of section 7 of the Civil Procedure Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated therein in conjunctive and not in disjunctive terms. Thus the doctrine will apply where it is proved that:
 - (i) The suit or issue raised was directly and substantially in issue in the former suit;
 - (ii) The former suit was between the same parties or parties under whom they or any of them claim;
 - (iii) Those parties were litigating under the same title;
 - (iv) The issue in question was heard and finally determined in the former suit; and



- (v) The court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
8. From the material placed before me, it was apparent that the 1st defendant herein Elizabeth Wangechi Mahinda had moved the Family Division of the High Court at Nairobi in Succession Cause no 308 of 2014; in the Matter of the Estate of Eustace Wamuria (deceased) and was soon thereafter on June 17, 2015 issued with a grant of letters of administration. By the said grant, the suit property LR no Ruguru/Chieni/277 was treated as part and parcel of the deceased's property and was accordingly transferred to the 1st defendant by way of transmission.
9. Upon learning of the said grant, the 1st plaintiff named therein as Morris Mureithi Mahinda filed an objection application dated June 31, 2016 seeking revocation of the grant issued to the 1st defendant herein. It was the plaintiff's contention that the proceedings to obtain the grant were defective in substance as the 1st defendant had concealed from the court the fact that prior to his death, the deceased who was the 1st plaintiff's brother had given to the 1st plaintiff the suit property as a gift.
10. It was further the 1st plaintiff's case that the 1st defendant was aware of the gifting unto himself of the suit property and the facts that he had immediately taken possession thereof and had developed the same.
11. On her part, the 1st defendant maintained that the suit property was owned by her late husband and that she was unaware that her husband had gifted the same to the 1st plaintiff. On the contrary, she accused the 1st plaintiff of taking forceful occupation of the property and thereafter refusing to vacate the same.
12. Having heard the objection including the hearing of oral evidence, the honourable Lady Justice Asenath Ongeru in a ruling delivered on June 7, 2019 dismissed the 1st plaintiff's objection with costs. At paragraph 22 and 27 of her ruling, the learned judge found as follows:
22. There is no evidence that the deceased had gifted the objector/applicant with the suit property. The objector/applicant has no colour of right to be in occupation of the suit property. He is an intermeddler in the estate of the deceased and he should vacate forthwith; and
27. The application dated June 31, 2016 be and is hereby dismissed and the objector/applicant is directed to vacate the suit premises within 60 days from this date in accordance with section 45 of the *Law of Succession Act*."
13. From a perusal of those proceedings it was clear to me that the objection proceedings were concerned with the same subject matter herein and that the parties in the former suit were the same as the ones before me. The only difference herein is that the 1st plaintiff who was the objector in the said proceedings has now joined his wife (the 2nd plaintiff) and son (the 3rd plaintiff) as claimants herein. He has in the same vein joined the 2nd and 3rd defendants who are a son and daughter respectively of the 1st Defendant in his claim. Those are parties clearly litigating under the same title.
14. While it may as well be as submitted by the plaintiffs that the court in the former suit had no jurisdiction to deal with the issue of adverse possession raised in these present proceedings, it was clear to me from the aforementioned paragraphs 22 and 27 of the ruling that the court in the former suit did pronounce itself on the issue of the ownership of the suit land and that the plaintiffs were already directed to vacate the same within 60 days of the ruling. The plaintiffs are aware of the said ruling and had indeed on June 20, 2019 lodged an appeal against the same to the Court of Appeal.



15. That being the case, it was clear to me that the plaintiffs could not come to this court in the manner that they have done herein and that this suit was filed in abuse of the court process. By filing this claim for adverse possession when the issue regarding the ownership of the land has been determined and they have a pending appeal against the same, the plaintiffs are seeking to open a parallel court process with the hope that one of the courts dealing with the matter would make a determination in their favour.
16. It was also clear from the perusal of the plaintiffs pleadings that other than the former suits and the pending appeal, there was a third suit pending as between the parties. At paragraph 21 of his Supporting Affidavit to the Originating Summons, the 1st plaintiff avers that there has been Nyeri HCCC no 65 of 2016 between himself and the 1st defendant in which suit the 1st defendant has sought the eviction of the 1st plaintiff. That suit according to the plaintiffs' is still pending determination and it was unclear why the matters raised herein have not been raised in the said suit.
17. It follows that I am persuaded that the defendants' preliminary objection has merit. I allow the same and strike out the suit herein for being *res judicata* and an abuse of the court process.
18. The plaintiffs shall bear the costs of the suit.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF JULY, 2022.

In the presence of:

Mr Wahome Gikonyo for the plaintiff

No appearance for the defence

Court assistant - Kendi

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J O OLOLA

JUDGE

