



**Kiarunyi v Imathiu; Kinyua (Applicant) (Environment & Land Case  
70 of 2019) [2022] KEELC 2457 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 70 OF 2019**

**CK NZILI, J  
JULY 20, 2022**

**BETWEEN**

**M’KIRIGIA KIARUNYI ..... PLAINTIFF**

**AND**

**DORIS CIOMBAKA IMATHIU ..... DEFENDANT**

**AND**

**DOUGLAS KINYUA ..... APPLICANT**

**RULING**

**A. The Application**

1. Before the court is a notice of motion dated February 15, 2022 seeking for the court to dismiss the suit for being both res-judicata and time barred. The application is supported by an affidavit sworn by Carl Peters Mbaabu on February 15, 2022. The grounds are that a similar suit namely Meru HCC No. 87 of 2003 an originating summons regarding the same land and the same parties which was determined and appealed against in Nyeri Court of Appeal Civil Appeal No. 135 of 2017.
2. The second reason is that the suit is based on fraud which is a tort allegedly committed on January 31, 1967 which is time barred under Section 4 (2) of the *Limitation of Action Act*. The applicant has attached copy of the originating summons, the two judgments at the High Court and the Court of Appeal as well as the proceedings indicating that the alleged fraud was discovered in 2002 and marked as annexures CM 1-4 respectively. The applicant therefore urges the court to find this suit res-judicata and filed out of time. The applicant has relied on Sections 7 & 8 of the *Civil Procedure Act*, Section 4 (2) of the *Limitation of Actions Act* and the holding in *Benjamin Gitonga Andrew (Suing as the legal representative of the estate of Stephen M’Mutua M’Kombe (deceased) vs Aggrey Muranga Ethangatha & 10 others, Mary Paola Mutinga (intended interested party)* [2022] eKLR.



3. The application is opposed through a replying affidavit sworn on March 8, 2022 by Daniel Kinyua on behalf of the plaintiff said be deceased. The plaintiff avers the Meru HCC No 87 of 2003 was an originating summons seeking for adverse possession whereas the instant case was seeking a declaratory suit urging the court to find that the deceased obtained title to the suit premises through fraud and or misrepresentation. Further it is submitted that the Nyeri Court of Appeal case was against the decision of the High court hence the issues herein were never canvassed by the two courts.

## **B. Pleadings**

4. In the plaint dated November 5, 2019 the plaintiff avers he is the bonafide owner or proprietor of L.R Nkuene/Mitunguu/128 registered on May 13, 1966 and he gave the deceased Japhet Imathiu Marete his first cousin the original title for safe keeping. Unknown to him, he avers the deceased on May 31, 1967 fraudulently and or clandestinely inserted his name in the register and transferred the land to his name. At paragraph 10 he pleads there have been cases between him and the deceased.
5. He therefore prayed for a declaration that the deceased acquired the land unlawfully, cancellation of the title and an order directing the defendants to retransfer the land to him.
6. The defendants filed a statement of defence dated 15.12.2021 and pleaded at paragraph 5 that a previous suit had been concluded. At paragraphs 7 & 8 thereof the defendants plead that the suit is both res-judicata and statute – barred.
7. In compliance with Order 11 *Civil Procedure Rules* the plaintiff filed a list of issues among the issues being whether the suit is res judicata and time-barred. On the other hand, the defendants filed a bundle of documents among them the originating summons dated 10.7.2003 replying affidavit, proceedings in Meru HCC No 87 of 2003, judgment, the Court of Appeal ruling and judgment, case summary and issues for determination.

## **C. Issues for Determination**

8. The court has gone through the pleadings, and accompanying documents list of issues, the application and the response. The issues for my determination are:
  - i. Whether a suit filed by way of an originating summons and another filed through ordinary plaint are subject to the rules of res-judicata.
  - ii. If the issues or matters raised in the plaint herein were raised in the previous suit.
  - iii. If the issues before the court in the instant suit formed part of the previous originating summons and were determined to finality by a court of competent jurisdiction.

## **D. Determination**

9. Section 7 of the [Civil Procedure Act](#) provides that no court shall try any suit or issue in which the matter directly and/or substantially in issue has directly and substantially been in the issue in a former suit between same parties or between parties under whom they or any of them claim or were litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised and been heard and finally decided by such court.



10. Res judicata is therefore normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment which may have determined the question of law as well as of fact between the parties.
11. While determining the principles applicable the Court of Appeal in *IEBC v Maina Kiai & 5 others* [2017] eKLR held the key elements to be satisfied conjunctively are: that the suit or issue was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; 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.
12. Further the court went on to state the doctrine serves the statutory duty of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and or hounded by issues and suits that have already been determined by a competent court, that it was designed as a pragmatic and commonsensical protection against wastage of time and resources in 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.
13. Additionally, the court held that without res judicata there would be no end to litigation and judicial process would be rendered nonsense, nuisance and prone to disrepute or calumny hence the same rests in public interest for swift, sure and certain justice.
14. Applying the above principles, it is not in dispute that the same parties herein and the subject matter was also the same position in the Meru ELC Case No. 83 of 2003 in which a judgment was rendered by Hon. Justice P.M Njoroge on 1 April 2, 2017 and an appeal preferred by the plaintiff herein in Nyeri Court of Appeal No. 135 of 2017, whose judgment was rendered on May 15, 2019.
15. During his testimony, the plaintiff in the trial court at paragraphs 3, 4, 5, 6, 7, 8, 11 introduced the issue of fraud. At paragraphs 41, 51, 58 of the judgment in the former the said issues featured. Similarly, at paragraph 64 (2) the court made a specific finding that the suit land was not irregularly or illegally registered in the name of the deceased.
16. Coming to the Court of Appeal decision in Nyeri Civil Appeal No. 135 of 2017, at page 3 one of the grounds of appeal was that the plaintiff/appellant had given the title deed for safe keeping to his step brother and instead of keeping it, he illegally and unprocedurally transferred the land to himself on January 21, 1967. The plaintiff relied on Section 26 of the [Land Registration Act](#) for the proposition that a title obtained through fraud or misrepresentation could be impeached.
17. At paragraph 6 of the judgment the court noted that the plaintiff had led evidence over the issue of fraudulent transfer which he allegedly discovered in 2002.
18. At page 10 thereof the Court of Appeal addressed itself on the issue of fraud and made a definite finding on whether or not the plaintiff had proved fraud and said he could not claim to have been on the land against the interests on an alleged illegal owner. The court held that the appellant sold the land to the deceased and later on attempted to come back using some ex parte injunctive orders.
19. The plaintiff has not appeal against the dismissed appeal. Instead he filed this suit on December 3, 2019 which was almost seven months after the dismissal of the appeal against the 1<sup>st</sup> defendant and his co-defendant who was also a respondent in the appeal based on an alleged fraud transfer and or registration of the same suit land. In the prayers the court is asked to declare the title deed invalid, cancel it and revert it his name or in the alternative for the defendants to retransfer the land to him. In the



previous suit originating summons the plaintiff had also asked for the land registrar to be ordered to register him as the bonafide owner.

20. In my considered view the issues are the same, over the same parties, regarding the same subject as in the previous suit which were determined by the two competent courts to finality.
21. To turn around and file another suit over the same matter in the name of the contention that the previous suit was an originating summons and appeal hence not covered by Section 7 of the Civil Procedure Act is in my view not only mistaken, misguided but also pretentious of the plaintiff.
22. The law as cited above talks of a suit or issue. In CCK & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR the Supreme Court of Kenya held the concept of res-judicata operates to prevent causes of action or issues from being relitigated once they have been determined on merits and it encompasses limits upon both issues and claims and the issues that may be raised in subsequent proceedings.
23. The court went on to state the issue of estoppel prevents a party who previously litigated a claim and lost it from taking a second bite of the cherry hence protecting the integrity of the administration of justice in pursuit of fairness in the settlement of disputes.
24. In my view therefore, the plaintiff cannot escape the parameters set out under Section 7 of Civil Procedure Act.
25. The issues raised have been determined to finality by courts of competent jurisdiction and it would be against public policy and would amount to an abuse of the court process to entertain this suit.
26. On the second issue of the suit being time barred Section 4(v) refers to 6 years while Section 26 (a) (c) of the Limitation of Actions Act provides that limitation does not begin to run until the plaintiff discovered the fraud or could with reasonable diligence have discovered it.
27. The suit was filed on December 3, 2019. The plaintiff pleads the alleged fraud happened on January 31, 1967. He does not however state in the body of the plaint when he allegedly discovered it.
28. In Gathoni v KCC Ltd [1982] KLR 104 the court held the law of limitation of action is intended to protect a defendant against unreasonable delay in the bringing of a suit against him and expects a litigant to exercise reasonable diligence and or take reasonable steps in his own interest.
29. In absence of the date of discovery of the fraud duly pleaded, my finding is that the suit is also time barred. In the premises I find the notice of motion with merits. The suit is hereby dismissed with costs to the defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

Riungu for plaintiff

Gatheru for C.P Mbaabu for defendant

**HON. C.K. NZILI**

**ELC JUDGE**

