



**Naitore v Mboroki & another (Environment and Land Appeal E086 of 2021)  
[2022] KEELC 12606 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12606 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E086 OF 2021  
CK YANO, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**MONICA NAITORE ..... APPELLANT**

**AND**

**NELSON MURITHI MBOROKI ..... 1<sup>ST</sup> RESPONDENT**

**MERU COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

*(Honourable Justice Lucy N Mbugua)*

**JUDGMENT**

**Background of the appeal**

1. The proceedings leading to this appeal were commenced by Nelson Kimathi Mboroki, who is now the 1<sup>st</sup> respondent, through a plaint dated December 1, 2019 filed in the chief magistrate's court at Meru ELC No 144 of 2019. The suit was against Monica Naitore who is now the appellant and the Meru County Government, the 2<sup>nd</sup> respondent herein. The relief sought by the 1<sup>st</sup> respondent include an order to cancel the certificate of title Kiirua/Naari/822 hereinafter ('the suit property') and the same to be registered in his name as the bona fide owner and an order of permanent injunction directed to the appellant herein.
2. According to his plaint, the 1<sup>st</sup> respondent averred that he was at all material time relevant to the suit the beneficial owner and in possession of the suit property, having purchased it from one Stephen Kirima who effected transfer prior to his death in the year 2001. The 1<sup>st</sup> respondent averred that after purchasing the suit property, he immediately took possession and has carried out substantive development on it. It was his case that the appellant herein colluded with the 2<sup>nd</sup> respondent herein and fraudulently transferred the suit property without the knowledge and consent of the 1<sup>st</sup> respondent and listed the alleged particulars of fraud against them.



3. In her defence filed on September 2, 2020, the 2<sup>nd</sup> respondent denied the 1<sup>st</sup> respondent's claim in toto and prayed for the suit to be dismissed with costs.
4. The appellant on her part filed a statement of defence on September 15, 2021 in which she pleaded inter alia, that the suit was res judicata Meru ELC case No 161 of 2013 and that the suit was time barred. The appellant also filed an application by way of notice of motion dated February 15, 2021 in which she sought several orders including the prayer to strike out the plaint and dismiss the suit for being res judicata and time barred and also an abuse of the court process.
5. The said application was opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn on April 28, 2021 and filed on April 29, 2021. The 1<sup>st</sup> respondent also filed an application dated January 8, 2020 for interlocutory orders of injunction and inhibition which was also opposed by the appellant by way of a replying affidavit sworn on April 29, 2021.
6. The learned magistrate heard the said two applications and dismissed them vide separate rulings delivered on July 6, 2021. Being aggrieved by the said rulings, the appellant filed the appeal herein on seven grounds vide the memorandum of appeal dated July 21, 2021 asking the court to allow the appeal herein to the extent that the ruling of the lower court be set aside and the plaint in Meru CM ELC No 144 of 2019 be struck out and the suit be dismissed with costs.
7. The 1<sup>st</sup> respondent equally having been aggrieved by the said rulings of the trial court filed a cross appeal dated April 11, 2022 and filed on April 13, 2022. The cross appeal is based on eight grounds and the 1<sup>st</sup> respondent prays for orders that the cross appeal be allowed to the extent that the ruling of the lower court be set aside and orders of inhibition and injunction registered against the suit land be reinstated pending hearing and determination of the main suit plus costs.

### **Submissions**

8. Pursuant to directions given by the court, the appellant and the 1<sup>st</sup> respondent filed written submissions which this court has to determine the appeal and cross appeal. The 2<sup>nd</sup> respondent did not file any submissions within the time given or at all.
9. In her submissions dated July 14, 2022 and filed on June 15, 2022 by the appellant through her advocates, Mutembei & Kimathi advocates, the appellant addressed three issues, namely, whether Meru CM ELC No 14 of 2019 is res judicata, Meru ELC No 161 OF 2013 (Nelson Kimathi Mboroki – v- Monica Naitore) and if not whether the suit before the chief magistrate is an abuse of the court and its process, whether the cause of action in Meru CM ELC No 144 of 2019 is time barred, and whether the cross appeal filed herein has any merit.
10. It was contended that in the ruling that is the subject of appeal herein, the learned magistrate held that the land in question was the same in both cases and the parties were also the same. That the trial court however, held that since the prayers in both suits were different, then the suit before the magistrate's court was not res judicata. The appellant asserted that in Meru ELC No 161 of 2013, the 1<sup>st</sup> respondent herein sought orders in the nature of adverse possession of the suit property which was heard by Honourable Justice Lucy N Mbugua who dismissed the claim vide judgment delivered on February 20, 2019. Subsequently, the 1<sup>st</sup> respondent filed Meru CM ELC No 144 of 2019 over the same subject matter and the same parties praying for orders of cancellation of the appellant's title and a permanent injunction, and the claim was based on fraud.
11. The appellant argued that the 1<sup>st</sup> respondent ought to have appealed against or sought for a review of the judgment in Meru ELC No 161 of 2013 instead of filing another suit before the subordinate court. The appellant's counsel submitted that if the learned magistrate found that the suit before her was not



res judicata, the court ought to have dismissed the suit for being an abuse of the court and its process. The appellant's counsel relied on the case *Kimoi Ruto & another v- Samuel Kipkosgei Kaitany & 5 others (2016) eKLR* and submitted that the learned magistrate erred in not considering the grounds in the application regarding abuse of court and its process.

12. On whether the cause of action in Meru CM ELC No 144 of 2019 is time barred, the appellant submitted that the 1<sup>st</sup> respondent's cause of action in Meru CM ELC No 144 of 2019 is entirely based on the tort of fraud. It was contended that the 1<sup>st</sup> respondent knew about the appellant's ownership of the subject suit land even as at the year 2013 when he filed Meru ELC No 161 of 2013 and 3 years had lapsed in 2016 hence the suit was time barred. It was therefore argued that the learned magistrate erred in holding that the date when the cause of action accrued was not very clear. The appellant relied on the case of *Edward Moonge Lengusuranga -v- James Lanaiyara & another (2019) eKLR* and urged the court to dismiss the case before the magistrate's court with costs.
13. Turning to the cross appeal the appellant urged the court to find that the ruling by the learned magistrate was properly anchored in both law and facts and rightly found that the application for interlocutory injunction and inhibition was rightly dismissed. The appellant urged the court to find that the cross appeal has no merit and dismiss it with costs.
14. The 1<sup>st</sup> respondent filed his submissions through his advocates Joshua Mwiti Law advocates on July 7, 2022 in which they submitted on three issues: Whether the suit in Meru CMCC ELC No 144 of 2019 is re judicata to Meru ELC No 161 of 2013; whether Meru CMCC ELC No 144 OF 2019 is time barred by virtue of the *Limitation of Actions Act* Cap 22 Laws of Kenya; whether the trial court erred in law and fact in discharging the 1<sup>st</sup> respondent's inhibitions over the suit property when the substantive suit was still pending before court.
15. While citing the provisions of section 7 of the *Civil Procedure Act*, the 1<sup>st</sup> respondent contended that the issues raised in the two suits were different, to wit, adverse possession and fraud and submitted that that is not what res judicata entails. On whether the suit Meru CMCC ELC No 144 of 2019 is time barred, the 1<sup>st</sup> respondent cited section 26 of the *Limitation of Actions Act* and submitted that the exact date as to when he discovered fraud on the suit land is a matter of fact which can only be demonstrated during the hearing of the matter. That the 1<sup>st</sup> respondent only became aware of the fraud when he was filing the suit. It was thus submitted that the suit is not time barred. The 1<sup>st</sup> respondent's counsel relied on the case of *Joseph Mwaniki Muchira - vs- Godfrey Muchangi (2018) eKLR*.
16. Regarding the ruling which lifted the injunctive and inhibition orders, it was submitted that the ruling lacked legal merit and if not revoked may cause untold damage to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent urged the court to reinstate the said orders to protect the subject matter from being disposed off pending determination of the main suit. It was argued that in the event the suit land is transferred to a third party not enjoined (sic) in the suit, then it may become practically impossible to enforce any orders obtained.

### **Analysis and determination**

17. I have perused and considered the record of appeal, the grounds of appeal and cross appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination as I can deduce from the grounds of appeal are-;
  - i. Whether CM ELC No 144 of 2019 is res- judicata and an abuse of the court process.



- ii. Whether the suit Meru CM ELC No 144 of 2019 is time barred.
  - iii. Whether the trial court was justified in discharging the orders of injunction and inhibition.
18. The law on res judicata is provided for in section 7 of the [Civil Procedure Act](#) which states 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 suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court'
19. Section 28 of the [Environment and Land Court Act](#) also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined.
20. Res judicata originated from the Roman Law 'ex Captio res judicata' which means:-
- ' One suit and one decision is enough for any single dispute” and the Latin phrase has further been defined by [Spencer Bower and Handley: Res Judicata \(Butterworths Common Law\) 4<sup>th</sup> UK Ed Edition](#) as -:
- 'a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be re-litigated between the parties or their privies'
21. Once a final judgment has been announced in a suit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the doctrine of re-judicata to preserve the effect of the first judgment and strike out the present suit. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of time and prevent abuse of the court process.
22. The authority of re-judicata applies when the party pleading res judicata establishes a similarity in the following issues between the former and present suit: The parties in the former suit must be the same as those in the current suit or have been represented by a party to the prior action, the claim must be the same in the former and current suit, the parties must have been heard on merit and there must be a final judgment.
23. The rationale behind the said doctrine of res judicata is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened. The rule of res judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause. It has also been stated that the courts must be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. In the case of *Omondi – v National Bank of Kenya Limited and others (2001) EA 177* the court also held that 'parties cannot evade doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit'. In that case the court quoted Kuloba J in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, 'if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he came to court, then I do not see the use of the doctrine of res judicata.'
24. In the present case, there is no dispute that the subject matter is the same, parcel of land Kiirua/Naari/822. The parties in Meru ELC No 161 of 2013 and Meru CM ELC case No 144 of 2019 are



the same although the Meru County Government was added in the latter suit. The prayers sought in Meru CMC ELC No 144 of 2019 are for an order to cancel the title of the suit premises and the land be registered in the name of the 1<sup>st</sup> respondent and orders of permanent injunction, while in ELC 161 of 2013, the claim is for adverse possession. The trial magistrate held that because the prayers sought in the suits are different, the matter is not res-judicata.

25. It is not in dispute that ELC 161 of 2013 was heard and determined and a judgment delivered by Mbugua J on February 20, 2019. The 1<sup>st</sup> respondent subsequently filed Meru CM ELC No 144 of 2019 over the same subject matter. Guided by the law and the decided cases referred to hereinabove, it is quite clear to me that case No 144 of 2019 is res judicata and an abuse of the court process. I am in agreement with the appellant's submissions that the learned trial magistrate erred by holding that the suit before her was not res judicata. In the former suit, it is clear that judgment was entered on merit after all parties were given a chance to present their case. No doubt, the 1<sup>st</sup> respondent could not evade the doctrine of res judicata by merely introducing a different cause of action and adding a new party.
26. I now turn to the issue whether the cause of action in Meru CM ELC No 144 of 2019 is time barred. The 1<sup>st</sup> respondent's cause of action in that case is entirely based on fraud. From the material on record, the 1<sup>st</sup> respondent knew about the registration of the suit land in the appellant's name in the year 2013 when he filed ELC No 161 of 2013. The learned magistrate therefore erred in holding that the date when the cause of action accrued was not clear. By claiming for adverse possession, the 1<sup>st</sup> respondent knew that the suit land was registered in appellant's name.
27. Section 26 of the *Limitation of Actions Act* make it very clear that in dealing with claims where fraud is alleged, then the time starts to run from the moment such fraud is discovered. In this matter, the 1<sup>st</sup> respondent alleged fraud. It is also not in dispute that in the year 2013, the 1<sup>st</sup> respondent filed Case No 161 of 2013 claiming adverse possession against appellant. That goes to show that by the year 2013, the 1<sup>st</sup> respondent was aware that the suit land was registered in the name of the appellant. Section 4 (2) of the *Limitation of Actions Act* is very clear that all action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. I am therefore satisfied, and it is my finding that Case No 144 of 2019 is time barred.
28. Having concluded that the 1<sup>st</sup> respondent's case was a nonstarter, I am in agreement with the learned magistrate's holding that the 1<sup>st</sup> respondent had not established a prima facie case against the appellant and the 2<sup>nd</sup> respondent and was justified in refusing to grant the orders of injunction and inhibition sought in the application dated January 8, 2020. In my view, that application lacked merit and was rightly dismissed. I find no basis to interfere with the magistrate's ruling.
29. The upshot of the above is that having reconsidered and appraised the evidence, and the law, I come to the conclusion that the learned magistrate properly addressed and applied the law and was right in dismissing the 1<sup>st</sup> respondent's application for orders of injunction and inhibition. However with regard to the suit, the magistrate, in my view misapprehended the law. The learned magistrate ought to have dismissed the suit for being re judicata, time barred and an abuse of the court process.
30. Accordingly, I order that-;
  - a. The appeal is allowed.
  - b. The suit before the trial court Meru CM ELC No 144 of 2019 is dismissed with costs.
  - c. The cross appeal lacks merit and is dismissed.
  - d. I award costs of this appeal and cross-appeal to the respondents.



31. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**In the presence**

C/A Mwenda

Anampiu holding brief for Kimathi for appellant

No appearance for respondents

**CK YANO**

**JUDGE**

