



REPUBLIC OF KENYA



Anthony & 2 others v Mbiti & another (Environment & Land Case 9 of 2021) [2022] KEELC 14538 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 9 OF 2021
A KANIARU, J
SEPTEMBER 20, 2022**

BETWEEN

DOMINIC NJERU ANTHONY 1ST PLAINTIFF

PETER MURIUKI NJIRU 2ND PLAINTIFF

EMILIO NYAGA NJIRU 3RD PLAINTIFF

AND

ANTHONY NJIRU MBITI (ALIAS NJIRU MBITI) 1ST DEFENDANT

ANDREW KIURA MBUNGU 2ND DEFENDANT

RULING

1. Before me is a preliminary objection dated August 10, 2022 and filed on August 12, 2022. The objection targets the suit as filed. It raises five (5) grounds, which are as follows:-
 - i. The suit is *res judicata*.
 - ii. The suit properties are matrimonial properties and that the plaintiffs are not spouses as provided for in the [Matrimonial Properties Act, 2012](#).
 - iii. The plaintiffs are on a forum shopping expedition lacking in precision and substance.
 - iv. The plaintiff's pleadings are grossly incompetent fundamentally flawed and is otherwise an abuse of court process.
 - v. The plaintiffs' pleadings offend basic drafting norms and disclose no clear cause of actions.
2. The suit is filed by Dominic Njeru Anthony, Peter Muriuki Njiru and Emilio Nyaga Njiru who are the plaintiffs, against Anthony Njiru Mbiti and Andrew Kiura Mbungu who are the Defendants. The preliminary objection is filed by the 1st defendant.



3. The plaintiffs instituted the suit by way of plaint. They said they are sons of the 1st defendant by virtue of being children of his estranged wife, one Lucia Ngari Njiru. It is alleged that their father was polygamous and he had a second wife, Anne Mbuya Njiru. They further alleged that their parents' relationship was hostile, which resulted in the 1st defendant having a sour relationship with the plaintiffs.
4. However, they aver that their father, during a family meeting in a bid to de-escalate the family disputes, subdivided and shared out land parcel number Mbeti/Gachuriri/413, which they term as family land, between the two houses. They averred that in that meeting, it was agreed as follows: that each of the 1st defendant's sons would get 10 acres of land, the two wives would each be given 5 acres, each house would be given 2.5 acres along the river, the 2nd defendant would be bequeathed an acre of land for having borne the cost of medical treatment for the 1st defendant, and finally that the 1st defendant would retain the remainder of the land.
5. Accordingly, the 1st defendant was said to have proceeded to partition the land into 17 parcels whose mutation form was registered on July 10, 1996 and equally made an application for consent to subdivide the land. Further, that during a meeting before the area district officer, the 1st defendant is said to have reconfirmed having gifted his family the said parcels of land. He was said to have even shown the plaintiffs their respective portions, the same being; Mbeti/Gachuriri/1267 & 1268 to the 1st plaintiff, Mbeti/Gachuriri/1269 & 1275 to the 2nd plaintiff, and Mbeti/Gachuriri/1261 to the 3rd plaintiff. The plaintiffs state to have then occupied and developed the said parcels. The long and short of it is that the 1st defendant failed to transfer the said parcels to the plaintiffs and further sued them before the tribunal claiming ownership of the respective parcels.
6. As a result, the plaintiffs instituted this suit against the 1st and 2nd defendants alleging fraud on their part for what they term as collusion to deprive the plaintiffs the alleged gifted parcels of land and instead transferring part of their share to the 2nd defendant. The plaintiffs averred that there were previous suits between them and the 1st defendant but none against the 2nd defendant over the suit parcels of land. The suits were said to be Embu H.C Misc Cause No. 50 of 2011 (JR) instituted by the plaintiffs against the 1st defendant and others and the court was said to have struck out the application for leave to institute judicial review proceedings. The second one was Siakago ELC Case No. 18 of 2011 filed by the 1st defendant against the plaintiffs. This suit was said to be at the execution stage.
7. In this suit, the plaintiffs sought, among other orders; a declaration that they were entitled to the respective portions gifted to them by the 1st defendant, cancellation and revocation of titles to the land gifted to them and held by the 1st and 2nd defendants, registration of themselves as proprietors of the respective parcels, and finally a permanent injunction restraining the defendants from alienating or dealing in any manner with the respective portions gifted to them.
8. The 1st defendant responded to the suit by filing a defence in which he denied the averments and allegations made by the plaintiffs in their suit. According to him, the plaintiffs confirmed having been bequeathed by him and the rest of his children parcels of land which he also acknowledged his children were in possession of. However, it is his contention that this did not bestow ownership on them. He made reference to a decision made by the land disputes tribunal and which the plaintiffs had sought review of and averred that the court had dismissed the review. According to him, the matter had been heard and determined and was fully settled. As such, the case filed by the plaintiffs was therefore res judicata.
9. The preliminary objection was canvassed by way of written submissions. The 1st defendant filed his submissions on February 7, 2022. He outlined the grounds raised in the preliminary objection. On the



first ground, it was submitted that the pleadings and documents fell within the ambit of the doctrine of *res judicata* as courts of competent jurisdiction had adjudged the issues raised in the suit and made a determination. With regard to the doctrine of *res judicata*, the 1st defendant relied on the provisions of Section 7 of the [Civil Procedure Act](#) and Section 28 of the [Environment and Land Court Act](#) which bar courts from adjudicating over disputes already determined by courts of competent jurisdictions, which are between the same parties and directly in issue in the former suits.

10. The 1st defendant further relied on the case of [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others](#) (2017) eKLR which highlights the elements to be satisfied for a case to be *res judicata*. It was argued that the plaintiff had filed a number of cases addressing similar issues to the present case and that the court in all those issues had made a finding in favour of the 1st defendant. In that regard, seven cases were mentioned to wit; Siakago Law court LDT Cause Number 18 of 2011, Embu High Court Misc 50 of 2011, Kerugoya High court JR 11 of 2012, Nairobi High Court Civil Suit 12 of 2012, Embu Law Court Civil Suit 305 of 2013, Siakago Law Courts MCL & E56 of 2018 and finally Embu High Court Appeal No. E006 of 2021.
11. It was submitted that the plaintiffs' aim was to misguide the court by adding new parties to the suit whereas the issues in dispute remained the same and in support of this reliance was made on the case of [Pangaea Holdings LLC & Another v Hacienda Development Ltd & 2 others](#) [2020] eKLR and the case of [Diocese of Eldoret Trustees \(Registered\) v Attorney General \(On behalf of the Principal Secretary Treasury\) & Another](#) [2020] eKLR. It was reiterated that institution of multiple suits amounted to an abuse of the court process.
12. The second ground of objection was with regard to the issue of the suit properties being matrimonial properties. The 1st defendant submitted that he had acquired the properties during the subsistence of marriage with the plaintiffs' mother. He argued that in an application filed by the plaintiffs in Nairobi High Court HCC No. 12 of 2012 (OS), the court, in dismissing it, was of view that that the plaintiffs had no right to claim a share from the defendant under the law governing division of matrimonial properties. According to the 1st defendant, the suit properties were matrimonial properties and the plaintiff could not play the role of their mother as the spouse with regard to the property.
13. The suit was said to be an abuse of the court process for reason that it had been determined by a court of competent jurisdiction. It was further said to be frivolous and vexatious all in an aim to embarrass the 1st defendant. Further the 1st defendant was of the view that the preliminary objection was merited and he relied on the case of [Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors](#) (1969) EA which describes what constitutes a preliminary objection. In conclusion, the 1st defendant urged the court to allow the preliminary objection as prayed.
14. The plaintiffs on their part filed their submissions on March 7, 2022. They stated the grounds of objection raised and they averred that the only ground that ought to be determined was the one on *res judicata*. They submitted that the suit before the Land Dispute Tribunal No. 18 of 2021 at Siakago could not be said to be *res judicata* for reason that issues of ownership could not be determined by the land dispute tribunal. In that regard it was submitted that under Section 7 of the [Civil Procedure Act](#) for a suit to be said to be *res judicata* it must be instituted before a court seized with jurisdiction. They however argued that, the issue of gifting of the suit parcels was not an issue directly and substantially before the tribunal.
15. The plaintiffs then referred to suit number Embu High Court- Misc No. 50 of 2011 about which they stated that the said suit had been transferred to Kerugoya High Court as JR No. 11 of 2011. With regard to that suit in Kerugoya High Court JR No. 11 of 2011, they submitted that the issue of jurisdictional competence had not been determined by the court therein and that what had been



determined was a notice of motion on the basis of a preliminary objection in which the court was said to have dismissed the application filed for being filed outside time.

16. In Nairobi High Court Civil suit No. 12 of 2021 *Lucia Ngari vs Anthony Njiru alias Njiru Mbiti* the suit was said to have been based on matrimonial property and that the issue as to whether the suit parcels constitute matrimonial property was not determined as the matter had been dismissed for want of prosecution. An application to reinstate the suit was equally dismissed.
17. In Embu Civil Suit No. 305 of 2013 *Njiru Mbiti vs Emilio Nyaga and Siakago MCL & E56 of 2018 Mike Njunja Mugo vs Emilio Nyaga Mbiti* it was argued that the properties subject of the two suits was different from the suit parcel of lands. Further in Embu High Court Civil appeal No. E006 of 2021 *Peter Muriuki Njiru & 2 Others Vs Njiru Mbiti*, the plaintiffs submitted that the appeal was still pending before the court and the court was yet to render its final determination. Lastly, with regard to ELC No. E006 of 2022 *Njiru Mbiti Vs Dominic Njeru Anthony & 2 others* it was stated that the 1st defendant had filed this suit seeking to recover the parcels of land Mbeti/Gachuriri/1267 and 1268 from the 1st plaintiff instead of filing a counterclaim.
18. The plaintiffs finally submitted that the suit properties were not matrimonial property and that no court had determined as such. And also that the 1st defendant had stated to have acquired them single handedly.

Analysis and Determination

19. I have carefully read the objection filed by the 1st defendant, the pleadings, and evidence placed before the court, together with the rival submissions by the respective parties. The only issue for my determination is whether the preliminary objection has merit.
20. The principles of preliminary objection were set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where it was stated thus:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Similarly Sir Charles Newbold in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

21. As stated in the *Mukisa* case, (*supra*) the elements for a preliminary objection are that it raises a pure point of law, it cannot be raised where the facts are disputed or where the facts have to be ascertained. Also it is not raised where the parties are seeking the court discretion. There are five grounds of objection raised. Having carefully looked at the grounds of objection, I am of the view that grounds two to five are not fit to be raised under a preliminary objection. The said grounds will require the



court to call evidence and witnesses to establish the veracity of the objections. On ground two, where the plaintiff seeks for the court to hold that the suit properties are matrimonial properties, this will certainly require the court to go to the genesis of acquisition of the property and also find out the contribution by the parties. This duty is a reserve of the high court in a matrimonial dispute. The other grounds are of course not points of law and they too require ascertaining of facts by the court.

22. The only ground left is that one for *res judicata* which is a point of law. The substantive law on the principle of *res judicata* is Section 7 of the [Civil Procedure Act](#) Cap 21 which provides 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”

23. The court, in the case of The [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR), set out the elements to be satisfied for the suit to be held to be *res judicata*. It stated thus;

[F] or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) 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.

35. In that case on the role of the doctrine of *res judicata* the court stated:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an 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. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice”.

36. The 1st defendant has mentioned a number of cases filed between the parties which he says renders this suit *res judicata*. The first case is Siakago Land Dispute Tribunal 18 of 2018 filed by Njiru Mbiti against Peter Muriuki, Dominic Anthony and Emilio Nyaga, the plaintiffs herein. It related to ownership of suit parcels of land Mbeti/Gachuriri/1267, Mbeti/Gachuriri/1268, Mbeti/Gachuriri/1275, Mbeti/Gachuriri/1261 (original Mbeti/Gachuriri/103). That suit was determined in favour of the defendant therein (the plaintiffs in this suit). An application for leave to file for judicial review was filed in



- Embu Misc Cause No. 50 of 2011 in which the court granted the parties leave and directed that the substantive application be filed within 21 days. In that regard according to the plaintiffs that suit was transferred to Kerugoya as JR No. 11 of 2012 where the court dismissed it for filing the application outside the 21 days granted.
37. From my perusal of the case, the dispute from the land dispute tribunal involved the same parties as the one before me save for the 2nd defendant. It also involved the same subject matter and was determined with finality. The only issue that arises is whether the court that determined that matter had the requisite jurisdiction. The plaintiffs have averred that the suits emanating from the land dispute tribunal are of no consequence as the same related to title to land and the land dispute tribunal had no jurisdiction to determine such matter. The jurisdiction of the Land dispute tribunal is set out under Section 3 (1) of the *Land Disputes Tribunals Act* Cap 303A (now repealed) which relates to the determination of the following matters;
 - (a). the division of, or the determination of boundaries to land, including land held in common;
 - (b). a claim to occupy or work land; or
 - (c). trespass to land
 38. From the clear provisions of the repealed Act, the jurisdiction of the land dispute tribunal was limited and did not include the issue on ownership of registered land. Any determination made outside the jurisdiction of the tribunal purporting to determine ownership of land is therefore a nullity.
 39. The court, in the case of *Republic v Laikipia West District Rumuruti Division Land Disputes Tribunal & 2 others Ex-Parte Joseph Mburu Kimani* [2013] eKLR stated that

“There is no doubt that the issue before the tribunal and subsequently before the Principal Magistrate’s Court Nyahururu related to ownership of the suit property which was at the material time registered in the name of the subject. In determining the issue of ownership of the suit property, the Tribunal no doubt exceeded its jurisdiction. Any action done without jurisdiction is in law a nullity, that is to say of no legal force. As such it could not and was not validated by its adoption by the lower court”.
 40. I find that the determination emanating from the land dispute tribunal all the way escalating to the judicial review application was a nullity and of no consequence. The tribunal did not have jurisdiction to determine the suit and even the acts of the court to adopt the award by the tribunal did not render the said determination as valid. It is my finding that the said three suits to wit; Siakago Land Dispute Tribunal 18 of 2011, Embu High court Misc No. 50 of 2011 and Kerugoya High Court JR 11 of 2011 were not res judicata.
 41. The other suits alluded to are Nairobi High Court Civil Suit No. 12 of 2012 and Siakago MCL & E56 of 2018. The former suit was between Lucia Ngari, mother to the plaintiff and Njiru Mbiti, the 1st defendant, while the latter was between the Mike Njunja Mugo and Emilio Nyaga Mbiti. Even without considering the other elements on *res judicata*, it is clear that the parties to the suit are different and the two cases can therefore not be said to be res judicata.
 42. The other suit is Embu Civil Suit No. 305 of 2013 Njiru Mbiti vs Emilio Nyaga. The parties to that suit are the 1st defendant and the 3rd plaintiff herein. The subject matter of the suit is land parcel Mbeti/Gachuriri/385. The subject parcel of land is different from the ones claimed in this suit which are suit parcels Mbeti/Gachuriri/1267, Mbeti/Gachuriri/1268, Mbeti / Gachuriri / 5253 and 5254, resultant subdivisions from land parcel Mbeti/Gachuriri/1269 and finally land parcel Mbeti/Gachuriri/ 5255



and 5256, resultant subdivisions from land parcel Mbeti / Gachuriri/1261. I therefore find that, that suit too is not res judicata.

43. The other one is Embu Civil Appeal No. E006 of 2021 Peter Muriuki Njiru & 2 others vs Njiru Mbiti. That appeal is between the parties in the suit herein and also looking at the memorandum of appeal, the suit properties are similar to the ones in this suit. For starters the appeal is said to be pending before the court and it has not been concluded. For a suit to be rendered to be res judicata it has to have been determined with finality and this too is the same case with Embu E006 of 2022 between the 1st defendant and the plaintiffs.
44. In view of the foregoing I find that the preliminary objection herein lacks merit. The suit as filed is not res judicata though it is evident that the parties have been litigating over the subject suit parcels over a long period of time. I therefore dismiss the preliminary objection and order the parties to get a date at the registry for directions with regard to Embu ELC No. E006 of 2022 Njiru Mbiti vs Dominic Njeru Anthony & 2 others and Civil Appeal No. E006 of 2021 Peter Muriuki Njiru & 2 others vs Njiru Mbiti which suits are pending before me and relate to the same subject matter. Costs in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF SEPTEMBER, 2022.

In the presence of Chakanya for 1st defendant and in the absence of the rest of the parties.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

20.09.2022

