



**Mamo & 8 others v Butt & 2 others (Environment & Land Case
1 of 2022) [2022] KEELC 14905 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14905 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 1 OF 2022
AK BOR, J
OCTOBER 25, 2022
(FORMERLY NYERI ELC CASE NO. E008 OF 2021 (O.S))**

BETWEEN

**DABASA HALKAHI MAMO 1ST APPLICANT
WILSON KANYI NDERI 2ND APPLICANT
SAMUEL TIANDA 3RD APPLICANT
LUCY NYARUAI NDERITU 4TH APPLICANT
SAMUEL MACHARIA WARUI 5TH APPLICANT
SAMSON GICHUKI 6TH APPLICANT
BASHIRI DABASO HALKAN 7TH APPLICANT
ABDI DABASO HALKAN 8TH APPLICANT
DAVID MWANIKI KANYI 9TH APPLICANT**

AND

**ABID MAHMOUD BUTT 1ST RESPONDENT
GEORGE ODINGA ORARO 2ND RESPONDENT
DAVID MORTON SILVERSTEIN 3RD RESPONDENT**

RULING

(The 2nd and 3rd respondents sued as the joint executors of the estate of Livia Le Poer Trench [deceased])

1. The applicants filed the application dated November 15, 2021 before the Nyeri Environment and Land Court (ELC) seeking to have the 1st respondent restrained from evicting them from portions



- of Nanyuki land reference number (LR No) 10422/19 (“the suit property”) pending hearing and determination of the application and the suit. In the alternative, they sought to have the status quo with regard to the suit property maintained until the application and suit were heard and determined.
2. The application was made on the grounds that the applicants had lived on the suit property since 1954 and claimed the land by virtue of its adverse possession and that the 1st respondent had obtained eviction orders in Nyeri ELC Case No 230 of 2016 against different parties which he intended to enforce against the applicants despite their claim to the suit property.
 3. The 4th applicant swore the affidavit in support of the application. She deponed that the suit property was registered in the 1st defendant’s name following a transfer to him by the 2nd and 3rd respondents as joint executors of the estate of the late Livia Le Poer Trench, who initially owned the land. She gave the details of the use the applicants were putting portions of the suit property into including farming, homesteads and stalls which they had leased out. She also gave the sizes or portions which she claimed each applicant occupied.
 4. She contended that the fact that the 1st respondent filed Nyeri ELC Case No 230 of 2016 against different defendants was evidence that he accepted the applicants’ presence on the suit property and their claim to it. She averred that they had a strong claim to the suit property based on adverse possession and added that the time the court granted the defendants to vacate the suit property in Nyeri ELC Case No 230 of 2016 was due to expire and the orders of eviction would be enforced against them alongside the 9 defendants in that suit. She exhibited photographs of the structures which she claimed the applicants had erected on the suit property together with a copy of the judgement delivered in Nyeri ELC Case No 230 of 2016.
 5. The 1st respondent opposed the application through the replying affidavit sworn on December 7, 2021. He deponed that he learned from the administrators of the estate of the late Livia Le Poer Trench that the 1st, 2nd and 4th applicants were living on the suit property with the express permission of the previous owner as employees; that the 7th and 8th applicants were the children of the 1st applicant; and the 9th applicant was the 2nd applicant’s child. He did not know the 3rd, 5th and 6th applicants and averred that they were not carrying out any activities on the suit property.
 6. He emphasised that the applicants did not acquire any rights adverse to his predecessor or his so as to meet the legal threshold for adverse possession. He pointed out that the land measured approximately 20 acres and that the applicants had not given the precise portions of the suit property which they laid claim to and contended that they could not claim adverse possession of the whole land if they were only occupying portions of it. He explained that he did not include the applicants in Nyeri ELC Case No 230 of 2016 because he did not know their identities when he filed that suit.
 7. In the supplementary affidavit filed in court on December 16, 2021, the 1st respondent averred that he had learned from the administrators of the estate of the late Livia Le Poer Trench that the 3rd applicant was previously employed by Livia le Poer Trench and that he was allowed to reside on the suit property during his employment and retirement. He had also learned that the 5th applicant was a former employee of the previous owners who allowed him to reside on the suit property. He deponed that the 6th applicant was the son of the 4th applicant and was possibly residing on the land with his mother.
 8. The 4th applicant swore a further affidavit on February 9, 2022 in which she denied that the applicants were employees of the previous owners of the suit property or that they were let onto the suit property to farm and build on it by virtue of being the applicants’ children and contended that they occupy different portions from those occupied by their parents. She added that they sued the 2nd and 3rd



- respondents because they maintain the position that the respondents did not have capacity to transfer the suit property to the 1st respondent as executors of the estate of the late Livia Le Poer Trench who had already forfeited her ownership rights over the suit property by virtue of adverse possession.
9. The 1st respondent swore an affidavit in response to the 4th applicant's affidavit in which he averred that the construction of curio shops on the suit property happened after the relocation of the British Army Training Unit Kenya (BATUK) to the land across from the suit property. He also filed an affidavit sworn by Hamid Kassim who deponed that BATUK relocated its camp from the Nanyuki Showground to its current location known as Nyati Barracks on September 7, 2016. Mr Kassim averred that the makeshift structures and kiosks mainly operating as curio shops came up on the frontage of the suit property after BATUK relocated to that area. He deponed that the British soldiers regularly patronised the curio shops while the catering establishments served the staff employed by BATUK.
 10. The 1st respondent filed the application dated February 17, 2022 seeking to have this suit struck out or dismissed for being *sub judice* Nanyuki ELC Case No E001 of 2021. The 1st respondent contended that the matters in issue in the two suits were the same and that they had similar parties who were litigating under the same title. He swore the affidavit in support of the application and deponed that this suit was not maintainable in law because there was a similar suit subsisting being Nanyuki ELC Case No E001 (OS).
 11. The 4th applicant swore the replying affidavit opposing the application for dismissal of the suit which was filed in court on May 9, 2022. She conceded that the applicants had initially filed Nanyuki ELC Case No E001 of 2021 (OS) on November 15, 2021 but this court stayed that suit on November 22, 2021 and directed the applicants to file their application at the Nyeri ELC being the court which heard Nyeri ELC Case No 230 of 2016. That that is what led them to file Nyeri ELC Case No E008 of 2021 (OS) on November 25, 2021.
 12. Ms Nderitu averred that they did not serve the suit papers on the respondents because they did not intend to pursue that matter at all. She pointed out that Nyeri ELC Case No 230 of 2016 related to trespass and involved the 1st respondent and different parties, while in this suit they seek to obtain title to the Suit Property by virtue of adverse possession. She maintained that Nanyuki ELC Case No E001 of 2021 (OS) was a dead matter.
 13. Parties filed submissions which the court has considered. The applicants submitted that they had satisfied the conditions for the grant of injunctive relief which they seek through the application dated November 15, 2021. They submitted that they had lived on the Suit Property since 1954 and that the 1st Respondent was the latest entrant onto the Suit Property. That he filed Nyeri ELC Case No 230 of 2016 and had obtained orders to evict the 9 defendants in that case from the Suit Property and intended to also evict the 9 Applicants in this case. They urged that their suit would be rendered an exercise in futility if the 1st Respondent evicts them from the Suit Property before their claim for adverse possession is adjudicated upon by this court.
 14. The Applicants submitted that Nyeri ELC Case No 230 of 2016 was different from this case in terms of the parties and the nature of claims sought. They argued that they live, work, farm and generally derive their livelihood from the Suit Property and if evicted, they would be rendered destitute. They relied on *Giella v Cassman Brown* (1973) EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR on the conditions that must be satisfied before an order for injunction can be issued by the court.
 15. They submitted that they had proved they had lived on the Suit Property since 1954 freely, exclusively and without the consent of the 1st Respondent or anyone else. They added that they will suffer



- irreparable loss if an order of injunction is not granted because they live on, farm on, rear livestock on the Suit Property and conduct themselves as landlords collecting rent from the stalls they have rented to tenants. They contended that the balance of convenience tilted in their favour and that the 1st Respondent would not be prejudiced in any way if the injunction were granted.
16. On the application seeking dismissal of this suit, the Applicants submitted that since this court had stayed Nanyuki ELC Case No E001 of 2021 (O.S) then the court should allow this suit to proceed to its logical conclusion. They contended that the mischief which Section 6 of the [Civil Procedure Act](#) seeks to cure is not manifested in this matter. Further, that granting the orders sought would deny the Applicants the right to have their case heard and determined by a court of competent jurisdiction as Articles 48 and 50 of the [Constitution](#) envisage.
 17. In his submissions, the 1st Respondent pointed out that this court did not direct the Applicants to file the Originating Summons and the accompanying application in Nyeri ELC Case No 230 of 2016 and added that the court record did not reflect this position. He urged that the two suits which the Applicants filed in Nanyuki and Nyeri were similar. He cited [Ann v RMK](#) (2021) eKLR and [Kinatwa Co-operative Savings and Credit Society Limited v Kinatwa Prestige Limited](#) (2021) eKLR on the meaning of the doctrine of *sub judice* which prevents the court from proceeding with the trial in which the matter in issue was directly and substantially in issue in a previously instituted suit.
 18. He also referred the court to the case of [Mary Wangari Kiarie v Safaricom \(K\) Limited](#) (2021) eKLR on the meaning and application of *res judicata*. The 1st Respondent's addendum submissions filed on April 8, 2022 reiterated the similarity of the two cases and urged that the sub judice rule prevents a party from suffering the same fate twice for the same fault and guards against a party who succeeds in both cases benefiting twice which in itself would present a conundrum in the execution of the judgment.
 19. The 2nd and 3rd Respondents submitted that they were appointed Executors of the Estate of Livia Le Poer Trench in Nairobi Succession Cause No 2376 of 2010 and that they undertook the distribution of the estate in accordance with the Will of the deceased dated January 11, 2007. That following the distribution including the sale and transfer of the Suit Property to the 1st Respondent the executors ceased to have any legal interest in the Suit Property. They submitted that the Applicants had not met the threshold for the grant of injunctive relief and that they had failed to show that they had a registrable interest in the Suit Property save the mere allegation that they had lived on the Suit Property since 1954.
 20. The 2nd and 3rd Respondents urged that Section 24 (a) of the [Land Registration Act](#) provided that acquisition of interest in land was prescriptive. They cited [Nelson Kazungu Chai & 9 others v Pwani University College](#) (2017) eKLR where the court stated that a right could only be protected when it existed in reality and not where it remained an illusion or mere expectation. Further, that one cannot acquire property rights over another's property other than in the manner prescribed in law. They contended that the Applicants neither brought their claim for adverse possession when the deceased was still alive nor did they do so during the succession proceedings. They concluded that the Applicants were trespassers with no rights over the Suit Property.
 21. They contended that the Applicants were guilty of laches and had slept on their rights by failing to object to the Grant of Probate in the Succession Cause despite it being gazetted. Further, that the Applicants should have taken steps towards acquiring prescriptive rights over the Suit Property if indeed they had been resident on the land since 1954 and that the suit was belatedly instituted after more than ten years since the death of the previous owner of the Suit Property.
 22. The 2nd and 3rd Respondents relied on [Snell's Equity](#), 30th Edition at page 33 paragraph 3-16 quoting Lord Camden LC- in [Smith v Clay](#) (1767) 3 Bro CC 639n at 640 n) where it is asserted that a court of



- equity had always refused its aid to stale demands where a party had slept upon his right and acquiesced for a great length of time. That what calls the court into activity was conscience, good faith and reasonable diligence and in the absence of these, the court is passive and does nothing. They pointed out that the Suit Property was sold to the 1st Respondent in 2013 and the transfer was made in 2016. They reiterated that they were improperly joined to this suit.
23. What is for determination is whether the court should grant the orders of injunction which the Applicants sought vide their application dated November 15, 2021 or dismiss the suit as being *sub judice* Nanyuki ELC Case No E001 of 2021 (OS) as the 1st Respondent sought.
24. It is common ground that there is a judgment touching on the ownership of the Suit Property which was delivered on October 14, 2021 in Nyeri ELC Case No 230 of 2015 by Lady Justice M C Oundo in which she determined the legality and propriety of the 1st Respondent's title over the Suit Property. Being a judgment *in rem*, that judgment binds the whole world because it operates directly on the property and affects all persons who may have an interest in the Suit Property.
25. Section 7 of the [Civil procedure Act](#) bars the court from trying 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 claim, litigating under the same title before a competent court where such issue has been raised, heard and finally decided by such court. The explanatory notes indicate that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.
26. The rationale for the doctrine of *res judicata* was discussed in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) (2017) eKLR as follows: -
- “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 common-sensical 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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
27. Further, the court stated as follows:
- “... the general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation, that is the finality principle, outweighed the public interest in achieving justice between the parties (the justice principle) and therefore the doctrine of *res judicata* applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because a competent tribunal has jurisdiction to decide wrongly, as well as correctly and if it makes a mistake its decision is binding unless corrected on appeal”.
28. The Applicants claim that they have lived on the Suit Property since 1954 and that they have therefore acquired rights over the Suit Property which are adverse to those of the 1st Respondent. If indeed the Applicants have lived on the Suit Property since 1954 and they wished to pursue their claim for adverse



possession of portions of the Suit Property, they ought to have done this during the lifetime of Livia Le Poer Trench or upon her demise, against the administrators of her estate in Nairobi Succession Cause No 2376 of 2010 before her estate was distributed and the Suit Property sold to the 1st Respondent.

29. The Applicants should have taken up their claim for adverse possession in Nyeri ELC Case No 230 of 2016 as a counterclaim to the 1st Respondent's claim. This court is bound by that judgement and cannot sit on appeal against the judgment of a Judge of concurrent jurisdiction. It was not controverted that some of the Applicants are the children of some of the Defendants in Nyeri ELC Case No 230 of 2016. Had the Applicants been vigilant, they would have applied to join Nyeri ELC Case No 230 of 2016 so that they could raise their claim for adverse possession to the Suit Property as a defence or attack to that suit.
30. Bearing in mind the judgment which upheld the 1st Respondent's title over the Suit Property, the Applicants would be hard pressed to establish a *prima facie* case with a probability of success. This not a proper case for the court to grant the injunctive orders sought.
31. Based on section 7 of the [Civil Procedure Act](#), this suit is dismissed. The respondents are awarded the costs of the suit.

DELIVERED VIRTUALLY AT NANYUKI THIS 25TH DAY OF OCTOBER 2022.

K. BOR

JUDGE

In the presence of: -

Mr. John Muu for the Applicants

Mr. Mwangi Kariuki for the 1st Respondent

Mr. Daniel Okoth for the 2nd and 3rd Respondents

Ms. Stella Gakii- Court Assistant

