



Kilo & 79 others v Hellen & 29 others (Environment and Land Case Civil Suit 33 of 2021) [2022] KEELC 13388 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE CIVIL SUIT 33 OF 2021
LN GACHERU, J
OCTOBER 6, 2022**

BETWEEN

MORRISON KILO MUNYAO & 79 OTHERS APPLICANT

AND

HELLEN WANJIKU MUIRU & 29 OTHERS RESPONDENT

RULING

1. The 1st defendant/respondent filed a notice of motion application dated April 8, 2022, seeking for orders:
 1. That the suit herein be struck out as the same is *res judicata* and an abuse of court process.
 2. That this honourable court be pleased to discharge/ set aside the court order made on February 22, 2022.
 3. That the costs of this application be provided for.
2. The application is premised on the grounds stated on the face of said application and the supporting affidavit sworn by the 1st respondent Hellen Wanjiku MuiRU and the annexures attached thereto.
3. It is the 1st respondent's contention that the instant suit is *res judicata* to Civil Suit No 1159 of 2000, wherein parties moved court for inter alia eviction orders. She contended that the defendants in Civil Suit No 1159 of 2000, filed a counter-claim and raised an issue of adverse possession, wherein the defendants sought orders over Makuyu/ Kambiti Block 1/1-54, 61 & 62, the suit property herein. The 1st respondent/applicant deponed that the plaintiffs in the instant suit were referred to as others in Civil Suit No 1159 of 2000, where the defendants in the foregoing case filed a suit on their behalf and others.
4. In response to the application, the plaintiffs/respondents filed a replying affidavit sworn on June 27, 2022, by the 1st plaintiff on behalf of the other plaintiffs. They deponed that the instant suit is not *res judicata* to Civil Suit No 1159 of 2000, for the reasons that they were not parties to the said suit. They



- contended that they sought to be joined as interested parties, but their application was declined as it was made after judgment had been entered.
5. The 23rd and 25th respondents supported the Instant notice of motion and relied on their joint replying affidavit sworn on the April 4, 2022. The replying affidavit was in response to the plaintiffs summons dated October 28, 2021, where the 23rd & 25th respondents gave details on how they acquired the suit property. They maintained that the instant suit is bad in law, since the issues raised therein have been determined.
 6. The matter was dispensed with by way of written submissions. Parties filed their rival written submissions on the diverse dates. The 1st respondent/applicant filed her written submission dated July 15, 2022, and raised three issues for determination by this court.
 7. On res judicata, the 1st respondent/applicant submitted that the subject matter in the instant suit and in Civil Suit No 1159 of 2000, concerns the same property being Makuyu/ Kambiti/ Block 1/ 1-54, 61 & 62. On the principle that parties ought to be the same, the 1st respondent submitted that from the pleadings of parties, it is evident that either party presented the suit for and on behalf of the respective parties. That the plaintiffs herein instituted a counterclaim in Civil Suit No 1159 of 2000, on behalf of all persons who were illegally in occupation of the suit property. Further the 1st respondent submitted that the trial court in Civil Suit No 1159 of 2000, was a court with competent jurisdiction and which court heard and determined the suit to its finality. In the end, she urged this court to dismiss the suit and set aside the orders issued on the February 22, 2022.
 8. The 23rd & 25th respondents filed their written submissions on the June 24, 2022 and asserted that the instant suit is disguised as an appeal against the judgment of the court in Civil Suit No 1159 of 2000. They relied on a litany of cases and the provisions of section 7 of the Civil Procedure Act, to demonstrate that the instant suit meets the principles of what amounts to *res judicata*.
 9. The plaintiffs/respondents filed their written submissions on the June 21, 2022 maintaining that the suit herein is not *res judicata*. In submitting so the plaintiffs summarized the ruling of the court in Civil Suit No 1159 of 2000, of February 4, 2021. Specifically, the holding of the court in paragraphs 4& 5 where the court found that the plaintiffs' suit in Civil Suit No 1159 of 2000, was not a representative suit. It is their submission that presently, parties have sued against the registered owners, who occupy the suit land. They added that they are not bound by the determination of the court in Civil Suit No 1159 of 2000, and thus a claim for *res judicata* cannot issue.
 10. It is the 1st respondent's/applicant's claim that this suit is *res judicata* to Civil Suit No 1159 of 2000, which suit had been filed over the suit property. It is prudent that this court first examine the said suit. The parties to the suit were;

MICHAEL MUOHI GATUNE

FRANCIS MUCHAI KARERA

KARAMBA WAINAINA

DAVID NJOROGE CHEGE

JOHN MUHINDI

LIVINGSTONE NDUTIRE

NELSON GICHUHI NJOROGE

ALEXANDER KARUGO



SAMSON CHEGE GICHUNGI
EZEKIEL KURIA KIGATHI & OTHERS.....PLAINTIFFS
VERSUS
LUKA KIMEU MUTEVU
JOSEPHAT MULEI MUTUNGI
BERNARD MULWA MULI
RICHARD MUTHINI KASYOKA
JOHN MBITHI MUTEVU
JOSHUA NGOVU
WAYUA NGANDA.....defendantS
AND
ROYAL CAPITAL LIMITED.....INTERESTED PARTY

11. The prayers sought therein were:
 1. An order that the plaintiffs be allowed to sue in a representative capacity on behalf of all the registered owners of the suit properties against the defendants in their representative capacity.
 2. Eviction of the defendants from the suit properties and an order restraining them from re-entering the said properties.
 3. Mesne profits.
 4. Costs and interest.
12. In response to the above suit, the defendants filed a Defence and Counter-claim for orders:
 1. A declaration that the defendants have acquired absolute titles to the suit properties by adverse possession
 2. A declaration that the defendants are entitled to be registered as the proprietors of the suit properties in place of the plaintiffs and that the plaintiffs should execute valid transfers or assignments in favour of the defendants free from encumbrances.
13. The matter was heard and determined and a Judgment was issued in favor of the Plaintiffs therein on 12th June 2020, to the extent that the defendants be evicted from occupying the suit land. The court did not however grant an order allowing the Plaintiffs to file a representative suit on behalf of other registered owners who were not party to the suit.
14. The 24th, 40th and others not party to this suit moved the said court vide an application dated 10th August 2020, to be joined to the suit as defendants. The court dismissed the said Application vide the ruling of 4th February, 2021, and held that the orders of the court issued in its judgment of 12th June 2020, did not have any significant forbearance with the applicants.
15. As if jolted by the said ruling, the instant suit was filed. Having established so the issues for determination by this court are
 - i. Whether the instant suit is res judicata



- ii. Whether the orders issued on 22nd February, 2022 should be discharged or set aside
- iii. Who should bear the costs of the application

i. Whether the instant suit is res judicata?

16. The law of res judicata is settled under section 7 of the Civil Procedure Act, which provides:

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.”

17. In the case of *Samwel Kiiru Gitau v John Kamau Gibui HCCC No 1249 of 1998*, had this to say:

For a matter to be res judicata, it must be one which the Court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to be res judicata.”

18. Similarly, in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] e KLR*, the Court of Appeal set out the ingredients of res judicata as follows:

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others [2005] 1 EA 83*.”

19. The purpose of res judicata is to prevent parties from abusing the process of Court by re-litigating over the same issues. It is meant to bring sanctity to Court and to respect the process of Court. In Order to determine whether the instant suit is res judicata to Civil Suit No 1159 of 2000, this Court will examine the following Whether the parties in the two suits are the same Whether the issues raised in the present suit are directly Whether the issues raised herein have been determined by a Court of competent jurisdiction

20. On the first issue, this Court has perused a copy of the judgment of the Court in Civil Suit No 1159 of 2000, and the instant suit and notices that the 4th, 7th, 17th and 18th respondents were parties to the former suit as Plaintiffs and have now been included in the later as defendants, while the 25th Applicant was a defendant therein. They had sued other persons who are not party to this suit. What appear from the annexures attached to the motion and the responses, the suit property is registered in the names of the defendants and the Plaintiffs occupy the land distinctively. A cursory look will inform this Court that the parties in the suit are not the same.



21. Evidently the court in its ruling of 4th February, 2021 held:

I stated expressly in the judgment that the suit before the court was between the Plaintiffs who had sued and the defendants who had been sued. That means the decision of the court was only going to affect the parties to the suit. The decree of the court extracted from the judgment and issued on 12th October, 2020 is very clear that the orders issued were only directed at the defendants who were parties to the suit.”
22. This meant therefore that there was no representative suit and the parties herein are different from the parties sued in the Civil Suit No 1159 of 2000.
23. The issue of adverse possession was raised in Civil Suit No 1159 of 2000, as a Defense and Counter-claim and the court when crafting its issues considered whether the defendants are entitled to the reliefs sought against the Plaintiffs.
24. The court found that the defendants had not established a claim for adverse possession against the Plaintiffs. Undoubtedly, the issue of adverse possession is the issue for determination by this court. It is also not in doubt that the court that issued the said Judgment was a court of competent jurisdiction. What then does this mean?
25. As stated above, the parties to the suits are different and the suit property is the same. What is constant is the fact that there are many parties who are occupying the suit property. This means therefore that the issue of adverse possession was adequately and conclusively determined between the parties in Civil Suit No 1159 of 2000, and no court can re-litigate on the same issue.
26. Importantly, the court in Civil Suit No 1159 of 2000 categorically stated that the orders therein bound the parties to the suit and not any other party. The court in excluding claim over Makuyu/ Kambiti Block 1/17,44,6,27,48,83,20,15,32 and 43 stated “The other parcels of land owned by persons who are not parties to the counter-claim. If the defendants wished to extend the counter-claim to the other persons whom the Plaintiffs purported to represent, they were also required to comply with Order 1 rule 8 of the repealed Civil Procedure Rules which they did not” It follows therefore that any claim can issue over other parcels of land save for the foregoing parcels that were succinctly enumerated in the judgment of the court. To this end, this court finds and holds that the instant suit is not res judicata.

ii. Whether the orders issued on 22nd February, 2022 should be discharged and/or set aside.

27. The 1st respondent/Applicant has urged this court to set aside the Orders of the court issued on 22nd February, 2022, which Orders were issued on the premise of the Notice of Motion Application of 28th October 2021, which remained unopposed as at the time of the issuance. The basis upon which the 1st respondent/Applicant want this court to discharge or set aside the orders is because the instant suit is res judicata.
28. Having established herein above that the suit is not res judicata, then it follows that the prayer for setting aside or discharging the Orders of 22nd February 2022, is not merited, and the same cannot be issued.



iii. Who should bear costs of the application?

29. This court retains its discretionary powers donated by section 27 of the *Civil Procedure Act*. Thus it will exercise the said power and directs that costs of this Application shall abide the outcome of the main suit.
30. Having now carefully considered the instant Notice of Motion dated 8th April 2022, the pleadings in totality and the written submissions together with the relevant provisions of law and cited authorities, the court finds and holds that the said Application is not merited.
31. Consequently, the court dismisses the said Application wholly with an order that the costs of the same shall abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF OCTOBER, 2022.

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo - Court Assistant

Mr Kalwa for the Plaintiffs/respondents

Mr Mungai H/B M/s Wangoko for the 1st respondent/Applicant

Mr Munyori for the 23rd & 25th respondents.

L. GACHERU

JUDGE

6/10/2022

