



**Gachoki (Suing as the legal representative and next of kin of the Estate of Gachoki Munyua - Deceased) v Ndung'u & another (Environment & Land Case E 238 of 2021) [2022] KEELC 15106 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E 238 OF 2021  
AA OMOLLO, J  
NOVEMBER 17, 2022**

**BETWEEN**

**JANET MUMBI GACHOKI ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE AND NEXT OF KIN OF THE  
ESTATE OF GACHOKI MUNYUA - DECEASED**

**AND**

**BILHA WANJIKU NDUNG'U ..... 1<sup>ST</sup> DEFENDANT  
KURIA GORO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before this court is the Plaintiff's application dated July 2, 2021 seeking for the following orders;
  1. Spent;
  2. That a temporary injunction does issue restraining the Defendants /Respondents from trespassing onto or in any other manner howsoever interfering with the suit property or any part thereof; levying any sort of rent on the Plaintiff/Applicant pending hearing and determination of this Application inter-parties.
  3. That a temporary injunction does issue restraining the Defendants /Respondents from demolishing or in any other manner howsoever interfering with the suit property or any part thereof; levying any sort of rent on the Plaintiff/Applicant pending hearing and determination of this Application inter-parties.
  4. That pending the hearing and determination of this suit, a temporary order of injunction does issue restraining the Defendants /Respondents whether by themselves or their representatives,



servants, agents and/or assigns from howsoever selling, alienating, trespassing onto, and/or any other manner whatsoever interfering with or otherwise dealing with the suit property.

5. That a temporary injunction does issue restraining the Defendants /Respondents either by themselves, agents, servants and family members access to quiet possession of the suit property.
6. That costs of this Application be in the cause.
2. The application was filed on grounds stated in the supporting affidavit sworn by Janet Mumbi on July 2, 2021 that the Plaintiff's deceased mother, Esther Gacoki Munyua, herein after referred to as "the deceased", was a bona fide purchaser for value without notice of Dandora B816A Dandora phase 11 herein after referred to as "the suit property" from the 2<sup>nd</sup> Defendant/Respondent sometime in 1988 for a consideration of Kshs. 50,000 *vide* agreement for sale dated January 15, 1988.
3. The Applicant stated that on the same date, the 2<sup>nd</sup> Defendant/Respondent wrote to the then Nairobi City Commission seeking to change the suit property address to that of the deceased, C/O Esther Gacoki Munyua, P.O Box 30386, Nairobi and that after taking ownership and possession of the suit property, commenced developments, erecting a building where the Applicant/Plaintiff has been residing with her family and other tenants.
4. The Applicant deposed further that she has been living on the suit property with the deceased until her death on May 9, 1995 before the transfer was done, and she has been paying land rates for the last 16 years but was served with a notice to vacate by the 1<sup>st</sup> Defendant/Respondent or be evicted forcefully and a letter seeking for payment of some alleged rent arrears for the years passed. The Applicant contended that the suit property is a subject of succession and she obtained a grant of letters of administration Ad Litem for purposes of this suit.
5. The application was opposed by the 1<sup>st</sup> Defendant/Respondent through a preliminary objection dated March 21, 2022 and replying affidavit sworn by Bilha Wanjiku Ndung'u on March 21, 2022. The 1<sup>st</sup> Defendant/Respondent explained that the Plaintiff/Applicant is the granddaughter to the deceased, her 1<sup>st</sup> cousin, and daughter of the 2<sup>nd</sup> Defendant.
6. The 1<sup>st</sup> Defendant/Respondent contended that this matter is *res judicata* as the issues herein have been determined in ELC No 376 of 2009, a case where the Plaintiff/Applicant vide her application dated October 25, 2018 sought to be joined in the suit and set the judgement aside but was dismissed by court, that the 2<sup>nd</sup> Defendant has no interest in the suit property and that the suit is time barred. She avers that suit is bad in law and an abuse of the due process of law as the 2<sup>nd</sup> Defendant has no interest.
7. The 1<sup>st</sup> Defendant/Respondent deposes that the deceased was not a bona fide purchaser of the suit property from the 2<sup>nd</sup> Defendant/Respondent, her father, as he did not have any disposable interest in the property as was held in ELC No 376 of 2009. That the 2<sup>nd</sup> Defendant had fraudulently transferred the same to himself, therefore it's not a subject of a succession and that the Plaintiff's motion is only meant to earn her more time to illegally stay on her plot and continue to earn income that is unjustified.
8. The Plaintiff submitted that the suit is not Res judicata as provided in section 7 of the [Civil Procedure Act, 2010](#) since she was not enjoined as a party to ELC No 376 of 2009 hence the matter was not conclusively determined. She stated the court having dismissed her application to be enjoined in the determined suit, she was denied a right to be heard, therefore filed this suit to enforce that right, while citing the case of [Gurbachan Singh Kalsi v Yowani Ekori](#) Civil Appeal No 62 of 1958 relied on in [Kassam Hauliers Ltd v Takaful Insurance of Africa Limited; Juliab Wambui Ngaruiya \(Interested Party\) \[2022\] eKLR](#) by Odunga J.



9. Further, the Plaintiff/Applicant submits that she had an interest in the suit property as the deceased purchased the same from the 2<sup>nd</sup> Defendant/Respondent in good faith hence a bona fide purchaser for value without notice and that she has been paying land rates. The Plaintiff argued that she had developed the suit property and being the only home known to her, failing to issue an injunction order against her eviction by the 1<sup>st</sup> Defendant will cause her irreparable damage. In support, the Plaintiff cited the case of *Katende v Hridar & Company Limited [2008]2 EA 173*, *Giella v Cassman Brown (1973) EA 358*, *Mrao ltd v First American Bank of Kenya ltd (2003) eKLR* and *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR*.
10. The Plaintiff also stated that the 1<sup>st</sup> Defendant's attempt to remove her from the suit property is statute barred as she has been living on the same for a period of more than 12 years.
11. The 1<sup>st</sup> Defendant/Respondent submitted that the preliminary objection should be upheld as this suit is *res judicata* citing the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*, *Charity Njanja Mwaniki (suing on her behalf and other siblings) v James Mwaniki Gaturu and Esther Wangui Ndung'u (ELC 184 of 2017-Nyahururu)*, *Bernard Mugo Ndegwa v James Nderitu Gitbae and 2 others (2010) eKLR* among others.
12. The 1<sup>st</sup> Defendant/Respondent submitted that the 2<sup>nd</sup> Defendant has no interest in the suit property and that the suit is barred by the statute of limitation because the alleged sale by the Plaintiff/Applicant was in 1988, a period more than 12 years as required by statute to present a suit in court for a cause of action. The 1<sup>st</sup> Defendant concluded that the Plaintiff has not met the threshold to warrant the issuance of an interlocutory injunction.
13. I have read and considered the Plaintiff's motion, the 1<sup>st</sup> Defendant's replying affidavit, preliminary objection and their submissions thereof and below is my opinion. The issues for determination are two:
  - a. Whether the preliminary objection by the 1<sup>st</sup> Defendant should be upheld?
  - b. Whether an interlocutory injunction should be issued against the 1<sup>st</sup> Defendant?
  - c. Cost
14. A preliminary Objection is confined on points of law and should be concise and specific Justice O A Angoto in *Taib Investments Limited v Fahim Salim Said & 5 others [2016] eKLR* stated,
 

“ 25. It is trite law that a Preliminary Objection consist 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 (See *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*.”
15. Further, in *Willie v Muchuki & 2 Others [2004] 2 KLR*, Kimaru Ag J (as he then was) quoted with approval the decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*, at page 701;
 

“ 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.”
16. The 1<sup>st</sup> Defendant/Respondent premised her objection on the points of law that the suit herein is *res judicata*, bad in law as the 2<sup>nd</sup> Defendant has no interest in the suit property and secondly, that it



- is time barred. A perusal of the pleadings filed in this suit shows that the issue at hand is a dispute over ownership of the suit property. I have read the pleadings filed in ELC No 376 of 2009 which contested the ownership of the same property and the judgment rendered by Obaga J settled that the 1<sup>st</sup> Defendant is the legal owner of the suit property.
17. It is not contested by either party that the Plaintiff/Applicant application to set aside the judgement in ELC No 376 of 2009 which was dismissed. She argues that the dismissal denied her the right to be heard as she was denied an opportunity to be joined in the determined suit. The question is whether the Plaintiff/Applicant should have lodged an appeal against the decision dismissing her application, or proceed to file a fresh suit as she has now done. The 1<sup>st</sup> Defendant/Respondent submitted that the judgement in ELC No 376 of 2009 having determined that the 2<sup>nd</sup> Defendant herein fraudulently transferred the suit property to himself renders him to have no interest in the same and so does the Plaintiff.
18. Section 7 of the [Civil Procedure Act](#) on *res judicata*, reads as follows:
- “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. The Court of Appeal held in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, \[2017\] eKLR](#), that:
- “[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.”
20. The court has a duty to hear all parties but it also has a duty to safeguard itself against abuse of its process and in upholding the 1<sup>st</sup> Defendant’s preliminary objection, the suit herein should be disposed of in its entirety. The Applicant is claiming to have been put in possession through purchase (by her deceased mother) from the 2<sup>nd</sup> Defendant. The Applicant has sought for an order in the main suit to be declared the rightful and legal owner of the suit property and has raised the issue of limitation stating that since the Applicant has been living on the suit property for a period in excess of 12 years, the 1<sup>st</sup> Defendant’s attempts to remove her from the suit property is time-barred.
21. The 1<sup>st</sup> Defendant/Respondent has a judgement in her favour as against the 2<sup>nd</sup> Defendant who turns out was not in possession of the suit property as at the time the proceedings in ELC 376 of 2009 was heard and determined. I have looked at the pleadings and the judgement in the “former suit” annexed



to the replying affidavit and there is no mention of a prayer for vacant possession. Thus the issue of occupation by the Applicant in my view was not dealt with in the former suit.

22. The SCOK in the case of *John Florence Maritime Ltd Services v CS Infrastructure, Transport and 5 Others* held at paragraph 58 and 59 of their judgement that;

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case<sup>3/4</sup>to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case.... The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.

23. One of the issues to be determined in this suit from the pleadings before the court is whether the Plaintiff occupation of the land has matured into a right conferred in law or she constitutes a person claiming through the 2<sup>nd</sup> Defendant for which the principle of res judicata would apply. This cannot be dealt with in a preliminary manner as is being urged by the 1<sup>st</sup> Defendant. I therefore uphold the Preliminary Objection dated March 21, 2022 is without merit and dismiss it.
24. The second issue is whether or not the application has met the threshold for granting the temporary order of injunction sought. From the pleadings filed, the Applicant is in possession of the suit property. The 1<sup>st</sup> Respondent does not hold a decree that entitles her to vacant possession. Since the occupation of the Applicant is one of the issues for determination in this case, that by itself demonstrates that the Applicant has a prima facie case with a probability of success. I am therefore satisfied that there is merit in granting the orders of injunction to remain in force until this suit is heard and determined.
25. The costs of the application awarded to the Plaintiff/Applicant.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2022**

**A OMOLLO**

**JUDGE**

