



Munene & 2 others v Kibuchi & another (Environment & Land Case E20 of 2021) [2022] KEELC 14896 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E20 OF 2021
JM MUTUNGI, J
NOVEMBER 17, 2022**

BETWEEN

**GRACE WAINOI MUNENE 1ST PLAINTIFF
FRANCIS NGATIA KINYUA 2ND PLAINTIFF
DAVID KIBUCHI KINYUA 3RD PLAINTIFF**

AND

**LYDIA WANJIWA KIBUCHI 1ST DEFENDANT
MARTIN MTHII KIBUCHI 2ND DEFENDANT**

RULING

1. The plaintiffs instituted the present suit by way of originating summons dated June 18, 2021. The plaintiffs claimed to have adversely occupied and adversely possessed a portion of land parcel Mutira/ Kaguyu/1614 (“the suit land”) for a period of over 50 years. The plaintiffs sought to be declared entitled to be registered as the absolute proprietors of half portion of the suit land. The originating summons was supported by a supporting affidavit sworn by the plaintiffs dated June 18, 2021 in which the plaintiffs averred they had occupied and built their homes on the portion they sought to be declared owners.
2. The defendants filed a replying affidavit in reply to the originating summons sworn by the 1st defendant on October 29, 2021. The defendants denied the plaintiffs had been in actual occupation of half of the suit land as claimed. The defendants averred that on the portion claimed by the plaintiffs, it is the defendants who have their tea plantation thereon which they, and not the plaintiffs utilize. The defendants deny that the plaintiffs’ occupation of the portion has been exclusive. The defendants aver the plaintiffs’ occupation has been the subject of various litigation in court where the suit land has been decreed in favour of the defendants.



3. The uncontradicted facts from the replying affidavit are that the 1st defendant's father David Kibuchu Wairangi (now deceased) purchased the suit land from Kimonde Kibira (now also deceased) in the 1960's. As per the purchase agreement, the Vendor, Kimonde Kibira was to subdivide land parcel Mutira/Kaguyu/93 into 2 equal portions of 5 acres and transfer one portion to the 1st defendant's father. Kimonde Kibira died before he had transferred the parcel of land to the 1st defendant's father. The 1st defendant's father sued the personal legal representative of Kimonde Kibira (deceased) in Nairobi HCCC No. 566 of 1978 for the transfer of the land. The 1st defendant's father however passed away before the suit was determined and was substituted by his wife, Jeniffer Wangechi Kibuchi and the Court ordered that the land be transferred to her.
4. Jennifer Wangechi Kibuchi sued the 1st plaintiff's husband Munene Wairangi in Nyeri HCCC No. 60 of 1995 for eviction and in defence, he pleaded that the plaintiff, the said Jennifer Wangechi held a portion of the land in trust for them. The Court referred the matter to the Land Disputes Tribunal at Baricho in Kirinyaga who determined the land belonged to Jennifer Wangechi Kibuchi and determined the same was not held in trust in favour of the 1st plaintiff's husband and others. The award made by the Tribunal was adopted by the court on December 16, 1999.
5. The defendants further averred the plaintiffs have additionally filed other cases namely Kerugoya ELC No. 91 of 2017 and Kerugoya ELC No. 26 of 2019 raising similar claims of ownership of a portion of the suit land and the court has held they are not entitled to the land. the defendants assert the plaintiffs have not been in adverse possession of the suit land but are rather engaged in frivolous and fishing exercise which the court should not permit.
6. The defendants simultaneously with the replying affidavit to the originating summons filed a notice of preliminary objection dated October 29, 2021 on the ground that:-

“ The plaintiffs suit is resjudicata as the subject matter, has been subject of previous litigations which have been heard and determined”.
7. The issue of *resjudicata* goes to the jurisdiction of the Court to entertain the suit. Resjudicata is a pure point of law that can be taken as a preliminary objection (see *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696). The court directed that the preliminary objection be argued by way of written submissions. Both the plaintiffs and the defendants have filed their submissions. The singular issue for determination is whether the present suit is *resjudicata*.
8. The resjudicata doctrine is embodied under section 7 of the [Civil Procedure Act](#) which provides as follows:-

Res judicata

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.



Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

9. The defendants' contention is that the resjudicata doctrine is applicable in the circumstances of the present suit as there have been previous cases where the same subject matter and the same persons and/or persons claiming through them have been involved and the Court has made determination on the same and/or similar issues that are raised in the present matter.
10. The defendants in support of the preliminary objection relied on the case of Nyeri HCCC No. 60 of 1995 where the 1st defendant's mother Jeniffer Wangechi Kibuchi (now deceased) was the plaintiff and had sued the 1st plaintiff's husband and the 2nd and 3rd plaintiffs for eviction out of the suit land. The defendants in the suit claimed that the plaintiff was holding the suit land in trust as they had beneficial interest since the land originally belonged to their deceased father. Alternatively, the defendants contended that having occupied the land since 1960, they had acquired title to the land by virtue of adverse possession. The High Court referred the dispute to the Land Disputes Tribunal who made an award holding that the plaintiff was not holding the land in trust for the defendants and ordered them to vacate from the land. The Tribunal's award was adopted as judgment by the SRM's Court at Nyeri Award No. 77 of 1999 and a consequent Appeal vide Nyeri HCCA No. 23 of 2000 was dismissed by the Court on 13th July 2009.
11. In a Succession Cause Nairobi HCC Succ. Cause No. 2844 of 2004 (Estate of Jeniffer Wangechi Kibuchi), letters of administration were issued to Geoffrey Karubia Kibuchi and an application by Munene Isangi (husband to the 1st plaintiff herein) seeking revocation of the letters of administration was dismissed by Musyoka J. holding that the applicant lacked any basis to be involved in administration of the deceased estate since the land the subject of the administration did not constitute family land as determined by the Land Disputes Tribunal.
12. The 1st plaintiff herein also in Kerugoya ELC No. 26 of 2019 sued the defendants herein amongst others seeking orders that the defendants held the suit land in trust for themselves and for her. She sought the trust to be determined and for a portion of 2.5 acres to be subdivided but out of the suit land and to be registered in her name. The defendants raised a Preliminary Objection that the suit was resjudicata as the suit had been previously heard and determined. The Hon. Justice Cheroni in a considered Ruling upheld the Preliminary Objection and struck out the plaintiff's suit that had been commenced by way of plaint for being Resjudicata.
13. In the present suit, the plaintiffs whose claim stem from the initial claim by Kamonde Kibira (deceased) who was the registered owner of land parcel Mutira/Kaguyu/93 measuring 10 acres approximately out of which 5 acres were subdivided and transferred to Jeniffer Wangechi Kibuchi (deceased wife of David Kibuchi also deceased) as land parcel Mutira/Kaguyu/1614 pursuant to Nyeri HCCC No. 60 of 1995 and subsequent Nyeri SRMCC Award No. 77 of 1999. The plaintiffs claim of beneficial interest to the suit land was disallowed by the Land Disputes Tribunal and the 1st plaintiff's claim in Kerugoya



ELC No. 25 of 2019 that the defendants held land parcel Mutira/Kaguyu/1614 in trust was equally dismissed by the Court on the basis that the suit was Resjudicata.

14. It is evident the plaintiffs either by themselves and/or through their representatives have been engaged in litigation with the defendants and/or with persons through whom the defendants claimed the suit land. Nyeri HCCC No. 60 of 1995 directly involved the suit land where the defendants mother Jeniffer Wangechi Kibuchi, as plaintiff sought to have the defendants evicted from the suit land. The defendants put up a defence claiming the plaintiff in the suit was holding the land as a trustee and alternatively that they were entitled to a portion of the land by virtue of adverse possession. Though the matter was referred to the Land Disputes Tribunal, the issues were heard and determined. The Tribunal's award was adopted as judgment and the consequent appeal to the High Court against the award was dismissed, meaning the determination reached by the Tribunal was final.
15. The plaintiffs have in their submissions argued that the Tribunal lacked jurisdiction to handle the matter and contended the Tribunal acted ultra vires its jurisdiction as conferred under section 3(1) of the *Land Disputes Tribunal Act* No 18 of 1990. Section 3(1) of the Act provides:-
 1. Subject to this Act, all cases of a, Civil nature involving a dispute as to:-
 - a. The division of or determination of boundary to land including land held in common;
 - b. a claim to occupy or work land; or
 - c. trespass to land, shall be heard and determined by the Tribunal established under Section 4.
16. In Nyeri HCCC No. 60 of 1995, the plaintiff's claim was one of trespass by the defendants who she wanted that they be ordered to vacate from the land. By implication also the matter raised the issue of the defendants right to occupy or work on the land. The Tribunal in my view had jurisdiction to handle the matter and the High Court in referring the matter to the Tribunal, must have satisfied itself that the Tribunal indeed had jurisdiction to handle the matter. The award made by the Tribunal was adopted by the Magistrate's Court under section 7 of the Act and the resultant appeal to the High Court was unsuccessful.
17. On the question whether or not the present suit is resjudicata, I have no hesitation in holding that it is. The parties herein have litigated on the same subject matter either directly or through persons through whom they claim. The suit land was the subject matter in Nyeri HCCC No. 60 of 1995 and the dispute was referred to the Land Disputes Tribunal where it was heard and determination made that the defendants vacate the suit land save for Margaret Muthoni Kinyua who was decreed to have a life interest on the portion that she was in occupation of. The plaintiffs in my view are using all means to camouflage the cause of actions in an effort to circumvent the resjudicata doctrine. The doctrine was intended to bring litigation, that concerned the same parties and same subject matter to a close. It was intended that when a matter was determined, a party to the litigation would not bring the same dispute back to the court on the same facts and issues under another format.
18. Respecting finality of litigation, the authors of *Mulla, Code of Civil Procedure*, 18th Ed 2012 at page 293 observed as follows concerning resjudicata:-

“The principle of finality or resjudicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once, a judgment becomes conclusive, the matters in issue covered thereby cannot be re-opened unless fraud or mistake or lack of jurisdiction



is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be re-opened and has little to do with the merit of the decision”.

19. The Supreme Court of Kenya in the case of *Kenya commercial Bank Ltd v Muiri Coffee Estate Ltd & another* (2016) eKLR succinctly put the rationale of the resjudicata doctrine as follows: _

“(54) 54) The doctrine of *resjudicata*, in effect allows a litigant only one bite of the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiple of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively”.

20. The Supreme Court further in the case cited with approval, the observation by Majanja, J. in the case of *ET v Attorney General & another* (2012) eKLR where the Judge stated thus:-

“The courts must always be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of actions so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit trying to bring before the court in another way and in a form a new cause of action which has been resolved, by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Ltd & others* (2001) EA 177, the court held that “Parties cannot evade the doctrine of resjudicata by merely adding other parties or causes of action in a subsequent suit”. In that suit, the court quoted Kuloba J. in the case of *Njangu v Wambugu & 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 comes to court, then I do not see the use of the doctrine of *resjudicata*.....”.

21. In the present case, the plaintiffs have abandoned the previous claims of beneficial interest and trust and now want to anchor their claim on the doctrine of adverse possession to pursue the same interest that they previously litigated on. The plaintiffs in my view are attempting to have a third or fourth bite of the cherry by panel beating their case to come up with a new cause of action. The doctrine of resjudicata cannot allow them to do so. Never mind that I do not consider that a claim founded on beneficial interest and/or trust can mutate to become a claim under adverse possession. Even if it was possible, for the action to be sustained, I fail to see how the plaintiffs could establish the ingredients of adverse possession, in the face of the various litigations between the parties where it is evident both the plaintiffs and/or their representatives and the defendants and/or their representatives have participated in.
22. Be it as it may be, it is my determination that the preliminary objection taken by the defendants is well founded and I hold the present suit is resjudicata and therefore unsustainable. I order the originating summons dated June 18, 2021 and filed on June 29, 2021 struck out with costs to the defendants.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17TH DAY OF NOVEMBER, 2022.



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HON. J.M. MUTUNGI
ELC JUDGE

