



REPUBLIC OF KENYA



Golf Range Limited v Gitau & 7 others (Environmental and Land Originating Summons E023 of 2020) [2025] KEELC 105 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2020
OA ANGOTE, J
JANUARY 23, 2025**

BETWEEN

GOLF RANGE LIMITED PLAINTIFF

AND

MARION GITAU 1ST DEFENDANT

AGNES KAGIRA 2ND DEFENDANT

BEATRICE KANYUU 3RD DEFENDANT

ROLAND KIOGORA 4TH DEFENDANT

WANJIRU KIONGO 5TH DEFENDANT

SYLVIA MUTHONI 6TH DEFENDANT

LISA MWAKAZI 7TH DEFENDANT

**KIPCHOGE KEINO, TOM O'MWOMBO, FRIDAH SHIROYA (SUED
JOINTLY AS THE TRUSTEES OF NATIONAL OLYMPIC COMMITTEE OF
KENYA) 8TH DEFENDANT**

RULING

1. Before the Court for determination are two Notices of Motion and one Preliminary Objection. The first Notice of Motion was brought by the Plaintiff. It is dated 30th October 2020 and brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 1 Rule 3, Order 11 Rule 3, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff is seeking orders that:
 - a. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants whether acting by themselves or through their agents, servants and/or employees from interfering with, threatening,



harassing, demolishing and/or evicting the Plaintiff from all the property known as Land Reference Number 209/15290, Original Number L.R No. 209/14151/2 (hereinafter ‘the suit property’).

- b. The Court be pleased to consolidate this matter with ELC Case No. 120 of 2008 Marion Gitau, Agnes Kagira, Beatrice Kanyuu, Roland Kiogora, Wanjiru Kiongo, Sylvia Muthoni and Lisa Mwakazi vs The Attorney General & Registered Trustees of NOCK so that the two are heard together as they relate to a claim of ownership on the same parcel of land by three sets of parties.
 - c. Costs of the application be in the cause.
2. The application is based on several grounds and supported by an affidavit sworn by Trevor Kanja, a director of the Plaintiff, who averred that the Plaintiff is the registered owner of L.R No. 11746 which is adjacent to the suit property.
 3. He further deponed that the Plaintiff has been in actual possession of the suit property (which partly houses Carnivore Restaurant) for 30 years, and that the suit property was initially registered in the name of the 8th Defendant against whom the Plaintiff instituted an adverse possession claim.
 4. It was deponed that the claim was dismissed; that the Plaintiff has brought an application for review on the grounds that the 8th Defendant did not disclose that its title was under challenge at the National Land Commission and that challenge ended in favour of the Defendants.
 5. The deponent stated that in addition to suing the 8th Defendant in ELC No. 120 of 2008, the Defendants have also sought the services of the Director of Surveys to place beacons on the suit property and restrict trespassers.
 6. The deponent averred that in view of the fact that the issue of demolition is still in dispute in ELC No. 120 OF 2008 and in view of the fact that the Plaintiff’s claim of adverse possession is equal/greater than those of the Defendants and the 8th Defendant, it is in the interest of justice that this suit be consolidated with the above-mentioned suit.
 7. In conclusion, the deponent averred that based on the foregoing, it is important that the Court restrains the Defendants from interfering with the Plaintiff’s developments on the suit property.
 8. The 1st Defendant filed a replying affidavit in which she deponed that the 1st and 3rd Defendants are the registered owners of the suit property and that the suit property was initially registered in the name of the 8th Defendant but the title was revoked on the grounds of illegality and a new grant issued in favour of the 1st and 3rd Defendants.
 9. The deponent averred that the Plaintiff had filed an adverse possession suit against the 8th Defendant but the same was dismissed and has neither been successfully reviewed nor appealed.
 10. With regard to ELC No. 120 of 2008, the deponent stated that they filed the same but their efforts to set the matter down for hearing were unsuccessful; that they consequently filed a complaint with the National Land Commission which found that the 8th Defendant had obtained the title by fraud, and that the title was revoked and the revocation was gazetted.
 11. It was deponed that the 1st and 3rd Defendants were then issued with a Certificate of Title for the suit property which was given L.R No. 209/14309 and that in view of the foregoing developments, their claim in ELC No. 120 of 2008 was no longer tenable and they therefore instructed their advocates to discontinue the case.



12. In conclusion the deponent referred to the Preliminary Objection on record and stated that the Plaintiff's suit is untenable as it deals with matters that were decided by a Court of competent jurisdiction. She stated that the Plaintiff illegally extended its fence onto the suit property sometime in 2010/2011.
13. The 8th Defendant filed a replying affidavit dated 13th July 2022 and sworn by its Acting Secretary General, Francis Mutuku. It was deponed that the Plaintiff is not entitled to injunctive relief as the threshold for the grant of the same had not been met.
14. The deponent further averred that the Plaintiff had filed a similar suit involving the suit property (ELC No. 125 of 2017); that the suit was dismissed after being heard by a Court of competent jurisdiction, and that in view of the foregoing, the doctrine of res judicata ousts the jurisdiction of the Court in the instant suit.
15. In conclusion, the deponent averred that the Plaintiff should have lodged an appeal instead of mischievously trying to have a second bite at the cherry.
16. The second Notice of Motion was filed by the 1st -7th Defendants. It is dated 3rd March 2021 and brought under Sections 1A, 1B, 3A, 7 and 8 of the Civil Procedure Act and Order 2 Rules 9 and 15 and Order 51 of the Civil Procedure Rules. The 1st - 7th Defendants are seeking for the following orders:
 - a. This suit by way of Originating Summons dated 30th October 2020 be struck out and/or dismissed with costs for being an abuse of Court process and/or estopped by reason of being Res Judicata.
 - b. An order that the Director of Survey, Kasarani do conduct a survey on the suit property and the surveyors designated to identify and/or replace all missing beacons be accompanied by an officer of police of the rank of an Inspector to ensure that there shall be no unwarranted interference with the exercise.
 - c. A report by the surveyor designated by the Director of Survey be submitted to this Court within a period of 14 days and the same do indicate the area on the suit property that has been illegally encroached upon by the Plaintiff.
 - d. The Plaintiff be ordered forthwith to remove all illegal structures constructed on the suit property.
 - e. Costs of the application and suit be borne by the Plaintiff.
17. The application is based on several grounds and supported by an affidavit sworn by Marion Gitau, the 1st Defendant. She reiterated the contents of the affidavit she swore in opposition to the Plaintiff's Notice of Motion.
18. She additionally stated that it is necessary for the Director of Survey to establish the beacons of the suit property and the Plaintiff's property to determine the actual boundaries as the Plaintiff has illegally tampered with the boundaries.
19. The 1st - 7th Defendants also filed a preliminary objection dated 18th February 2021. The gravamen of the Preliminary Objection is that firstly; the instant suit is res judicata as the issue of ownership was conclusively determined by the Court in ELC 125 of 2017 which involved adverse possession of the suit property.
20. Secondly, it was deponed, the National Land Commission concluded proceedings in favour of the Defendants and they were eventually issued with a title in 2019; thirdly, that the title having been issued



in 2019, a claim of adverse possession cannot stand and fourthly, that the pleadings are irregular as the Plaintiff has sued Agnes Kagira, Roland Kiogora, Wanjiru Kiongo, Sylvia Muthoni and Lisa Mwakazi who are not registered proprietors of the suit property.

21. The Plaintiff filed a replying affidavit sworn by its Director Trevor Kanja. He deponed that the parties in ELC No. 125 of 2017 were the Plaintiff and the 8th Defendant; that the 1st -7th Defendants were not parties to the suit and that the determination that adverse possession had not been proven was therefore strictly limited to the Plaintiff's claim against the 8th Defendant.
22. Having not been parties in that suit, it was deponed, the 1st -7th Defendants can therefore not claim to be bound by the judgement delivered in that suit.
23. The deponent maintained that the Plaintiff was not a party to the proceedings before the National Land Commission and was therefore not bound by the determination given therein.
24. He stated that the complaint before the National Land Commission dealt with rival claims in title to land while the current suit is dealing with adverse possession that the Plaintiff is claiming against the Defendant's original allocation, and that based on the foregoing, the suit is not res judicata.
25. The deponent averred that since the Plaintiff has had continuous and uninterrupted possession of the suit property for 30 years, it has an arguable case for adverse possession and as such, the case should be heard on merit.
26. He further averred that the reliefs sought by the Defendants are drastic and should not be issued at an interlocutory stage as they would determine the main suit without a trial.
27. The deponent noted that it is in the interest of justice to hear both parties and determine the status quo of the suit property which includes a Kshs. 500,000,000 investment by the Plaintiff. The deponent further noted that if there was a misjoinder of the Defendants, the same did not render the suit a nullity as the Court could at any time order their striking off.
28. All parties filed submissions and authorities which I have considered.

Analysis and Determination

29. The definition of a preliminary objection was set out as follows in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 :

“ 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...A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”
30. The point of law raised by the 1st -7th Defendants is that the instant suit is res judicata. They have argued that the matters in issue in the instant suit were decided with finality by a Court of competent jurisdiction in ELC No. 125 of 2017.
31. The Plaintiff has averred that the threshold of res judicata has not been met as the parties in ELC No. 125 of 2017 were the Plaintiff and the 8th Defendant, not the 1st to 7th Defendants.



32. The Plaintiff has also argued that in the former suit the issue was whether the Plaintiff had been in adverse possession of the suit property as against the 8th Defendant since 2003, while in the instant suit, the issue is whether the Plaintiff has been in factual possession of the suit property for 30 years as against the 1st - 7th Defendants' allotment.

33. Section 7 of the *Civil Procedure Act* provides as follows concerning 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.”

34. In the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR), the Supreme Court stated as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

35. In the case of *George W M Omondi & Another vs National Bank of Kenya Ltd & 2 Others* [2001] KEHC 841 (KLR) the Court stated as follows:

“In that regard, I accept the submission by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in *Mwangi Njangu v Meshack Mbogo Wambugu* (supra) where he said:-

“If a litigant were allowed to go on forever re-litigating 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 a Court, then I do not see what use the doctrine of res judicata plays.”

36. This position was reaffirmed by the Supreme Court in the case of *John Florence Maritime* (Supra) when it stated as follows:

That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:



The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. 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. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and 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 res judicata.....’”

37. Of the elements of res judicata set out by the Supreme Court in the John Florence Maritime Case above, the Plaintiff is disputing the fourth element - that the parties and cause of action are not the same.
38. I have perused the orders sought by the Plaintiff in ELC No. 125 of 2017 and those sought by the Plaintiff in the instant suit. They are similar though sought against different Defendants.
39. Considering that the Plaintiff is claiming adverse possession of the suit property in both suits, the claim that the cause of action is different therefore fails.
40. While the parties in the suits are different - with the 1st - 7th Defendants added in the instant suit, it is my considered view that the Plaintiff has merely added the new parties to try and evade the doctrine of res judicata.
41. I say so because the Plaintiff has instituted a suit founded on the same cause of action, seeking the same orders and dealing with the same subject matter but has given it a cosmetic facelift by adding the 1st - 7th Defendants.
42. The Plaintiff stated that it was not aware that there was an ownership tussle between the 1st - 7th Defendants and the 8th Defendants over the suit property when it filed the former suit. The Plaintiff has not brought an application for review to challenge the Judgment based on that ground.
43. The Plaintiff having failed to exercise its right of review, cannot try to have another bite of the cherry by instituting the instant suit. Indeed, the dispute between the Defendants as regards ownership cannot change the facts relating to the doctrine of adverse possession.
44. Although the Plaintiff has stated that the current claim of adverse possession is based on the letters of allotment issued to the 1st to 7th Defendants, its trite law that under sections 37 and 38 of the *Limitation of Actions Act*, as read together with Order 37 Rule 7(2) of the Civil Procedures Rules, a claim of adverse possession can only lie as against a title holder, and not people holding letters of allotment.
45. That being the case, it is my finding that based on the documents on record, the two suits are manifestly similar and meet the threshold of res judicata.
46. Having found the current suit to be res judicata, I will not delve into the other prayers. Indeed, the Defendants herein cannot ask for the dismissal of the suit and at the same time ask for other positive prayers to be granted regarding the suit property. That is not permissible. They will have to file a distinct suit.



47. For those reasons, the Plaintiff's application dated 30th October, 2020 is dismissed and the 1st to 7th Defendants' application dated 3rd March, 2021 is partially allowed as follows:

- a. The Originating Summons dated 30th October 2020 be and is hereby dismissed by reason of being Res Judicata.
- b. The Plaintiff to pay the costs of the suit and the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wachira for Plaintiff

Mr Kuria for 1st to 7th Defendants

Ms Kiget for Mr. Arusei for 8th Defendant

Court Assistant - Tracy

