



REPUBLIC OF KENYA



**Buuri & 2 others v Mukiira (Environmental and Land Originating Summons
65 of 2019) [2025] KEELC 420 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 65 OF 2019**

JO MBOYA, J

FEBRUARY 4, 2025

BETWEEN

ARNOLD MUTUMA BUURI 1ST PLAINTIFF

NELSON MUTETHIA MUTUMA 2ND PLAINTIFF

QUINTON MUCHAI MUTUMA 3RD PLAINTIFF

AND

STEPHANO MURURU MUKIIRA DEFENDANT

RULING

1. The suit before the court has been commenced by way of Originating Summons [OS] dated 25th November 2019; and wherein the Plaintiff has contended that the suit land constitutes his [Plaintiff's] ancestral land. [See the contents of paragraphs 3, 4 and 8 of the supporting affidavit attached to the originating summons].
2. Furthermore, the Plaintiff has also contended that the registration of the suit land in the name of the Defendant was procured and obtained by way of fraud. [see the contents of paragraph 6 of the supporting affidavit].
3. Moreover, the Plaintiff has also conceded that there was a previous suit, namely, Meru CMCC No. 417 of 2004 [hereinafter referred to as the previous suit] which suit was dismissed for want of prosecution/non-attendance.
4. In any event, the Plaintiff has contended that various attempts to reinstate the suit were declined and or dismissed by the court. For coherence, the Plaintiff herein maintains that the suit remains dismissed. [see the contents of paragraph 6 of the supporting affidavit].



5. Despite the foregoing, the Plaintiff herein contends that the suit beforehand discloses and captures a reasonable cause of action and hence the same ought to be heard and determined in the conventional manner, namely, vide a plenary hearing.
6. The questions that the court has to grapple with are namely; whether the suit herein is res judicata; whether the suit herein discloses a reasonable cause of action; whether the claim for adverse possession can be raised and canvassed in the same suit and or matter alongside a claim for fraud; and whether the claim for adverse possession is mutually inconsistent with a claim for fraud.
7. I beg to start with the first issue namely; the question of res judicata. Pertinently, it is admitted by the Plaintiff herein that there was a previous suit and the suit was dismissed for want of prosecution/non-attendance. Furthermore, it has been contended that there were various attempts by the Plaintiff herein to reinstate the suit, namely, CMCC No. 417 of 2004, but the attempts were not fruitful.
8. For good measure, the Plaintiff has posited at paragraph 6 of the supporting affidavit that the attempts towards reinstatement/ restoration of the previous suit were declined.
9. In the circumstances, the common ground is to the effect that the previous suit remains dismissed. In this regard, it suffices to state that the dismissal order pertaining to and concerning CMCC 417 of 2004 constitutes a judgment of the court in favour of the adversely party namely the defendant. To this end, it suffices to cite and reference the decision of the Court of Appeal in the case of *Njue Ngai v Ephantus Njiru Ngai* 2016 eKLR where the court of appeal considered a similar situation like the one beforehand and returned a verdict that a dismissal order indeed constitutes a judgment for the adverse party.
10. Moreover, the same position [supra] was also highlighted and revisited by the Court of Appeal in *Cooperative Bank of Kenya Ltd v Cosmos Mrombo Moka* (2019) eKLR.
11. To the extent that the suit, namely, CMCC 417 of 2004; was dismissed for non-attendance and coupled with the fact that the dismissal orders have not been set aside, I find and hold that same [dismissal order] indeed constitutes a judgment.
12. Secondly, it is imperative to state and underscore that once a suit is dismissed for non- attendance a party [the Plaintiff not excepted] cannot thereafter file a fresh suit on the same issues or near similar issues.
13. Premised on the provisions of Order 12 Rule 6 (2) of the *Civil Procedure Rules* 2010 and coupled with the fact that the dismissal order has not been set aside, it is my finding that the suit beforehand is legally untenable and thus constitutes an abuse of the due process of the court.
14. What constitutes an abuse of the due process of court and in particular the concept of abuse of the due process of the court has been highlighted and amplified in a plethora of decisions. In particular, the concept was elaborated upon by the court of appeal in the case of *Muchanga Investments Ltd v Safaris Unlimited [Africa Ltd]* (2009) eKLR; *Satya Bharna v the Director of Public Prosecution* and others paras 24 – 26; and by the Supreme Court in the case of *Rutogot Farm Ltd v Kenya Forest Service* (2018) eKLR.
15. On the 2nd issue, namely, the issue as to whether the suit herein raises and or discloses a reasonable cause of action, it is my considered position that the suit beforehand does not raise and/disclose a reasonable cause of action known to law or at all.
16. To start with, what constitutes a reasonable cause of action was elaborated upon and canvassed by the court of appeal in the case of *Samedy Traders v Kingwor Ltd* (2021) eKLR and in *Rajesh Pranjivan*



- Chundasama v Sailesh Pranjivan Chundasama* (2014) eKLR respectively. In particular, it was stated that what constitutes a reasonable cause of action must espouse some ingredients capable of being investigated and or interrogated during a trial.
17. In respect of the instant matter, the Plaintiff herein has contended that the suit land was/is ancestral land. Furthermore, the Plaintiff herein has also contended that the suit land was acquired by the Defendant through fraud. In this regard, a question does arise as to whether the Plaintiff can canvass the plea of fraud [which has been adverted to at paragraph 6 of supporting affidavit] simultaneously with a claim based on adverse possession.
 18. In my humble view, the two [2] causes of actions are mutually inconsistent and hence cannot be impleaded together. Put differently, the two causes of action are contradictory and antithetical.
 19. In any event, it suffices to state that the moment a party, the Plaintiff herein not excepted, raises fraud, the claim founded on adverse possession dissipates into thin air. [see the decision of the Court of Appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR. Particularly, paragraphs 42, 43 and 44 of the decision are succinct and apt.
 20. Moreover, the Plaintiff herein has also contended that the suit land was ancestral land. In this regard, it suffices to cite and reference the contents of paragraphs 3, 4 and 8 of the supporting affidavit that underpins the originating summons.
 21. There does arise the question whether the Plaintiff can lay a claim based on beneficial ownership [ancestral claims] while at the same time canvassing a claim for adverse possession.
 22. To my mind, the Plaintiff herein cannot be allowed to raise the two claims together. In any event, such an endeavour would be tantamount to approbating and reprobating at the same time. Such an endeavour also constitutes an abuse of the due process of the Law.
 23. Be that as it may, the legal position that one cannot raise and canvass a claim for beneficial ownership [ancestral land] and adverse possession simultaneously was highlighted by the court of appeal in the case of *Catherine Kuriko and 3 others v Evaline Rosa* (2020) eKLR.
 24. Finally, I do wish to state that for as long as the decision of the court in CMCC 417 of 2004 remains, the issues being raised at the foot of the instant suit are res-judicata. [See Section 7 explanation 4 of the *Civil Procedure Act* Cap 21 Laws of Kenya).
 25. The question of res-judicata has been highlighted in a number of cases. However, it suffices to reference the decision of the Court of Appeal in *Benjob Amalgamated Ltd v Kenya commercial bank ltd* (2016) eKLR where the Court of Appeal cited with approval the decision of the house of Lords in *Hederson v Hederson*.
 26. Lastly, I do wish to underscore that the Plaintiff herein cannot be allowed to continue the filing of suits by instalments. Such position is prohibited under the law. To this end, the provisions of Order 3 Rule 4 (2) of the *Civil Procedure Rules* 2010 suffices.
 27. In view of the foregoing, I find and hold that the suit beforehand is not only premature and misconceived, but also constitutes an abuse of the due process of the court.
 28. In any event, I find and hold that parties are bound by their pleadings and hence the Plaintiff herein cannot be heard to abandon his pleaded case before the court and to endeavour to resort to what learned counsel for the Plaintiff termed “election of the cause of action to canvass”.



29. In this respect, it is pertinent to reference the provisions of Order 2 Rule 6 of the *Civil Procedure Rules* 2010. [See also *Dakianga Distributors Ltd v Kenya Seed Company Ltd* (2015) eKLR.
30. In short, I find and hold that the suit beforehand is a candidate for striking out and the same be and is hereby struck out with costs to the Defendant.
31. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 4TH DAY OF FEBRUARY 2025

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma – Court Assistant.

Mr. Mwirigi Bryan for the Plaintiffs.

Miss Mugo for the Defendant.

