Muthama & 3 others v Estate of John Gakunga Njoroge & 2 others (Environment & Land Case E006 of 2023) [2024] KEELC 3307 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3307 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E006 OF 2023

CA OCHIENG, J

APRIL 4, 2024

BETWEEN

BONIFACE MUTHAMA ..... 1ST APPLICANT

PHILIP MUTISO ..... 2ND APPLICANT

SAMSON NDETO ..... 3RD APPLICANT

EDWARD MWANIA ..... 4TH APPLICANT

AND

THE ESTATE OF JOHN GAKUNGA NJOROGE ..... 1ST RESPONDENT

JOHN MUINDE GAKUNGA ..... 2ND RESPONDENT

JOHN KINYANJUI GAKUNGA ..... 3RD RESPONDENT

RULING

1. What is before Court for determination is the 3rd Respondent's Notice of Preliminary Objection dated the 16th November, 2023, to the Notice of Motion Application dated the 23rd October, 2023, premised on the following grounds:-

    a. The matter is *res judicata* as the issue of ownership of Kitanga Settlement Scheme Plot No. 27 was determined in HCFP & A No. 256 of 1995 (Machakos) in the matter of the *Estate of John Gakunga Njoroge (Deceased)* and Civil Appeal No. 140 of 2017 (Nairobi) *Beth Mueni v John Kinyanjui Gakunga and Anor*.

    b. This application offends the provisions of Section 7 of the *Civil Procedure Act* and is an abuse of the Court process.

c. The Applicants are the sons of Beth Mueni who was a litigant in both cases stated above and they merely intend to circumvent the cause of justice and continue to deprive the beneficiaries of the Estate what is rightfully their inheritance.

2. The Notice of Preliminary Objection was canvassed by way of written submissions.

Submissions

3. The Respondents' in their submissions contend that this suit is *res judicata* as the Applicants' have brought it by claiming a portion of Kitanga Settlement Scheme Plot No. 27 measuring 7 acres which belonged to the Estate of *John Gakunga Njoroge (deceased)*. Further, that the 2nd and 3rd Respondents are Administrators of the said Estate having filed Machakos Hcf P&A 256 of 1995 wherein Beth Mueni (Applicants' mother) had filed an Application seeking to revoke the Grant as she claimed the 7 acres from Kitanga Settlement Scheme Plot No. 27. They claim the objection proceedings were heard and determined on 16th November, 2015. Further, that Beth Mueni lodged an Appeal to the Court of Appeal, which upheld the High Court decision vide its Judgment delivered on 8th March, 2023. They insist that the Applicants' though not parties in the two suits are bound by the decision of the High Court and Court of Appeal as the issue therein was whether the parties claiming were rightfully and legally on the property known as Plot No. 27 Kitanga. They argue that the Applicants' have not come to court with clean hands and are merely disguising themselves as new parties in order to prosecute this case with the full knowledge that there were previous suits. To support their arguments, they relied on Section 7 of the *Civil Procedure Act* as well as the following decisions: *Abok James Odera v John Patrick Machira* Civil Application No. Nai 49 of 2001; *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR; *Lotta v Tanaki* (2003) 2 EA 556; *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal No. 62 of 1958; Apondi v Canuald Metal Packaging (2005) 1EA 12; *Mburu Kinyua v Gachini Tuti* (1978) KLR 69: (1976 – 80) KLR 790; Churanji Lal & Co. v Bhaijee (1932) 14 KLR 28; *Siri Ram Kaura v MJE Morgan* Civil Application No. 71 of 1960 (1961) EA 462 and *Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* (2014) eKLR.

4. The Applicants in their submissions insisted that the instant suit is not *res judicata*. They contend that they have occupied the suit land openly, without secrecy, without permission from the registered owners and with the intention to have the land for a continuous uninterrupted period of 35 years. They argue that the issues they have raised in the Originating Summons have never been raised previously. They deny that they have ever litigated or presented the claim herein to any court of competent jurisdiction. Further, that parties herein are entirely different and it cannot be said they are litigating under the same titles. They insist that the Respondents have not adduced any evidence to establish the nexus between the two parties. They reiterate that the issues which were tried in the succession cause were entirely different from the nature of the present suit. To support their averments, they have relied on Section 7 of the *Civil Procedure Act* as well as the following decisions: *The Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR and *Abok James Odera v John Patrick Machira* Civil Application No. Nai 49 of 2001.

Analysis and Determination

5. Upon consideration of the instant Notice of Preliminary Objection including the Originating Summons, respective Affidavits and rivalling submissions, the only issue for determination is whether this suit including the Notice of Motion Application dated the 23rd October, 2023 are *res judicata*.

6. The legal provisions governing the doctrine of *res judicata* is set out at Section 7 of the *Civil Procedure Act* which stipulates inter alia:

> " 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 can 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."

7. The *Civil Procedure Act* also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:-

> " 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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."

8. In Mulla, *Code of Civil Procedure*, 18th Ed 2012 at page 293, it describes the doctrine of *res judicata* as follows:-

> " The principle of finality or *res judicata* 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 reopened 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 reopened and has little to do with the merit of the decision."

9. I note in Machakos HCSC No. 256 of 1995 *Estate of John Gakunga Njoroge (deceased)* the Interested Parties therein filed two Applications dated the 30th November, 2004 and 31st December, 2004 respectively where they claimed to have purchased portions of land from Plot No. 27 Kitanga Settlement Scheme. One of the Interested Parties' was Beth Mueni who is the mother to the Applicants' herein. Justice Edward M. Muriithi in his Ruling dated the 16th November, 2015 dismissed the two Applications and directed the parties to negotiate a settlement with the administrators including beneficiaries from whom they purchased the land from. Beth Mueni being aggrieved with this decision lodged an Appeal vide Nairobi Civil Appeal No. 140 of 2017 *Beth Mueni v John Kinyanjui Gakunga & John Muinde Gakunga* whose fulcrum revolved around the suit land. The Court of Appeal in its Judgment delivered on 8th March, 2023 dismissed the Appeal and noted that Beth Mueni bought land belonging to a deceased person's Estate, without a confirmed Grant and advised her to seek a refund

of the purchase price. I note the instant Originating Summons was filed on 2nd October, 2023 after the decision from the Court of Appeal. From the two decisions, the 2nd Respondent contends that the instant suit is hence *res judicata*, which fact is disputed by the Applicants.

10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that;-

> " 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

11. In order to rely on the doctrine of *res judicata*, the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), held 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 to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:
>
> (i) the matter in issue is identical in both suits;
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> (ii) the parties in the suit are the same;
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> (iii) sameness of the title/claim;
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> (iv) concurrence of jurisdiction; and
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> (v) finality of the previous decision."

12. On perusal of the Originating Summons, I note the Applicants' omitted to include Beth Mueni who is their mother and was the purchaser of the suit land. I note they now seek to be declared owners of seven (7) acres of land from Kitanga Settlement Scheme Plot No. 27 through adverse possession. Further, they have confirmed that the said property belonged to the Estate of John Gakunga Njoroge and made reference to Machakos Succession Cause No. 256 of 1995. They have however avoided to explain that they entered the suit land by virtue of being the children of Beth Mueni.

13. In the case of *Nancy Mwangi t/a Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* (2014) eKLR, J Gikonyo while dealing with the issue of *res judicata* stated 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 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 new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and others* 92001) 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 Vs 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..."

14. Based on the facts before court while relying on the legal provisions, I have cited above as well as associating myself with the decisions quoted, I find that the dispute over the suit land was the matter in issue revolving around the claim by Beth Mueni in the aforementioned Machakos Succession Cause as well as the Court of Appeal case. Even though the parties are not the same, however there is sameness of title/claim. Further, there was concurrence of jurisdiction of the High Court and ELC and finality on Beth Mueni's claim in both the High Court and Court of Appeal respectively.

15. I opine that the Applicants' claim is still the same as Beth Mueni's claim but the only thing they have done is cloth the cause of action in a different apparel but if the same is dissected it remains similar. The fresh Applicants' by suing the Respondents' have merely added themselves to the same cause of action so as to keep their mother's claim for John Gakunga's land alive. In the circumstance, I find that the Applicants' claim over the suit land was already heard and determined by Courts' of competent jurisdiction.

16. To my mind I am of the view that the Applicants cannot purport to bring forth another claim over the suit land now revolving around adverse possession after their mother's claim as a purchaser was dismissed. It is trite that Litigation must come to an end and in the current scenario, the Applicants are trying to re-introduce the same cause of action against the Respondents.

17. It is against the foregoing that I find that the instant suit is indeed *res judicata*.

18. In that regard, I find the instant Notice of Preliminary Objection merited, and will proceed to strike out the Notice of Motion Application dated 23rd October, 2023 including the Originating Summons dated the 23rd October, 2023 and amended on 9th November, 2023 with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF APRIL, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Nzuva for Respondents

Torotwa for Applicants

Court Assistant – Simon/Ashley