



REPUBLIC OF KENYA



KENYA LAW
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**Keriempere & 2 others v Gitau (Environment & Land Case
E009 of 2024) [2024] KEELC 6810 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E009 OF 2024
MN GICHERU, J
OCTOBER 9, 2024**

BETWEEN

SOLOKA KERIEMPERE 1ST APPLICANT

SERAH MAUNDU MUSONGO 2ND APPLICANT

JUSTUS MUTISO 3RD APPLICANT

AND

ANTONY KARIUKI GITAU RESPONDENT

RULING

1. This ruling is on the notice of motion dated 13/2/2024. The motion which is by the plaintiffs is brought under Sections 1A, 1B, 63(e), 3 and 3A of the *Civil Procedure Act*, Orders 40 rules 1, 2 and 3 and 50 rules 1 and 2 of the *Civil procedure Rules* and all other enabling provisions of the law.

The motion seeks one main prayer as follows.

3. Pending the hearing and determination of this suit, the court do issue a temporary injunction prohibiting, stopping and restraining the respondent whether by himself or through his servants, employees and agents or otherwise howsoever from executing or in any way acquiring any benefit under or by virtue of the judgement in Kajiado ELC No. 63 of 2020 dated 7/3/2023, the subsequent decree issued on 12/7/2022 and the warrants of eviction issued on 7/3/2023.
4. The costs of the application be borne by the defendant.
2. The motion is based on eight grounds and is supported by an affidavit sworn by the second plaintiff, Serah Maundu Musongo dated 13/2/2024 which has three (3) annexures. The gist of the above material is as follows. Firstly, the 2nd and 3rd applicants are the legal beneficial owners of LR Loitoktok/ Kimana – Tikondo/6238 which they lawfully purchased from the 1st plaintiff *vide* a sale agreement



dated 10/11/2009. Secondly, the 2nd and 3rd defendants have been in occupation of the suit land since they bought it. Thirdly, the defendant through falsehoods and material non-disclosure obtained a judgment and decree in ELC 63 of 2020 at Kajiado allowing him to evict the 2nd and 3rd defendants from the suit land. Fourthly, the defendant did not serve the defendants as a result of which the case proceeded ex parte. Fifthly, on 24/1/2024, the 2nd and 3rd plaintiffs were evicted from the suit land and their structures demolished.

For the above and other reasons, they pray for the orders as per the motion.

3. The motion is opposed by the defendant who has sworn a replying affidavit dated 26/2/2024 in which he replies as follows. Firstly, he is the registered owner of suit land which he purchased from the first plaintiff on 4/7/2017. Secondly, upon purchase he took immediate possession. Thirdly, the 2nd and 3rd plaintiffs trespassed on the suit land knowing very well that the defendant was the registered owner. Fourthly, he warned the 2nd and 3rd plaintiffs to vacate the land several times but they did not heed his warning as a result of which he filed ELC No. 63 of 2020 at Kajiado which was concluded in his favour. Fifthly, it is improper for the plaintiffs to file the current suit since the dispute has already been decided by a court of competent jurisdiction.
4. In addition to the replying affidavit sworn by the defendant the defendant's counsel has filed a notice of preliminary objection dated 26/2/2024 in which he states as follows.
 1. The suit and the application dated 13/2/2024 are incompetent and incurably defective.
 2. This court lacks jurisdiction to hear and determine the suit in view of ELC Kajiado 63 of 2020 hence the plaintiffs' suit offends the provisions of Section 7 of the *Civil Procedure Act*.
 3. The suit is misconceived, incompetent, a non starter, bad in law and a palpable abuse of the court process and ought to be dismissed with costs.
5. Counsel for the parties filed written submissions and identified the following issues.
 - i. Whether the suit is res judicata?
 - ii. Whether it is proper to file a fresh suit or to proceed under the earlier suit, i.e. ELC 63 of 2020.
6. I have carefully considered the motion in its entirety including the pleadings so far, the supporting affidavit, the replying affidavit and the notice of preliminary objection. I make the following findings. On the first issue, I find that this suit is res judicata because Kajiado ELC 63 of 2020 concerned the same subject matter, that is to say, LR Loitoktok/Kimana-Tikondo/6238 and the same parties, that is to say Serah Maundu Musongo, Justus Mutiso and Antony Kariuki Gitau who were all parties in earlier suit and who are all parties in this one, the only addition being the 1st plaintiff Solonka Keriempere.

Section 7 of the *Civil Procedure Act* provides 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, 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”.

The parties in this case being the same as in the earlier suit, the subject matter having been the same and there being a judgment issued by a court of competent jurisdiction, it was not open to the plaintiffs to file a fresh suit. Section 7 of the *Civil Procedure Act* stands in the way of the plaintiffs forbidding them from filing a fresh suit.



7. On the second issue, I find that the proper way to proceed was under Order 10 [Civil Procedure Rules](#) which deals with consequences of non-appearance, default of defence and failure to serve. Under rule 11 of the Order, it is provided as follows,

"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just".

This avenue of Order 10 [Civil Procedure Rules](#) is still open to the parties. The avenue that is closed is the one through this suit.

For the above stated reasons, I dismiss the notice of motion dated 13/2/2024, uphold the preliminary objection dated 26/2/2024 thereby dismissing this suit. There will be no order as to costs because the plaintiffs may still continue in Kajiado ELC No. 63 of 2020 which is still open to them.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 9TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

