



REPUBLIC OF KENYA



KENYA LAW
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**Ruigu & 2 others v Tanui & 5 others (Environment & Land Case
E013 of 2023) [2024] KEELC 6493 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E013 OF 2023**

CA OCHIENG, J

OCTOBER 3, 2024

BETWEEN

**MARTIN RUIGU 1ST PLAINTIFF
NICHOLAS NJOROGE NJENGA 2ND PLAINTIFF
JENNIFER WANGUI NJENGA 3RD PLAINTIFF**

AND

**SOLOMON K TANUI 1ST DEFENDANT
WILSON I KIMANI 2ND DEFENDANT
JIMMY KIMARU 3RD DEFENDANT
MOSES K SAINA 4TH DEFENDANT
REGISTRAR OF TITLES (NAIROBI REGISTRY) 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. What is before Court for determination is the 1st to 4th Defendants' Notice of Motion Application dated the 11th March, 2024 brought pursuant to Section 7 of the *Civil Procedure Act*. They seek the following Orders:-
 1. That this Honourable Court has no jurisdiction to entertain this suit.
 2. That the Honourable Court be pleased to strike out the suit herein as it is res judicata.
 3. That the Honourable Court do issue a permanent restraining order against the Plaintiffs, their agents, servants and or any other person claiming the suit property under them for claiming ownership, trespassing, entering into or in any manner interfering with the 1st, 2nd, 3rd and



4th Defendants ownership and quiet possession of the suit parcel of land known as LR No. 7340/58 North of Athi River in Machakos County.

4. That costs be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Wilson Kimani. The 1st to 4th Defendants contend that the 2nd Plaintiff herein was a Defendant in Mavoko CM ELC No. 6 of 2019 *Ngelauta Self Help Group v Nicholas Njenga & Another*. They claim the fulcrum of dispute in the lower court suit was LR No. 7340/58 which is the suit land herein. Further, that the lower court suit was heard and determined. They aver that the 2nd Plaintiff herein and another, had filed a Counter-claim in the aforementioned lower court suit. Further, that the aforementioned case was determined and the parties therein did not appeal or review the said decision. He insists that substantially and materially, the instant suit is res judicata. He avers that the Plaintiffs' seek to overturn the impugned Judgment through this suit. He argues that by dint of the said Judgment, having the same documents of ownership as the 2nd Plaintiff save for different names, the 1st and 3rd Plaintiffs are estopped from claiming ownership of the suit property or filing a fresh suit in pursuit of such a claim. He reiterates that they have legal ownership of the suit land and it is the Plaintiffs' who have trespassed thereon. Further, that this suit amounts to an abuse of the court process and the 2nd Plaintiff has sworn a false Affidavit deposing that there has been no previous litigation over the suit land.
3. The Plaintiffs opposed the instant suit by filing a Replying Affidavit sworn by Nicholas Njoroge Njenga where he deposes that LR No. 7340/58 ceased existing in 2009. He contends that the Plaintiffs herein who were Defendants in Mavoko CM ELC No. 6 of 2019 had no obligation to disclose to the Plaintiffs therein that they were in error as far as their suit was concerned. He explains that the subject matter of this suit is LR Nos. 7340/471; 7340/472; 7340/473 and 7340/474 respectively. He claims the Defendants' herein forged a title deed in their favour on 15th December, 2022 known as LR No. 7340/58. He insists that parties in the lower court were different from parties herein hence the suit is not res judicata.
4. The 1st to 4th Defendants filed a Supplementary Affidavit sworn by Wilson Irungu Kimani, where he reiterated their averments and insisted that the Plaintiffs are dishonest. He explained that in the Lower Court, the 2nd Plaintiff testified that he purchased LR No. 7340/58 from the beneficiaries of the estate of the late Kiarie Kirimire. Further, according to that piece of evidence, in 2019, the said title was still intact as there is no mention of the subdivision in the lower court.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the Notice of Motion Application dated the 11th March, 2024 including the respective Affidavits and rivalling submissions, at this juncture the only for determination is whether this suit is res judicata and if it should be struck off.
7. The 1st to 4th Defendants have sought for this suit to be struck off on the claim that it is suit res judicata by dint of the Judgment in Mavoko CM ELC No. 6 of 2019 *Ngelauta Self Help Group v Nicholas Njenga & Another*, where the 2nd Plaintiff was a Defendant therein. Further, that the fulcrum of dispute in the said suit revolved around the suit land herein. They contend that the Judgment in the lower court was never reviewed nor appealed from.
8. From perusal of the Court Record, I note the 1st to 4th Defendants though duly served, failed to file their Statements of Defence to controvert the Plaintiffs' averments but instead opted to file the instant Application.



9. In the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine

10. While the Supreme Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR stated that:-

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.” [Emphasis added]

11. Similarly, in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

12. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiffs’ averments, the claim remains unopposed. Insofar as the Applicants’ have raised important points, I note the issues raised require evidentiary proof. I opine that there are several contested facts which include two competing titles to the suit land including the period subdivision was undertaken as claimed by the Plaintiffs, which cannot be determined at this juncture. Further, two of the Plaintiffs’ herein were never parties in the lower court suit. To my mind, the 1st to 4th Defendants should have expressly rebutted the Plaintiffs’ averments in a Statement of Defence and explained the root of their title. In the foregoing, while associating myself with the decisions I have cited, it is my considered view that the instant Application is premature as it is not anchored on any Defence.

13. In the circumstances, I find the instant Notice of Motion Application unmerited and will strike it out with no order as to costs.

14. I direct the Defendants to file and serve their respective Statements of Defence within the next twenty-one (21) days from the date hereon.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Parties absent

Court Assistant – Simon/Ashley

