



Kimani v Mhasibu Housing Company Limited & another (Environment & Land Case E038 of 2021) [2023] KEELC 16772 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E038 OF 2021**

**BM EBOSO, J
MARCH 1, 2023**

BETWEEN

VIRGINIA WANJIKU KIMANI PLAINTIFF

AND

MHASIBU HOUSING COMPANY LIMITED 1ST DEFENDANT

KIGWE LIMITED 2ND DEFENDANT

RULING

1. On 1/12/2021, Virginia Wanjiku Kimani [the plaintiff] took out an originating summons dated 30/11/2021, inviting this court to determine the following questions:
 - a. Has the plaintiff's continuous possession of Land Parcel No 10823/13 for twelve years earned the plaintiff – ownership of the 16 acres of the entire portion of land earned the plaintiff title by adverse possession against either the 1st and 2nd defendants or against both of them? [sic]
 - b. Did the 2nd defendant have power to sell or transfer to the 1st defendant, or to any other person, the entire of land parcel No L.R 10823/13 including the 16 acres the plaintiff has been and still is, in possession of by the time the 2nd defendant purported to sell and or transfer the said parcel of L.R 10823/13 from itself any other person? [sic]
 - c. Should the court declare the plaintiff to have obtained title to 16 acres out of the entire portion of L.R No 10823/13?
 - d. Should the court cancel the registration of the 1st defendant as proprietor of the entire 100 acres the said L.R No 10823/13 is comprised, sever the 16 acres out of the said parcel and order subdivision of the said parcel of land into two



portions one for the plaintiff comprising of 16 acres and the other for the 1st defendant comprising of 84 acres.

- e. Pending the hearing and determination of this suit, should the honourable court restrain, order, injunct, the 1st defendant from evicting the plaintiff from or in any way dispossessing the plaintiff of or in any other way dealing with, disposing of or charging, selling, the 16 acres the plaintiff is in possession of out of L.R No 10823/13?
- f. Which party is to pay the costs of this originating summons?

2. Simultaneous with the originating summons, the plaintiff brought a chamber summons application dated 30/11/2021, seeking an interlocutory injunction restraining the two defendants against evicting her from, selling, charging, disposing, subdividing or in any other way dealing with Land Reference Number 10823/13 [hereinafter referred to as “the suit property”]. The plaintiff contended that she was entitled to 16 acres out of the suit property under the doctrine of adverse possession.
3. Upon being served with the originating summons and the chamber summons, the 1st defendant filed a preliminary objection dated 24/1/2022, inviting the court to strike out the suit on the ground that the suit was res judicata. The 1st defendant identified Nairobi ELC Case No 454 of 2013 and Thika ELC Case No E032 of 2021 as the two suits that rendered this suit res judicata.
4. Subsequent to that, on 29/6/2021, the 1st defendant brought a notice of motion dated 13/6/2022, inviting the court to strike out this suit on the same ground as those that were outlined in the preliminary objection. The application and the preliminary objection are the two items that fall for determination in this ruling. I will dispose the preliminary objection first.
5. The doctrine of res judicata is contained in Section 7 of the *Civil Procedure Act* which 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, 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.”

6. What constitutes a preliminary objection was defined by Law JA in the Court of Appeal case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696 at page 700 as follows:

“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”.

7. Newbold VP, in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696, defined what constitutes a preliminary objection in the following words:

“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 points by way of preliminary objection does



nothing but unnecessarily increases cost and, on occasion, confuse the issues. This improper practice should stop.”

8. The preliminary objection under consideration was predicated on the ground of res judicata. In the absence of pleadings by the plaintiff disclosing clear elements of res judicata, the 1st defendant would be expected to place before the court evidence of pleadings and determinations relating to the preceding suit or suits. That would call for a formal application and a supporting affidavit exhibiting pleadings and determinations relating to the preceding suit(s). It is not surprising therefore that when the 1st defendant realized the folly of using a preliminary objection to raise issues that required ascertainment through evidence, it quietly brought the notice of motion dated 13/6/2022 and urged the court to determine the merits of both the preliminary objection and the motion.
9. I will not spend the court’s valuable time focusing on the merits of the preliminary objection because it was inappropriately invoked as a platform for canvassing the question of res judicata. Based on the principle in *Mukisa Biscuits Co v West End Distributors Ltd* [supra], it is clear that the factual issues that are raised in the preliminary objection require ascertainment through evidence. They cannot be ventilated on the platform of a preliminary objection. Consequently, the preliminary objection attracts an order striking it out without venturing into its merits. The notice of preliminary objection dated 24/1/2022 is accordingly struck out.
10. The court is constrained to observe that it is extremely irrationale for the 1st defendant to invite the court to determine both the preliminary objection and the notice of motion while aware that the issues raised in the two items are the same and the relief sought is also the same. The 1st defendant will bear costs of the preliminary objection. I now turn to the application.
11. The notice of motion dated 13/6/2022 was supported by an affidavit sworn on 13/6/2022 by Morris Njagi, the Chief Executive Officer of the 1st defendant. It was predicated on the grounds set out on the face of the application. It was canvassed through written submissions dated 29/8/2022. In summary, the 1st defendant contends that this suit is res judicata by dint of the fact that there have been two preceding suits relating to the suit property, namely: (i) *Milimani ELC No 454 of 2013 - Kigwe Limited v Violet Ngugi & Others*; and (ii) *Thika ELC E032 of 2021 Celine Wambui Kigwe v Kigwe Limited*. The 1st defendant contends that *Milimani ELC Case No 454 of 2013* was determined through a Judgment rendered by Komingoi J on 22/6/2021 while *Thika ELC E032 of 2021* was struck out by Kemei J on 9/12/2021. The 1st defendant adds that because the two suits involved members of the Kigwe family, the plaintiff must have been aware of them and privy to them.
12. The plaintiff opposed the application through her replying affidavit sworn on 14/7/2022 and written submissions dated 28/11/2022. Her case is that this suit is not res judicata because she was not a party to either of the two suits alluded to by the 1st defendant. She adds that she did not litigate through or under any of the parties to the two preceding suits. She denies the 1st defendant’s contention that members of the Kigwe family are colluding to frustrate the 1st defendant. She further contends that her claim in this suit is for orders of adverse possession, which none of the parties in the preceding suits sought. It is her position that through information from Celine Kigwe and David Waiganjo respectively she learnt that the Judgment in *Miliman ELC Case No 454 of 2013* and the ruling in *Thika ELC Case No E032 of 2021* were the subjects of pending appeals in the Court of Appeal. She urges the court to dismiss the application.
13. I have considered the application, the response to the application, and the parties’ respective submissions on the application. I have also considered the relevant legal frameworks and jurisprudence. The single question to be answered in the notice of motion dated 13/6/2022 is whether this suit is res judicata.



14. Our superior courts have, in a line of pronouncements, made elaborate expositions on the doctrine of res judicata. The Court of Appeal gave a rendition of the doctrine in *John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR in which it cited verbatim the following paragraph in *Henderson Vs Henderson* (1843) 67 ER 313:

“.....where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

15. In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR the Court of Appeal made the following exposition on the doctrine:

“The doctrine of res judicata has been explained in a plethora of decided cases. In the recent case of the Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
- b) The former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

16. The Court of Appeal explained the rationale of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.” (emphasis mine)



17. The test to be applied in disposing the single issue in the application under consideration is whether disposal of Milimani ELC Case No 454 of 2013 and Thika ELC Case No E032 of 2021 by the respective trial courts constitute sufficient grounds for invoking the doctrine of res judicata against this suit. I will first focus my analysis on Milimani (Nairobi) ELC Case No 454 of 2013.
18. The 1st defendant/applicant did not exhibit pleadings relating to Nairobi ELC Case No 454 of 2013. They only exhibited the Judgment. The plaintiff exhibited the plaint dated 15/4/2013 drawn by M/s Mbiyu Kamau & Co Advocates. Although she alluded to the “defendant’s pleadings” at paragraph 8 of the affidavit, none was exhibited.
19. A perusal of the evidential materials presented to the court does not disclose that the plaintiff in this suit [Virginia Wanjiku Kimani] was a party to Milimani ELC Case No 454 of 2013. Secondly, there is no clear evidence that she was aware of the suit. The plaintiff in the said suit was Kigwe Limited who is the 2nd defendant in the present suit. Thirdly, in Milimani ELC Case No 454 of 2013, the claimant [Kigwe Ltd] alleged fraud in the acquisition of the title held by the 1st defendant in the present suit [Mhasibu Housing Company Ltd]. The plaintiff in the present suit has mounted a claim of adverse possession.
20. From the above brief analysis, it does emerge that the plaintiff in the present suit is not one of the parties who litigated in Milimani [Nairobi] ELC Case No 454 of 2013. It does also emerge that the key issue to be determined in the present suit relates to adverse possession while the issue that fell for determination in Milimani ELC Case No. 454 of 2013 was the allegation of fraud in the acquisition of the title held by the 1st defendant. In the above circumstances, and in the absence of clear evidence that there is collusion between the plaintiff and those who litigated against the 1st defendant in Milimani ELC Case No 454 of 2013, it would be unsafe to shut the plaintiff out of the seat of justice on account of the judgment in Nairobi ELC Case No 454 of 2013. I now turn to Thika ELC Case No E032 of 2021
21. My perusal of the evidential materials relating to Thika ELC Case No E032 of 2021 does not reveal that the plaintiff in the present suit was privy to the said suit. She was not a party to the suit. A perusal of the pleadings in Thika ELC Case No E032 of 2021 reveals that Celine Wambui Kigwe sued Kigwe Limited [as 1st defendant] and Mhasibu Housing Company Ltd [as 2nd defendant]. The two key issues in Thika ELC Case No E032 of 2021 related to fraud and adverse possession by Celine Wambui Kigwe.
22. It similarly does emerge from the above analysis that the plaintiff in the present suit was not one of the litigants in Thika ELC Case No E032 of 2021. It does also emerge that the cause of action was not wholly the same as the cause of action in the present suit.
23. What I discern from the notice of motion dated 13/6/2022 is an invitation to strike out this suit on the basis of suspicion that there might be collusion between some members of the Kigwe Family. An order striking out a suit in limine is a draconian recourse because it shuts a litigant out of the seat of justice without the benefit of a full trial. It is handed down sparingly and in clear cases. It cannot be handed down on the basis of suspicion.
24. Indeed, Madan J.A expressed the above view in *D T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* (1980 eKLR) in the following words:

“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 live by amendments, 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.”

25. The 1st defendant urged the court to strike out this suit for the same reasons that Kemei J invoked to strike out Thika ELC No E032 of 2021. My view is that the facts relating to Thika ELC Case No E032 of 2021 are distinguishable because there was evidence that Celine Wambui Kigwe was aware of and actively participated in Milimani ELC Case No 454 of 2013 by filing an application for joinder. She failed to prosecute the application for joinder only to bring a new suit after a final Judgment had been rendered in the said suit. That is not the position in the present suit.
26. For the above reasons, I do not find merit in the notice of motion dated 13/6/2022. The result is that the preliminary objection dated 24/1/2022 is struck out. Secondly, the notice of motion dated 13/6/2023 is dismissed for lack of merit. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF MARCH 2023

B M EBOSO

JUDGE

In the Presence of: -

Ms Wacuka for the Plaintiff

Ms Kori for the 2nd Defendant

Court Assistant: Ms Osodo

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