



**Langat v Langat (Environment & Land Case 342 of 2012)
[2023] KEELC 16050 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 342 OF 2012
JM MUTUNGI, J
MARCH 1, 2023
(FORMERLY NAKURU HCCC NO. 271 OF 2012)
IN THE MATTER OF L.R. NO. 13287/178
AND
IN THE MATTER OF SECTION 38(1) OF THE
LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

BETWEEN

ELIZABETH LANGAT PLAINTIFF

AND

STANLEY KIPKEMBOI LANGAT DEFENDANT

RULING

1. Before me for determination are two applications; one filed by the Defendant, Stanley Kipkemboi Langat dated 24th January 2022; and the other by the Plaintiff, Elizabeth Langat dated 11th February 2022.
2. In the application by the Defendant, he prays for the following orders:-
 - a. That this Honourable Court be pleased to strike out the instant suit for being an abuse of Court process and to order that the earlier filed suit as between the parties serialized as NAKURU ELC NO. 342 OF 2012 (Formerly HCC NO. 271 of 2012) ELIZABETH LANGAT VS STANLEY KIPKEMBOI LANGAT is the only suit as between the parties herein that shall proceed to full hearing.
 - b. That this Honourable Court be pleased to strike out the instant suit for not disclosing any reasonable cause of action as against the Defendant for being resjudicata to a former suit



serialized as NAKURU CMCC NO. 793 of 2012 STANLEY KIPKEMBOI LANGAT VS ELIZABETH LANGAT.

- c. That this Honourable Court be pleased in the alternative to strike out the Originating Summons and all other pleadings of the Plaintiff/Respondent dated 10th August 2012 for being frivolous, vexatious and an abuse of the Court process.
 - d. That costs of this application as well as costs of this suit be provided for.
3. The application is supported on the grounds set out on the body of the application and the affidavit sworn in support by the defendant. The plaintiff filed a replying affidavit in opposition to the application dated 4th April 2022.
 4. The plaintiff in her application prays for the following orders:-
 - a. That this Honourable Court be pleased to order that the instant suit be consolidated with Nakuru ELC No. 342 of 2012 (Formerly HCC No. 271 of 2012) Elizabeth Langat Vs Stanley Kipkemboi Lagat.
 - b. That this Court be pleased to make such further orders as it may deem fit towards effectual, expeditious and complete adjudication of all issues in the disputes hereof.
 - c. That the costs of this application be provided for.
 5. The plaintiff's application is supported on the grounds set out on the face of the application and the affidavit sworn in support by the plaintiff. The defendant filed a replying affidavit in opposition to the plaintiff's applications on 28th April 2022.
 6. The two applications were canvassed by way of written submissions by the parties as directed by the Court. The parties in their submissions reiterated the facts as outlined in their respective affidavits sworn in support of the applications. In order to contextualize the two applications, I will set out, albeit in brief, the facts of the matter.
 7. The plaintiff instituted the present suit on 24th July 2012 as Nakuru HCCC No. 271 of 2012 which was later Renumbered as Nakuru ELC No. 342 of 2012 (present suit). In the suit, the plaintiff averred she was the rightful proprietor and allottee of L.R. No. 13287/127 and that the defendant had acquired title to land parcel L.R. No. 13287/178 which was a subdivision from L.R. No. 13287/127 fraudulently. The plaintiff sought to be declared as the owner of L.R. No. 13287/127 and the title issued to the defendant to be declared null and void. The plaintiff without awaiting determination of Nakuru ELC No. 342 of 2012 (formerly Nakuru HCCC No. 271 of 2012) on 10th August 2012 filed a new suit by way of an Originating Summons (O.S) serialized as Nakuru HCCC No. 304 of 2012 (now Renumbered as Nakuru ELC No. 343 of 2012). In the Originating Summon, the plaintiff averred that she had become entitled to be registered owner of the title held by the defendant over L.R. No. 13287/178 by reason of adverse possession. In her application, the plaintiff avers that the two suits Nakuru ELC No. 342 of 2012 and Nakuru ELC No. 343 of 2012 raise similar issues; involve the same subject matter, and are between the same parties and hence should be consolidated and heard together for convenience.
 8. The defendant for his part contended the plaintiff was engaged on a fishing expedition in that she filed a suit Nakuru ELC Case No. 342/2012 predicated on fraud on the part of the defendant in acquiring land parcel N. L.R. No. 13287/178 (a sub-division from L.R. No. 13287/127) and soon thereafter filed Nakuru ELC No. 343 of 2012 premised on the doctrine of adverse possession. The defendant contends that the plaintiff cannot under one suit claim the defendant had fraudulently acquired title



to the suit land and in yet in another suit claim she had acquired title to the land by the defendant through adverse possession.

9. The defendant further avers that the dispute between the parties has previously been litigated and finally determined in a former suit namely Nakuru CMCC No. 793 of 2012 where the defendant was the plaintiff and the present plaintiff was the defendant. As such, the defendant contends that the suit by the plaintiff is resjudicata and the same ought to be struck out.
10. I have carefully considered the twin applications by the defendant and the plaintiff together with their respective submissions and the issues for determination are firstly, whether in the face of Nakuru ELC No. 342 of 2012 which was filed earlier in time, Nakuru ELC No. 343 of 2012 (O.S) filed later was sustainable and if so, whether the two suits ought to be consolidated. Secondly, whether the suit is resjudicata by reason of Nakuru CMCC No. 793 of 2012.
11. Section 6 of the Civil Procedure Act precludes the filing of subsequent suits between the same parties on the same subject matter and similar facts where there is a pending suit on the matter, while Section 7 of the Civil Procedure Act bars the filing of suits between the same parties and on similar facts where there has been a previous suit between the same parties and/or persons claiming through them where the issues have been finally determined by a Court of competent jurisdiction.
12. Section 6 of the Civil Procedure Act provides as follows:-
 - “6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”.
13. Section 7 for the Act, codifies the Res-judicata doctrine and provides as follows:-
 - “7. Res-judicata
No Court shall try any suit 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”.
14. In the present matter, it is quite evident that the two suits Nakuru ELC No. 342 of 2012 and Nakuru ELC No. 343 of 2012 (formerly Nakuru HCC No. 271 of 2012 and Nakuru HCC No. 304 of 2012 - O.S)) respectively filed by the plaintiff apparently in quick succession related to the same subject matter and between the same parties. The defendant in an earlier suit Nakuru CMCC No. 793 of 2012 commenced vide a plaint dated 11th July 2012 had sued the plaintiff in the instant suit claiming the plaintiff had blocked a public road of access to his (defendant’s) land parcel L.R. No. 13287/178 in respect of which he (defendant) was the registered owner and held a certificate of title. The defendant in the lower Court suit sought a mandatory order that the plaintiff opens the public access road that she had closed and a permanent injunction restraining the plaintiff from in any manner dealing with or interfering in any manner with L.R. No. 13287/178.



15. The plaintiff at the time of filing the instant suit Nakuru ELC No. 342 of 2012 on 24th July 2012 acknowledged the suit by the defendant in the lower Court and the fact that the defendant held a certificate of title though the plaintiff claimed the defendant had acquired the title to the property fraudulently.
16. In the Originating Summons Nakuru HCCC No. 304 of 2012 (O.S) that the plaintiff filed on 13th August 2012 against the defendant, the plaintiff sought to be declared as owner of L.R. No. 13287/178 measuring 3.921 Hectares by virtue of having adversely possessed the same for a period of over 12 years.
17. The defendant has argued that the plaintiff could not properly institute the suit ELC No. 342 of 2012 where she challenges the defendant's title as having been fraudulently acquired and therefore null and void and soon thereafter in less than a month instituted another suit ELC No. 343 of 2012 claiming to be entitled to the same land by virtue of adverse possession. I agree with the defendant's submissions that the plaintiff cannot on one hand challenge the defendant's title for having been fraudulently acquired and on the other hand seek to be declared as having acquired the same title under the doctrine of adverse possession. The doctrine of adverse possession would be inapplicable where the title of the registered owner is under challenge. The adverse possession doctrine is premised on the assumption that the person shown to be the registered owner was regularly registered except that his/her title has become extinguished through prescription. I agree with the observations of Angote, J. in the case of Haro Yonda Juaje Vs Sadaka Nzenge Mbauro & Another (2014) eKLR where he stated:-

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the plaintiff's averment is that the title which was issued to the defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation

Oloa, J. reiterated the same position in the case of Johnson Thiaka Nyaga Vs James Kinyua Nyaga and 5 others where he stated as follows:-

“In a claim of adverse possession however, it is my view which I also took in the case of Gichira Ngungi Vs Betty Mithamo & Others – Kerugoya ELC Case No. 471'B' of 2013 cited by the plaintiff's counsel that the claimant must concede that indeed the registered proprietor of the land in dispute is the true owner. The claimant cannot be in adverse possession of what he considers to be his own land. It is important therefore the parties seeking another's land, by way of adverse possession must recognize the other party as the registered owner thereof before laying a claim thereto by way of adverse possession”.

18. In the present (ELC 342 of 2012), the plaintiff clearly is challenging the defendant's title on the basis that the defendant acquired the title fraudulently. Indeed, the plaintiff claims that the portion the defendant acquired title to constituted part of her property. In the circumstances, the plaintiff could not turn around and lay claim to the parcel of land under the doctrine of adverse possession. The plaintiff having instituted a suit against the defendant claiming he had obtained title to the parcel of land fraudulently could not properly file a fresh suit claiming the same title under the adverse possession doctrine. The suit ELC No. 343 of 2012 is unsustainable and was clearly filed in abuse of the process of the Court and I accordingly order the same struck out.



19. Having reached the determination that the Originating Summons (ELC 343 of 2012) was unsustainable and having struck out the same, it is apparent that the plaintiff's application for consolidation cannot be granted. The application is ordered dismissed.
20. The issue that remains for determination is whether the present suit (ELC No. 342 of 2012) is resjudicata by virtue of the decision/determination in Nakuru CMCC No. 793 of 2012. I have perused the record of the lower Court case and it is evident that the plaintiff who was the defendant never defended the suit and that the suit proceeded ex-parte. The Magistrate's Court issued a mandatory order compelling the plaintiff to open up the access road that she had closed and further issued a permanent injunction restraining the plaintiff from interfering with the defendant's quiet possession of land parcel L.R. No. 13287/178. From the pleadings, the issue of fraud and/or issue of adverse possession were not canvassed before the lower Court. The Magistrate's Court never made a determination as to the ownership of the disputed property and the issue of fraud pleaded in the present suit was not pleaded and/or considered by the lower Court. In the premises, the doctrine of resjudicata, would in my view, be inapplicable in the present circumstances. It is therefore my determination that the present suit is not resjudicata and that the parties need to move with speed to have this matter which has been in court for a decade determined finally on merits.
21. The net result is that the defendant's Notice of Motion dated 24th January 2022 is partially successful in the sense that the Originating Summons being ELC No. 343 of 2012 (formerly Nakuru HCC No. 304 of 2012) is ordered struck out with costs to the defendant. The plaintiff's Notice of Motion dated 11th February 2022 is ordered dismissed with no order as to costs. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST **DAY OF MARCH, 2023.**

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J.M. MUTUNGI

ELC JUDGE

<i>NKR ELC NO. 342 OF 2012</i>	0
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