



**Kiharu & 2 others v Muchene (Environment & Land Case
E017 of 2023) [2023] KEELC 18791 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E017 OF 2023**

**LN MBUGUA, J
JULY 12, 2023**

BETWEEN

JAMES M. KIHARU 1ST PLAINTIFF

JUDITH WAMBUI MUCHENE 2ND PLAINTIFF

RACHAEL NDUTA MWAURA 3RD PLAINTIFF

AND

RAOUL EMMANUEL MUCHENE DEFENDANT

RULING

1. Title Number Dagoretti / Uthiru 884 is in contention by the parties herein who are all family members. According to the plaint dated January 24, 2023, the Plaintiffs identify themselves as the children of Caxton Muchiri Muchene and Hottensiah Gichiru Mukiri (both deceased), while the Defendant is their nephew, a son to their elder brother-Geoffrey John Muchene (deceased). The Plaintiffs claim that together with the Defendant, they are entitled to 1/5 of the suit land each since registration of Geoffrey John Muchene (deceased) as owner of Dagoretti/Uthiru/884 was encumbered by customary trust.
2. The Plaintiffs filed a Notice of Motion application dated January 24, 2023 which is for determination before this Court. They are seeking temporary orders, restraining the Defendant by himself, his servants, agents and/or whomsoever acting on his instructions from trespassing onto, selling, transferring or disposing off Title Number Dagoretti/Uthiru 884 pending the hearing and determination of this suit.
3. The application is opposed by the Defendant vide his Replying Affidavit sworn on April 24, 2023. He avers that the issues raised for determination in the plaint upon which the instant application is premised have been determined in Milimani ELC No 368 of 2017 Raoul Emmanuel Muchene & Another v Rachael Nduta Mwaura. He points out that in that suit, the Defendant therein who is the 3rd Plaintiff herein besides filing her statement of defence raised a counterclaim with same prayers such



as the ones raised in this suit thus the instant suit is res judicata, the other court having rendered its decision on October 19, 2022. He adds that he is in the process of executing a decree in that matter.

4. On June 12, 2023, the Court gave directions on the filing of written submissions. There was however no compliance with the said directions.
5. I have considered the rival arguments advanced herein. The issue for determination is whether this suit is resjudicata to the suit ELC 368 of 2017, if not, whether a temporary injunction should be granted as prayed.
6. I find that in the case [*Muchene v Mwaura \(Environment & Land Case 368 of 2017\) \[2022\] KEELC 13722 \(KLR\) \(19 October 2022\)*](#) (Judgment), the 3rd Plaintiff herein who was the Defendant in that matter was enjoined from interfering with LR No Dagoreti / Uthiru / 884. In arriving at the finding, the court stated that;

' Contrarily, the Defendant herein has failed to establish and prove her twin claims in respect of Customary Trust and Adverse Possession.'

7. In the circumstances, the issue of whether registration of the Defendant herein as owner of Title Number Dagoretti/Uthiru 884 was encumbered by customary trust has already been determined by the court. Adding the 1st and 3rd Plaintiffs as parties herein does not negate the fact that a finding was reached by the court on the issue.
8. It appears that the Defendant was in the process of executing the decree in Environment & Land Case 368 of 2017 when the Plaintiffs filed this suit and failed to disclose the existence of the former suit. Such conduct is barred under Section 7 of the [*Civil Procedure Act*](#).
9. In the case of [*Siri Ram Kaura v MJE Morgan, CA 71/1960 \(1961\) EA 462 cited in Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende \[2022\] eKLR*](#), the Court of Appeal stated that;

' It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.'

10. In [*Gladys Nduku Nthuki v Letsbeho Kenya Limited; Mueni Charles Maingi \(Intended Plaintiff\) \[2022\] eKLR*](#), the court stated that;

' However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else'.

11. I find that this suit is resjudicata to the case of *Muchene v Mwaura* (Supra). In the circumstances, I need not delve into the merits of the application dated January 24, 2023. The said application and the entire suit are hereby struck out with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Amaiyo for Defendant/Respondent

Court Assistant: Eddel

