



**Kamau v Mbiro (Sued as the legal administrator of the Estate of Eddah Wanjiru Kamau (Deceased)  
(Environment & Land Case 96 of 2019) [2023] KEELC 20539 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20539 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT & LAND CASE 96 OF 2019**  
**JM MUTUNGI, J**  
**OCTOBER 9, 2023**  
**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22**  
**-AND-**  
**IN THE MATTER: OF A CLAIM FOR ADVERSE POSSESSION**  
**PURSUANT TO SECTION 37 & 38 OF LIMITATION OF**  
**ACTIONS ACT**  
**-AND-**  
**IN THE MATTER OF SECTION 7(D) OF THE LAND ACT 2012**  
**-AND-**  
**IN THE MATTER OF: ORDER 37, RULE 7 OF THE CIVIL PROCEDURE**  
**RULES 2010**  
**-AND-**  
**IN THE MATTER OF TITLE NUMBER MITI MINGI/MBARUK**  
**BLOCK 5/970(C)**  
  
**BETWEEN**  
**PAUL KAMAU ..... PLAINTIFF**  
  
**AND**  
**ANN NJOKI MBIRO (SUED AS THE LEGAL ADMINISTRATOR OF THE**  
**ESTATE OF EDDAH WANJIRU KAMAU (DECEASED) ..... DEFENDANT**



## JUDGMENT

1. The plaintiff commenced this suit by way of an Originating Summons dated 26<sup>th</sup> august 2019, seeking the following orders:
  - a. A declaration that the defendant's rights to recover land parcel No. Miti Mingi/Mbaruk Block 5/970 (Kianjoya C) measuring approximately 0.0393 HA (suit property) is barred under the Limitations of Actions Act Cap 22 laws of Kenya, and her title/claim extinguished on the grounds of adverse possession.
  - b. The Plaintiff be registered as the proprietor of the suit land to hold in trust for his beneficiaries in place of the Defendant.
  - c. An order to issue restraining the Defendant by herself, agents, servants and/or employees from interfering with the Plaintiffs' peaceful possession and occupation of the suit land, in any manner whatsoever and/or howsoever.
  - d. The Deputy Registrar and/or the Executive Officer of the Environment and Land Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the entire suit land in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary transfer instrument.
  - e. Costs
  - f. Further and/or other orders that court may deem fit and expedient.
2. The Originating Summons was predicated upon the annexed affidavit of Paul Kamau and on the grounds that:
  - a. The Plaintiff purchased the suit land from which he erected a matrimonial house and resided on the suit land for more than Twenty years.
  - b. The Plaintiff knew that he was the legal and beneficial owner of the suit land until the year 2014 when he was discovered that the suit land had been registered in the name of Eddah Wanjiru Kamau (deceased) without any justification or reason.
  - c. The Plaintiff had been in exclusive, open and un-interrupted occupation and possession of suit land since 1997.
  - d. Despite the registration of the land in the name of the proprietor, the Plaintiff continued to occupy the suit land with the knowledge of the Defendant and as such the Defendant's rights over the suit land have been extinguished by effluxion of time.
  - e. The Plaintiff's occupation over the suit land has therefore been adverse to the interests of the defendant and the Plaintiff has acquired prescriptive rights over the portion of the suit land.
  - f. The Plaintiff's interest(s) over the suit land merits registration since the Plaintiff's right and/or interests, are vindicated vide Section 28 of the [Land Registration Act](#).
3. The Defendant filed her Replying Affidavit dated 7<sup>th</sup> October 2019 in opposition to the Originating Summons and inter alia averred as follows:



- a. The Plaintiff had failed to disclose the existence of a suit over the same subject property filed by the deceased being Nakuru CMCC No. 283 of 2015 in which she had obtained orders restraining the Plaintiff from constructing permanent structures, fencing and or in any way interfering with the suit land.
  - b. That the said order had not been appealed from and/or challenged and the Defendant signified her intention and the right to raise a preliminary objection to have the suit struck out.
  - c. The Defendant intimated the suit in CMCC No. 283 of 2015 was coming up for Judgment on 22<sup>nd</sup> October 2019.
  - d. The Plaintiff could not claim legal ownership of the suit property by way of adverse possession and as a purchaser at the same time against the Defendant.
  - e. The Plaintiff had not demonstrated when he abandoned his right as a purchaser and/or why he did not raise the issue of adverse possession when he responded to the suit before the Magistrate's Court.
4. The Defendant further raised a Counterclaim in her Replying Affidavit in response to the Originating summons in which she reiterated the averments of her Replying Affidavit and inter alia stated as follows:
- a. That Eddah Wanjiru Kamau the deceased is the registered owner of the suit land.
  - b. The Plaintiff was a stranger to the Defendant and that he was a trespasser in private property and the court should declare him a trespasser.
  - c. The Plaintiff should demolish any structure he may have elected and be stopped from interfering with the suit land.
  - d. The Honorable Court has no jurisdiction to hear and determine this suit the same being res judicata.
5. The Defendant by way of Counterclaim prayed for judgment to be entered against the plaintiff for:
- a. A declaration that the Defendant's deceased mother was the owner of the suit land which is duly registered in her name.
  - b. An order of eviction to issue against the plaintiff
  - c. Costs of the suit
  - d. Any other relief as the Court deems fit to grant in the circumstances.
6. On 29<sup>th</sup> September 2020 counsel for the Plaintiff informed the Court that the application for injunction that had been filed simultaneously with Originating Summons had been overtaken by event as the Defendant had executed the order of eviction issued in the suit before the Lower Court.
7. The Court directed that the present status quo be maintained and observed and specifically directed the Defendant not to sell, transfer or charge the property pending the hearing and determination of the suit. The parties were also directed to comply with Order 11 of the Civil Procedure Rules and exchange their bundles of documents and witness statements.
8. On 30<sup>th</sup> October 2020, the Plaintiff filed his list of documents dated 6<sup>th</sup> October 2020, which included the copies of death certificate of Eddah Wanjiru Kamau, Letters of Administration Ad litem, and receipts issued by Njenje Agencies while on 11<sup>th</sup> November 2020, the Defendant filed her list of



documents which included copies of certificate of title registered in the name of Eddah Wanjiru Kamau, pleadings in Nakuru CMCC NO. 283 of 2015, Interim Order dated 25<sup>th</sup> March 2015, Judgment in Nakuru CMCC No. 283 of 2015, warrants of evictions, letter dated 28<sup>th</sup> July 2020 communicating results of eviction and photos of the scene after eviction was carried out.

9. The suit was heard on 31<sup>st</sup> January, 2022 when the Plaintiff, his two witnesses and the Defendant testified and closed their respective cases. The Plaintiff testified as PW1 and he testified that he knew the deceased as the registered owner of the suit property. It was his evidence that he purchased the suit land through Njenje Agencies who were acting as agents for Eddah Wanjiru Kamau (deceased). He stated that he was issued with receipts for the payments he made to the Agents towards the purchase price which he exhibited in the bundle of documents.
10. The Plaintiff stated that he knew the suit property was owned by Eddah Wanjiru Kamau (deceased) and that it was the daughter of the deceased and the agents who showed him the plot. He further stated that he entered into the plot in 1999 following the purchase and constructed a temporary mud house thereon and planted trees. It was the Plaintiff's further evidence that at the time he bought the suit property, the plot there were no titles as the subdivision process had not been finalized.
11. The Plaintiff further testified that about the years 2012/2013, the Agent promised that he would process the title and he requested to be paid an additional Kenya Shilling 20,000/- for processing of the title, which the Plaintiff stated he did not pay. The Plaintiff stated in 2013 the deceased asked him to avail the Agent he claimed sold him the land but he said the Agent had relocated from where he was operating and he could not trace him.
12. The Plaintiff maintained he was in possession and occupation as at the time the deceased processed the title in her name and that his possession was continuous and uninterrupted for over 15 years and hence he contended he had acquired title to the suit property by virtue of being in adverse possession.
13. The Plaintiff stated that the deceased sued him in Court in Nakuru CMCC No. 283 of 2015 and that he was ordered to vacate from the suit plot after he has been in possession of the land for 16 years.
14. The Plaintiff affirmed that the case before the Lower Court was determined on 21<sup>st</sup> April 2020 declaring him to be a trespasser issued by the Court, and pursuant to an order of eviction he was evicted from the suit property. He insisted that he had been an adverse possessor of the land and urged the Court to grant him the orders he sought in the Originating Summons.

The Plaintiff under cross examination affirmed that as at the time of hearing he had been evicted from the suit property and he was not in occupation. He affirmed the eviction order was issued in Nakuru CMCC no. 283 of 2015 where he had been sued by the deceased for being a trespasser in the suit property.

15. Michael Kariuki Kithumbu and Daniel Mwangi Kamau were called by the Plaintiff as PW-2- and PW3 respectively. PW2's evidence was to the effect that he assisted the Plaintiff in constructing a house in Pipeline Estate in 1999 and that he knew the Plaintiff resided in the plot until when he moved to another plot. PW-2- stated he owned a plot within Pipeline estate and was therefore a neighbor to the Plaintiff. PW-3- likewise testified that he resided in Pipeline estate and knew the Plaintiff as a neighbor and that the Plaintiff had been in occupation of the suit plot until when he was evicted pursuant to a Court order
16. DW1, ANNE NJOKI MBIRO, stated that she was the Administrator of the estate of Eddah Wanjiru Kamau (deceased) and in testimony she adopted the contents of her Replying Affidavit dated 7<sup>th</sup>



- October 2019 as her Evidence in Chief and relied on the list of documents dated 7<sup>th</sup> October 2019 produced as defendant's exhibits 1-8.
17. She further in her evidence stated that the plaintiff was evicted from the suit property pursuant to a Court order and that she was presently in possession and occupation of the suit property. She stated that at the time the instant suit was filed, there was another case pending in Court being Nakuru CMCC No. 283 of 2015 and that Judgment in the case was delivered on 21<sup>st</sup> April 2020 and that no appeal had been preferred against the Judgment. She stated that she obtained an eviction order and the Plaintiff was duly evicted from the suit property.
  18. The parties filed their written submissions pursuant to the Court's directions.  
The Plaintiff filed his submissions on 28<sup>th</sup> February 2022 and raised three issues for determination.
    - a. Whether or not the Plaintiff had established ownership by way of adverse possession.
    - b. Whether or not the Plaintiff had acquired title by way of adverse possession
    - c. Whether or not the Plaintiff was entitled to the prayer in the Originating Summons.
  19. The Plaintiff submitted that Section 7 of the *Limitation of Actions Act*, Cap 22 provided that "an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
  20. The Plaintiff relied in the Cases of Wilson Njoroge Kamau Versus Nganga Muceru Kamau (2020) eKLR and Paul Kamande Gicheha Versus Jacob Kinyua (2018) eKLR. The Plaintiff argued that since he had been in continuous and uninterrupted possession of the suit plot for a period of over 12 years the Defendant's title thereof became extinguished and he (the Plaintiff) was entitled to be registered as the owner of the suit land.
  21. On the issue of whether this suit was res judicata, the Plaintiff submitted the issue of res judicata had not been raised at the Lower Court and that there was no limitation period as to when a claim for adverse possession could be instituted as long as the 12-year period had elapsed.
  22. The Defendant filed her written submissions on 4<sup>th</sup> April 2022 and raised two issues for determination as follows:-
    - a. Whether the Plaintiff has made out a claim of adverse possession against the respondent.
    - b. Costs of suit
  23. The Defendant submitted that the instant suit by the Plaintiff claiming adverse possession was filed when there was already a case pending between the same parties over the same subject matter where the Defendant was claiming for a declaration of trespass against the Plaintiff and the eviction of the Plaintiff. The Defendant contended that the decision of the Magistrate's Court declaring the Plaintiff a trespasser and ordering his eviction was not appealed against and was executed and the Plaintiff evicted from the suit land. The Defendant thus submitted the instant suit was rendered Res judicata.
  24. I have considered the Originating Summons, the defendant's Replying Affidavit, the evidence adduced and the rival submissions of the parties, the main issues for determination in this suit are:
    - a. Whether this Court lacks jurisdiction on the basis that there has been previous proceeding in Nakuru CMCC No. 283 of 2015 between the parties which rendered the instant suit res judicata.



- b. Whether the Plaintiff has acquired the suit property by way of adverse possession and if so, whether he should be registered as the owner thereof in place of the respondent.
25. The substantive law on Res Judicata is codified in Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides that:

“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”.

The Black’s law Dictionary 10<sup>th</sup> edition defines “res judicata” as

“An issue that has been definitely settled by Judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

Steve Ouma, in A Commentary on the *Civil Procedure Act* Cap 21, Second Edition at page 38 has explained Section 7 to mean:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been matter directly and substantially in issue in such suit.”

26. The doctrine of res judicata has two rationales. First, that hardship to the individual that should litigate twice for the same cause is distasteful. Second, that it is in the public interest that there should be an end to litigation. Fundamentally, every suit must be hinged on a cause of action, and there being no cause of action to sustain the second suit for the reason of it merging in the previous Judgment, the subsequent suit cannot stand.
27. In the Case of Kennedy Mokuia Ongiri Versus John Nyasende Mosloma & Florence Nyamoita Nyasende (2022) eKLR, the Court held that ...in order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;
- what issues were really determined in the previous Application;
  - whether they are the same in the subsequent Application and were covered by the Decision.
  - whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.
28. In the Case of Njangu Versus Wambugu and another Nairobi HCCC No. 2340 of 1991 (Unreported), Kuloba J, as he then was, stated that:
- ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’



29. These principles were restated by Hon. Justice Odunga in Republic – Vs – Attorney General and Another Exparte James Alfred Koroso, where he expressed himself thus on the issue of access to Justice:

“Access to Justice cannot be said to have been ensured when persons in whose favour Judgments have been decreed by Courts or Tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

30. The Learned Judge in the Case of Kennedy Mokuu Ongiri (Supra) further held that

“...Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity. “

31. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists orders in Nakuru CMCC No. 283 of 2015 between Ann Njoki Mbiro Versus Paul Kamau wherein the issue of trespass and legal ownership of the subject suit land was heard and determined by the Court. Further, the process of execution was carried out and the plaintiff herein was evicted from the suit land.

32. During cross examination, the Plaintiff herein admitted that he was evicted pursuant to a Court Order in Nakuru CMCC No. 283 of 2015, where he had been sued by Eddah Wanjiru Kamau (now deceased). He further confirmed that he defended the suit through his advocates and also admitted that he did not claim adverse possession in the Lower Court. Judgment in the case was delivered on 21/4/2020, which he never appealed against.

33. The Court appreciates that as at the time the present suit was filed on 27<sup>th</sup> August 2019 as per the Court stamp embossed on the Originating Summons, the Defendant had long before on 19/3/2015 filed Nakuru CMCC No.293 of 2015 against the Plaintiff. In the Magistrate’s court suit the Defendant herein claimed against the Plaintiff herein the following orders:-

- a. An order that the Defendant is a trespasser as the Plaintiff is the registered owner with a valid Title Deed:
- b. An order of eviction do issue against the Defendant, his agents, servants, employees and/or any other person by whatsoever name claiming through the Defendant.

34. The suit before the Magistrate’s Court was between the same parties as in the present suit and involved the same subject matter being the suit property. Though none of the parties raised the issue as a preliminary objection the matter pending before the Magistrate Court was without doubt subjudice in terms of Section 6 of the *Civil Procedure Act* Cap 21 Laws of Kenya which 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.”



35. The issue of subjudice and Res judicata go to the jurisdiction of the Court to sustain a suit and may be raised by a party at any stage and/or Suo moto by the Court itself. In the present matter, a suit was pending before a Court of competent jurisdiction on the same subject matter. The Plaintiff in filing the present matter never even acknowledged the existence of the suit before the Magistrate's Court. In my view the Plaintiff acted in abuse of the Court process in filing the present suit when there was already an ongoing suit in another Court on the same subject matter and between the same parties.
36. While I think I have said enough to demonstrate that this suit is doomed to fail on the basis of the twin principles of Res judicata and subjudice, I am constrained to comment on the application of the doctrine of adverse possession upon which the Plaintiff has grounded his case.
37. The doctrine is predicated on the basis that a claimant has had continuous and uninterrupted possession of the subject land for a period of 12 years or more. If the possession is interrupted by acts of dispossession, eviction and/or filing of a suit for trespass and/or eviction the period stops running. Where a registered owner asserts his rights by filing a suit for eviction in Court, time stops running. However in the same suit where trespass /eviction is claimed against an adverse possessor such a person can successfully set up a defence of being an adverse possessor which would more or less operate as a Counterclaim. The Court of Appeal in the Case of Githu -vs- Ndeete (1984) KLR 776 held as follows:-

“ Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; (see Chesire's Modern Law of Real property, 11<sup>th</sup> Edition at P 894”)

The Court of Appeal in the Case of Benson Mukuwa Wachira -vs- Assumption Sisters of Nairobi Registered Trustees (2016) eKLR observed thus:-

“ --- as regards assertion of title, it is not enough for a proprietor of land to merely write to a trespasser (to vacate). A letter by the proprietor even if it be through an Advocate or the Chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict, or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stops the time from running.”

38. In the present matter the Defendant instituted a suit for the eviction of the Plaintiff before the Magistrate's Court. The Defendant was determined to get the Plaintiff out of her land. The Plaintiff did not plead adverse possession and did not appeal against the Judgment that was rendered by the Magistrate's Court declaring him a trespasser and ordering his eviction. The Judgment is a final Judgment which was duly executed. That rendered the present suit Res judicata.
39. The upshot is that after carefully evaluating and analysing the evidence, I hold and find that the Plaintiff has not proved his case on a balance of probabilities. I dismiss the suit with costs to the Defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAKURU THIS 9<sup>TH</sup> DAY OF OCTOBER 2023.**

**J. M. MUTUNGI**

**ELC - JUDGE**

