



**Munyi v Muturi & another; Muturi & 2 others (Plaintiff); Kimani & 74 others (Defendant)  
(Environment & Land Case 83 of 2016) [2023] KEELC 21934 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21934 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 83 OF 2016  
A KANIARU, J  
NOVEMBER 6, 2023**

**BETWEEN**

**DORIS NJUTHE MUNYI ..... PLAINTIFF**

**AND**

**JOSPHAT NJIRU MUTURI ..... 1<sup>ST</sup> DEFENDANT**

**HARRISON NYAGA MUTURI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JOSPHAT NJIRU MUTURI ..... PLAINTIFF**

**HARRISON NYAGA MUTURI ..... PLAINTIFF**

**LAZARO MBOGO ..... PLAINTIFF**

**AND**

**PETER MBURU KIMANI ..... DEFENDANT**

**LUCY WAITHERERO MWANGI & 73 OTHERS ..... DEFENDANT**

**RULING**

1. I am called upon to determine a motion on notice dated 07.04.2022 and filed on 09.05.2022. The motion has been brought by the 43<sup>rd</sup> (A) and 43<sup>rd</sup> (B) defendants in the counter claim – Peter Mburu Kimani & Lucy Waitherero Mwangi (herein referred to as the applicants) as against the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Plaintiffs in the counterclaim – Josphat Njiru Muturi, Harrison Nyaga Muturi & Lazaro Mbogo respectively (herein referred to as the respondents) . It is expressed to be brought under section 4(1) and 7 of the *Limitations Act* (Cap) 22, Section 1A, 1B & 3A of the *Civil Procedure Act* 2010 and Rule 51(1) of the *Civil Procedure Rules*. The application is seeking the following orders;



- a. This Honourable Court be pleased to strike out with costs the counterclaim herein as against the 43<sup>rd</sup> A & B Defendants/Applicants herein for being statute barred.
  - b. Without prejudice to prayer (a) above this Honourable Court be pleased to dismiss with costs the suit herein as contained in the counterclaim as against the 43<sup>rd</sup> A & B defendants/applicants for being an abuse of the court process.
  - c. This Honourable Court be pleased to order that the restriction registered against land parcel Mbeti/Gachoka/473 be removed and/or withdrawn forthwith.
  - d. The costs of this application be provided for.
2. The application came with a supporting affidavit sworn on 07.04.2022 and the grounds for bringing it are mainly that the Respondent's case in the counterclaim is statute barred as the same was brought after 12 years of Registration and issuance of the Certificate of title of a portion of the suit land being Mbeti/Gachoka/473 of which the two Defendants are beneficiaries. That the same parcel of land was not among the parcels of land that were the subject of objection proceedings No. 20 of 1973 that is being relied upon by the plaintiff's in the counterclaim.
  3. The Application was responded to by the parties in their respective Replying Affidavits and it was agreed that the application be disposed of by way of written submissions.
  4. The 43<sup>rd</sup> Defendants (A) & (B) filed their submissions on 16.01.2023. They mainly reiterated the content of their Supporting Affidavit and the grounds set out above. The same position was reinforced by their counterparts in the Counterclaim being the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29, 30<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 34<sup>th</sup>, 37<sup>th</sup>, 38<sup>th</sup>, 39<sup>th</sup>, 40<sup>th</sup>, 42<sup>nd</sup>, 46<sup>th</sup>, 47<sup>th</sup>, 49<sup>th</sup>, 57<sup>th</sup>, 61<sup>st</sup>, 62<sup>nd</sup>, 63<sup>rd</sup>, 68<sup>th</sup>, 70<sup>th</sup> and the 74<sup>th</sup> Defendants who filed their submissions on 13.03.2022.
  5. The Respondents in their submissions filed on 07.03.2023 took the position that the court had already made a determination on the reliefs sought by the Applicant's in their application herein through a court ruling that was delivered on 22.11.2018. The said ruling was in respect of a Preliminary Objection that had been brought by the Plaintiff in the main suit – Doris Njuthe Munyi - where she was seeking similar orders as the ones being sought by the Applicants herein. Therefore the notice of motion is said to be *Res Judicata*.
  6. I have considered the application, the responses made to it, and the rival submissions. Without belabouring too much on the issues herein, there was a Preliminary Objection that had been raised by the Plaintiff in the main suit – Doris Njuthe Munyi - which was filed on 16.02.2018 for reasons that the Respondent's Counterclaim is statute barred and offends the provisions of Sections 4(1) and 7 of the *Limitations of Actions Act*. That the said Counterclaim is also *Res - Judicata* and offends the provisions of Section 7 of the *Civil Procedure Act*. The court heard the parties on the objection and in its ruling delivered on 22.11.2018 found no merit in the Preliminary Objection and consequently dismissed it.
  7. It is clear that the Applicants in the instant application are seeking the same orders under the same provisions of law but what they've done is that they are now trying to separate themselves from the case herein by claiming that their portion of land being Mbeti/Gachoka/473 is not part and parcel of the suit land. This cannot be true because from the Counterclaim, the Respondent's case is that they are laying claim to the whole land parcel originally referred to as Block 1209 Gachoka Adjudication Section. This is the land which they say was illegally subdivided and registered in other parties names, who were not the lawful beneficiaries. Mbeti/Gachoka/473 was part of that larger parcel. The Respondent's can therefore not separate themselves from the suit herein nor the Ruling issued by the court regarding the orders being sought. To this end, I must associate myself with the



court's determination on the issue of limitation. To deliberate on it again would amount to re-opening and deliberating on issues that a court of competent jurisdiction has already pronounced itself on. I lack the jurisdiction to do so.

8. The law under Section 7 of the *Civil Procedure Act* Cap 21 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.”

9. In the cases of *E.T vs Attorney General & Another* (2012) eKLR the court held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.” Emphasis mine.

10. Again in the case of *Omondi vs National Bank of Kenya Limited and Others* (2001) EA 177 as quoted in the above case the court held that;

“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another Nairobi* HCCC No. 2340 of 1991 (unreported) where he stated, ‘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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’ Emphasis mine.

11. On whether the court should dismiss or strike out the suit herein as contained in the counterclaim against the Applicants for being an abuse of the court process, the Applicant's in their submissions submitted that the Respondent's are basing their claim solely on the award in Objection Cause 20/73 of which land parcel No. Mbeti/Gachoka/473 was not a subject matter and that the said parcel of land only came to be a subject in Appeal No. 77/75 which appeal was dismissed. They claim that if this court were to entertain the suit herein, it would wrongly be purporting to exercise appellate jurisdiction against the award in 77/75. They therefore submit that the suit as contained in the counterclaim amounts to an abuse of the court process. I am of the humble view that whether land parcel No. Mbeti/Gachoka/473 was part of the of the award in Objection Cause 20/73 or whether the same only became a subject in Appeal 77/75 is a matter that I am not able to competently make a determination on at this stage of the proceedings. This can only be determined during trial. Since the Respondent's are laying claim to the said land parcel, the onus will be on them to prove that it was part and parcel of the suit land herein originally referred to as Block 1209 Gachoka Adjudication Section and whether the same was subject of Objection Case No. 20/73. The court would be short circuiting justice if it does not give the respondents an opportunity to do that.



12. Again, the court of Appeal pronounced itself on the issue of abuse of court process in the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229 as follows:-

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.”

I am not persuaded by the Applicant’s that the Respondent’s Counterclaim has any of the above elements which would amount to abuse of the court process. I am therefore not inclined to dismiss the said Counterclaim.

13. It is also necessary to appreciate the jurisprudence available on striking out a matter or dismissing it without first hearing it. It is not an option that the court resorts to readily. In the *Co-operative Merchant Bank Ltd vs George Fredrick Wekesa*, the Court of Appeal stated thus:

“Striking out a pleading is a draconian act, which may only be resorted to in plain cases ... whether a case is plain or not is a matter of fact ... since oral evidence would be necessary to disprove what the parties say ...”

To me, the case before me is not plain. More specifically, what the applicants are alleging is not obvious.

14. Further, in *Yaya Towers Limited vs Trade Bank Limited (in liquidation)*: Civil Appeal No. 35 of 2000, the court expressed itself as follows:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial ...”

15. May be it is additionally useful to go far back in time to glean what past judicial luminaries said on the issue of striking out a suit. In *D.T. Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & Another*: [1980] eKLR, Madan J.A. (as he then was) stated as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly 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 full facts of a case before it.”

16. Finally, on this issue, I am guided by the wisdom of the Court of Appeal in *Peter Ngugi Kabiri vs Esther Wangari Githinji & Another* [2015] eKLR And *Kutima Investments Limited vs Muthoni Kibara & Another* [2015] eKLR where it was clearly emphasized that it is a fundamental right for the parties to be heard on merits.



17. On the last issue whether the restriction registered against land parcel Mbeti/Gachoka/473 should be removed and/or withdrawn, the provisions of law with regard to restrictions are to be found in the [Land Registration Act](#), specifically Section 76, 77 and 78 which provides;

76. Restrictions.

- (1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
  - (a) for a particular period;
  - (b) until the occurrence of a particular event; or (underlining mine)
  - (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

77. Notice and effect of restriction.

- (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.
- (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.

78. Removal and variation of restrictions.

- (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to



be removed, varied, or other order as it deems fit, and may make an order as to costs.

18. From the above provisions of law, it is clear that the Land Registrar is the person who registers a Restriction. It is also evident that restrictions are not supposed to endure indefinitely on a title and that the Registrar of their own volition or on application by an interested party, or the court on notice to the Registrar may order a restriction to be removed. In this case the Restriction is said to have been registered on 27.04.2021 and the same indicates that “no dealings until Embu ELC Case No. 83 of 2016 pending in court is heard and determined.” Has Embu ELC Case No. 83 of 2016 been heard and determined? The answer is obviously no. Have the applicants demonstrated why the court should order removal of the said Restriction prematurely? Again the answer is no. In fact, in their written submissions, none of the parties addressed the issue of removing the said Restriction. It was the Applicant’s duty to demonstrate why the Restriction ought to be removed as they are parties seeking for the said orders but they failed to do so. I must therefore reject their claim.
19. The upshot of the foregoing is that I dismiss the Applicant’s Notice of Motion dated 07.04.2022 in its entirety with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A.K. KANIARU**

**JUDGE**

In the presence of Njeru Ithiga for plaintiff in the main suit; plaintiffs in the counter-claim present in person; Mureithi Z.D. for M/s Mbwiria for 3<sup>rd</sup> plaintiff in the counter-claim. Kamunda Andrew for Kamunda Daniel for 3<sup>rd</sup> to 7<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup>, 21<sup>st</sup>, 26<sup>th</sup> to 32<sup>nd</sup>, 34<sup>th</sup>, 37<sup>th</sup> to 40<sup>th</sup>, 42<sup>nd</sup>, 46<sup>th</sup>, 47<sup>th</sup>, 49<sup>th</sup>, 57<sup>th</sup>, 61<sup>st</sup> to 63<sup>rd</sup>, 68<sup>th</sup>, 70<sup>th</sup> and 74<sup>th</sup> defendants.

Rose Njeru for the defendants in the main suit who are 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the counter-claim.

M/s Waithera Mwangi for 43<sup>rd</sup> A and 43<sup>rd</sup> B defendant/Applicants in the counter claim.

