



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 6 OF 2020 (OS)

MUIRURI WAINAINA1ST PLAINTIFF/APPLICANT

AGATHA WAMBUI WAINAINA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

JOSHUA KINYUA KIARIE (Administrator of the estate of JOYCE

WAMAITHA (Deceased)DEFENDANT/RESPONDENT

RULING

1. By their Originating Summons dated 3rd February 2020, Muiruri Wainaina and Agatha Wambui Wainaina (*the Plaintiffs/Applicants*) pray for orders *inter alia*:

(a) That the Plaintiffs/Applicants have acquired land acres measuring 0.86 Ha. and 0.57 Ha. respectively of land parcel LR No. Nyeri/Uaso-Nyiro/207 by way of adverse possession having lived on the said parcel of land since the year 1984 without interruption; and

(b) That the Plaintiffs/Applicants as the persons who occupy the ground to the suit lands should be registered as owners of areas measuring 0.86 Ha and 0.57 Ha respectively to be hived from the said LR No. Nyeri/Uaso-Nyiro/207 and the same be added to their parcels of land being LR Nos. Nyeri/Uaso-Nyiro/205 and 206 or in the alternative they be issued with separate titles of the area having acquired the same by way of adverse possession.

2. Filed contemporaneously with the Originating Summons is a Notice of Motion application similarly dated 3rd February, 2020 wherein the two Applicants pray for a temporary order of injunction restraining the Defendant/Respondent from interfering with their land parcel numbers Nyeri/Uaso-Nyiro/205 and 206 and/or any portions that the Applicants occupy on land parcel number Nyeri/Uaso-Nyiro/207 pending the hearing and determination of the suit.

3. The application which is supported by an affidavit sworn by the 1st Plaintiff – Muiruri Wainaina – is predicated on the grounds that the Defendant/Respondent has trespassed into the Applicants' parcels of land being LR Nos. Nyeri/Uaso-Nyiro/205 and 206 as well as part of LR No. Nyeri/Uaso-Nyiro/207 which the Applicants have occupied since 1984 thereby denying the Applicants the opportunity of exercising their rights over the properties.

4. The Applicants aver that they purchased the suit land from the Respondent's family and that a title was issued to them and the boundaries were demarcated. It is their case that for more than 34 years, they have lived peacefully on the land and extensively developed the same by building permanent structures thereon. They accuse the Respondent of invading the said parcels of land in the year 2019 and proceeding without any lawful cause to demolish their houses on the purport that the land belonged to himself.

5. The Defendant/Respondent – Joshua Kinyua Kiarie who is sued herein in his capacity as the Administrator of the Estate of Joyce Wamaitha (*Deceased*) is however opposed to the grant of the orders sought. In his Replying Affidavit sworn and filed herein on 10th March, 2020, the Defendant contends that both the application and the suit herein are mischievous, frivolous, vexatious and aimed at embarrassing this Honourable Court while punishing the Defendant with endless litigation.

6. The Defendant avers that parties in this suit were engaged in another suit being Nyeri ELC Case No. 121 of 2014 regarding the same parcels of land where judgment was delivered on 20th February, 2019. The Defendant asserts that the Plaintiffs had pleaded the same matters of adverse possession in the said earlier case and that as such they cannot reintroduce the same issues in the current suit as the same are barred by virtue of Sections 6 and 7 of the Civil procedure Act.

7. It is further the Defendant/Respondent's case that the orders of injunction sought herein are not only misguided but an abuse of the Court process as the boundaries between the parcels of land were fixed through a consent order between the Plaintiffs and the Defendant herein on 10th November, 2015 in the said previous suit. The Defendant avers that following the consent, the District Surveyor visited the land and fixed the boundary and relevant beacons and that he stands to suffer the greatest prejudice if the orders were granted as he had fenced off his portion of the land upon entry of Judgment in the previous suit.

8. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

9. It is the Defendant's case that the Plaintiffs have deliberately failed to disclose relevant facts in this case and that they are out to mislead the Court. According to the Defendant both the suit herein and the instant application are *res judicata* as the parties herein were the very same parties in Nyeri ELC Case No. 121 of 2014 where Judgment has since been issued in regard to the same subject matter herein.

10. The law pertaining to the doctrine of *res judicata* is captured under the provisions of **Section 7 of the Civil Procedure Act** as follows:

“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.”

11. Considering the provisions of the said **Section 7 of the Civil Procedure Act** in **Independent Electoral and Boundaries Commission - vs- Maina Kiai & 5 Others (2017 eKLR)**, the Supreme Court of Kenya observed that for one to invoke the doctrine of *res judicata*, all the elements outlined thereunder must be satisfied conjunctively.

That is:

“(a) The suit or issue was directly and substantially in issue in the former suit;

(b) That 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; and

(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.”

12. In addition to **Section 7 of the Civil Procedure Act**, **Section 28 of the Environment and Land Court Act** also bars this Court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any Court of competent jurisdiction.

13. Applying the stated law and principles to the facts before me, it is not in dispute that the parties herein were the same parties in the said Nyeri ELC Case No. 121 of 2014. A perusal of the judgment and pleadings annexed to the Defendant's Replying Affidavit as filed herein reveals that indeed the Defendant was the 1st Plaintiff in the said case and that the two Plaintiffs herein were the Defendants in that matter. From a perusal of the annexed Plaintiff, it is apparent that the Plaintiff in the said Nyeri ELC Case No. 121 of 2014 had sought an order that LR Nos. Nyeri/Uaso-Nyiro/205, 206 and 207 be re-surveyed and that the boundaries on the ground be fixed by the District Land Registrar Nyeri, in order to give the Plaintiff's parcel 207 the actual physical acreage of 42.87 acres on the ground.

14. It was the Plaintiff's case in that previous suit that the Defendants' parcels of land namely LR No. Nyeri/Uaso-Nyiro/205 and 206 which were a sub-division of the original parcel number LR No. Nyeri/Uaso-Nyiro/127 were much bigger on the ground than the 2.02 Ha. (4.991 Acres) that they ought to be and that the Plaintiff's own parcel of land was much smaller on the ground than its actual measurements.

15. In their Statement of Defence dated 3rd July 2014, the two Defendants had denied the allegations leveled against them and asserted that the said boundary was fixed and marked by a Government Surveyor with the concurrence of all parties.

16. A perusal of those pleadings thus reveals that a cause of action revolves around LR No. Nyeri/Uaso-Nyiro/207 which was the main claim both in the previous suit as well as the present one. It is also clear from the material placed before me that on 10th November, 2015, the parties in the previous suit recorded a consent *inter alia* as follows:

“By consent:

(i) LR No. Nyeri/Uaso-Nyiro/205, 206 and 207 (formerly Nyeri/Uaso-Nyiro 127) be resurveyed and the boundaries on the ground be fixed by the District Land Registrar Nyeri and the District Land Surveyor Nyeri in accordance with the records held by the Land Registry Nyeri

(ii) The date and time for the said site visit to be agreed between the parties, the District Land Registrar and Surveyor but the said exercise to take place and a Report to be in Court not later than 90 days from the issuance of the order.

(iii) ...“

17. It was also clear from the material placed before me that the Report referred to was eventually filed in Court on 9th January, 2018 and that the Report was adopted as the Judgment of the Court on 20th February 2019.

18. The Plaintiffs herein are aware of the said Judgment which has neither been appealed nor set aside. Some five (5) months after the Judgment was delivered, the Plaintiffs filed a Notice of Motion application dated 5th July, 2019 in the previous suit seeking to have the Judgment set aside and/or varied on the grounds that they had not been properly consulted by their then Advocate on record before the consent was recorded in Court on 10th November, 2015.

19. The Plaintiffs also sought orders of injunction against the Defendant herein similar in nature to those sought in the application herein dated 3rd February, 2020. Having considered the said application, the Honourable Lady Justice M.C. Oundo found no basis therefore and dismissed the same in her Ruling dated and delivered on 23rd October, 2019.

20. Arising from the foregoing, it was clear to me that the present suit is *res judicata* and filed in abuse of the Court process. As Majanja J. cautions in **E.T. -vs- Attorney General & Another (2012) eKLR**:

“The Courts must be vigilant to guard against 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 form of a new cause of action the same matter which has been resolved by a Court of competent jurisdiction.”

21. In the matter before me, there was no reason given why the Plaintiffs did not counterclaim for adverse possession in the previous suit. They knowingly recorded a consent to have the suit properties re-surveyed and the boundaries of the same to be fixed appropriately and they cannot now be allowed to file a fresh suit merely because they were dissatisfied by the outcome of the new survey.

22. As was stated in Kampala High Court Civil Suit No. 450 of 1993 – **Nyanza Garage -vs- Attorney General**:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters and creating and or adding to the backlog of cases Courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

23. As I have found herein, the parties in this suit and the previous one are the same. The issues raised in this suit were directly and substantially in issue in the former suit. Those issues were heard and finally determined in the former suit leading to the Judgment of the Honourable Lady Justice L. N. Waithaka delivered in the said former suit on 20th February, 2019.

24. The upshot is that both the suit and the Motion dated 3rd February, 2020 are *res judicata* and filed in abuse of the Court process. I strike out both with costs to the Defendant/Respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 3RD DAY OF FEBRUARY, 2022

In the presence of:

Mr. Muchiri wa Gathoni for the Respondent

Mr. Kahuthu for the Plaintiff/Applicant

Court assistant - Mugambi

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J. O. OLOLA

JUDGE