



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 40 OF 2017**

**(formerly Kisii ELC Case No. 125 of 2016)**

**CHACHA MATIKO MWIRINYI.....PLAINTIFF**

**VERSUS**

**MARTHA MBUSIRO MWITA.....1<sup>ST</sup> DEFENDANT**

**MATIKO MUHIRI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the defendants' preliminary objections to the suit expressed as follows:-

**i. At paragraph 9 of the 1<sup>st</sup> defendant's replying affidavit sworn on 15<sup>th</sup> February, 2018 that the plaintiff's suit is unsuited with regard to acquisition of title to LR NO. BUGUMBE/ISEBANIA/106 (the suit property) by adverse possession and**

**ii. At paragraph 9 of the 2<sup>nd</sup> defendants replying affidavit sworn on 15<sup>th</sup> February, 2018 and filed on even date that the plaintiff's claim is res judicata.**

2. The plaintiff filed this suit by way of an originating summons dated 19<sup>th</sup> November, 2016 under Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 Sections 7 and 38 of the Limitation of Actions Act ( 22 laws of Kenya. He claims to have acquired title to the suit property by prescription and or adverse possession. He has sought determination of issues, among them, declaration that the defendant's right to recover the whole of the suit property is barred under the Limitation of Actions Act (Cap 22) and their title thereto extinguished on the grounds that the plaintiff has openly, peacefully and continuously been in occupation and possession of the property for a period in excess of 12 years.

3. In her replying affidavit, the 1<sup>st</sup> defendant averred, inter alia, that she is the registered proprietor of the suit property which was previously registered in the name of her husband, John Matiko Getangita (Deceased), who had lawfully purchased it from the 2<sup>nd</sup> defendant. That she has lawfully acquired the property by transmission following succession proceedings in Kehancha PM's Court Succession Cause No. 32 of 2013. That her deceased husband sued the plaintiff in Kisii HCCC No. 11 of 1988 whereby the plaintiff was permanently restrained from entering and interfering with the suit property. She denied the plaintiff's claim, termed the suit non suited and sought its dismissal with costs.

4. By his replying affidavit, the 2<sup>nd</sup> defendant stated among others, that on 25<sup>th</sup> January 1977, he got registered as the owner of the suit property and transferred the property to the 1<sup>st</sup> defendant's deceased husband on 16<sup>th</sup> July, 1984. That the plaintiffs' claim is resjudicata as he same had been, determined in Kisii HCCC No. 11 of the 1988 in favour of the 1<sup>st</sup> defendant's deceased husband against the plaintiff.

5. The plaintiff is represented by B.N. Ogari and Co. Advocates. The 1<sup>st</sup> defendant is represented by J.O Soire and Co. Advocates while the 2<sup>nd</sup> defendant is represented by Karario Marwa & Co. Advocates.

6. Learned counsel for the 1<sup>st</sup> defendant filed submissions dated 11<sup>th</sup> June 2018, whereby he termed the plaintiff's suit, res judicata, misconceived, frivolous and sought its dismissal with costs to both respondents. He did submit that both parties admitted that there was Kisii HCCC no. 11 of 1988 which was terminated in favour of the 1<sup>st</sup> defendant's deceased husband. That the plaintiff's claim for a dverse possession to the suit property cannot hold because his occupation on the property has never been peaceful as it was a subject matter in Kisii HCCC No. 11 of 1988.

7. In his submissions dated 16<sup>th</sup> May, 2018, learned counsel for the 2<sup>nd</sup> defendant made reference to the suit property registered in the

name of the 1<sup>st</sup> defendant and that the case is resjudicata as there was Kisii HCCC no. 11 of 1988 which was determined in favour of the 1<sup>st</sup> defendant's deceased husband. That there is no basis for adverse possession claim by the plaintiff as the issue was conclusively determined by the High Court. He relied on the case of **Ngugi –v- Francis Kibui Kinyajui & 3 others (1989) eKLR and Ibrahim Wakhayaga & others –v- Peter Mubatsi Nambiro CA No. 84 of 1988.**

8. By his submissions dated 7th June, 2018, learned counsel for the plaintiff urged that two issues namely adverse possession and resjudicata stand for determination. He cited **Chevron (K)Ltd –v- Harrison Charo Washutu (2016) eKLR, Adnam –v- Earl of Sabdwich (1877) 2 QB 485, Mweu –v- Kin Ranching & Farming Co-operative Society Ltd (1985) KLR 439 and ANM –v- PNM (2016) eKLR**, in support of his submissions.

9. I have carefully considered the 1<sup>st</sup> and 2<sup>nd</sup> defendants' preliminary objections in their respective replying affidavits, the entire originating summons and submissions by counsel herein. The issues for determination are succinct :-

- a) Whether the plaintiff's suit is unsuited for adverse possession over the suit property
- b) Whether plaintiff's claim is res judicata.

10. As regards the 1<sup>st</sup> issue, the 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that the plaintiff has not acquired adverse possession over the suit property for over a period of over twelve (12) years hence the suit is non suited. **Concise Oxford English Dictionary 12<sup>th</sup> Edition** defines the term "Suited" as appropriate or fitting.

11. The 2<sup>nd</sup> defendant claimed that on 16<sup>th</sup> July, 1984 when he transferred the suit property to the 1<sup>st</sup> defendant's deceased husband, twelve years had not elapsed thus the plaintiff would not acquire title to the suit property by way of adverse possession even on the assumption that they were in possession of the property. He denied the plaintiff's claim and sought eviction of the plaintiff and his family members from the property.

12. The plaintiff's claim is clearly hinged on acquisition of title to the suit property by way of adverse possession. The claim is highly contested by the defendants. I am of the considered view that this suit has to be heard on its merit in order to determine whether the plaintiff has met the threshold for adverse possession as recognized in **Gatimu Kinguru –v- Muya Gathangi (2008) 1 KLR 1007**, and **Chevron case (supra)**

13. On the second issue, **Black's Law Dictionary 10<sup>th</sup> Edition** fashioned a definition for "resjudicata" as:-

- (a) An issue that has been definitively settled by judicial decision
- (b) An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.

14. The Black's Law Dictionary further provides the three (3) essential elements of resjudicata. These are:-

- a) An earlier decision on the issue.
- b) A final Judgment on merits and;
- c) The involvement of the same parties or parties in privity with the original parties.

15. The 1<sup>st</sup> defendant averred that Kisii HCCC No. 11 of 1988 was terminated in favour the 1<sup>st</sup> defendant's deceased husband. The 2<sup>nd</sup> defendant attempted to prove that very position by way of his supplementary list of documents dated 11<sup>th</sup> April 2018, which fail to establish all the essential elements of res judicata doctrine.

16. According to the plaintiff, Kisii HCCC No. 11 of 1988 was dismissed for want of prosecution. That the suit was not heard and determined as the court file is unavailable. It is common ground that a decision was rendered in Kisii HCCC No. 11 of 1988. However, there is no confirmation that there was a final determination of the matter involving the same parties and the same subject matter as provided under Section 7 of the Civil Procedure Act (Cap 21 laws of Kenya).

17. The plaintiff further contended that the issues and parties in Kisii HCCC No. 11 of 1988 were different from the instant suit. If that is the position, were the issues finally adjudged in that case?

18. In **Ngugi case (supra)**, the Court of Appeal held that the spirit, if not the letter of **Section 7 of the Civil Procedure Act (Cap 21)** forbids a court from any fresh trial of a concluded issue. The section is couched in mandatory terms in relation to a matter which is directly and substantially issue, in a former suit, between the same parties, litigating under the same title and finally determined by a court of competent jurisdiction.

19. In the instant suit, there is nothing to show final settlement of disputed issues by orders issued in Kisii HCCC no. 11 of 1988. The defendants have not satisfactorily exhibited any document to reveal the nature of matter, the parties and the final decision rendered in the former suit. Nonetheless the parties to this suit have the right to a fair hearing as provided under **Article 50 (1) of the Constitution of**

**Kenya, 2010.** I would therefore reserve all unclear issues and others for hearing and determination of the suit on its merits.

20. Accordingly, I disallow the defendants' preliminary objections with no order as to costs.

**DELIVERED, DATED and SIGNED at MIGORI this 3<sup>RD</sup> day of October 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Parties and their respective counsel – Absent

Tom Maurice – Court Assistant