



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 63 OF 2016

EUNICE LUGATSIBA AMBUTSI.....PLAINTIFF

VERSUS

NICHOLAS KIBOWEN KIGEN.....1ST DEFENDANT

GABRIEL KANDA.....2ND DEFENDANT

PAULINE JEBWAMBOK.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced the instant suit by way of a plaint dated **30/3/2016** which was filed on the same date. The plaintiff seeks judgment against the defendants for:-

(a) A declaration that parcel of land Reference No. 6614/10 (Original No. 6614/2/9) exclusively belongs to the Estate of Baranabas Ambutsi Masinjila deceased and the defendants, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the suit property.

(b) A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever, from entering, trespassing, ploughing, planting or otherwise interfering with the plaintiff's quiet possession and enjoyment Land Reference No. No. 6614/10 (Original No. 6614/2/9).

(c) General damages for trespass.

(d) Costs of this suit together with interest thereon.

(e) Any such other or further relief as this honourable court may deem appropriate.

PLEADINGS

The Plaintiff

2. In the plaint, the plaintiff states that the suit land is owned by the estate of the deceased **Barnabas Ambutsi Masinjila**; that the plaintiff is one of the administrators of the estate of the deceased; that on or about **March 2016** the defendants without any colour of right or justification wrongfully entered and took possession of part of the suit land; that they remained thereon; that they have not acquired any exclusive right as to possession occupation or ownership thereof; that their stay on the land has not been peaceful and that they are causing the land to deteriorate.

The Defence

3. In the joint statement of defence the 2nd and 3rd defendants filed on **14/12/2016** the defendants have denied the claim and asserted that they purchased the respective portions of land they occupy vide two sale agreements dated **10th December 2013** and **15th July 2015** respectively and took possession thereof, and have acquired exclusive rights to remain thereon and that they have not wasted the property. They claim that

the instant suit for trespass injunction and general damages is not warranted.

DETERMINATION

4. On a preliminary basis the 2nd defendant avers that the suit is *res judicata*, the court having dismissed a previous suit ***Kitale ELC No 23 of 2017 - Joseph Makarios Masinjila v Gabriel Biwott Kanda [2018] eKLR*** filed by the son to the plaintiff in the present suit who sought eviction of the 2nd defendant from the suit land. I have called for and perused the file record in respect of ***Kitale ELC No 23 of 2017*** and found that the claim of dismissal is true. In that case the court dealt with the same suit land mentioned herein and dismissed the suit. The plaintiff in that case sought an order for rescission of a sale agreement dated **10/12/2013**, an order directing the defendant to deliver up vacant possession of the land to the plaintiff, *mesne profits*, damages for fraudulent misrepresentation and costs; it also stated that the plaintiff was the beneficial owner of **LR No. 6614/10 Noigam** situate at **Kachibora** in Trans-Nzoia County. The copy of title produced in the instant case reads that it is in respect of **LR No. 6614/10**. In his evidence the plaintiff in that case admitted that there is a ***Succession Cause No. 118 of 2012 Bungoma*** which has not reached the confirmation of grant stage and that he did not have the title as at the time of the sale, that he was *one of the administrators* in the succession cause. The grant in the present case is from the Eldoret High Court in ***Eldoret HC Succession Cause No. 184 of 2006***.

5. In that previous litigation ***Kitale ELC No. 23 of 2017*** also this court observed as follows:

“9. I have examined the pleadings in this matter and the agreement entered into by the parties. It appears that the parties entered into that agreement by consent without any duress, and upon the understanding on the part of the defendant that the plaintiff owned the land and could transfer it to the defendant. The defendant has demonstrated that even now he is still ready and willing to complete the transaction provided the plaintiff can demonstrate that he has capacity to transfer the land.”

6. The conclusion of the court in ***Kitale ELC No. 23 of 2017 - Joseph Makarios Masinjila v Gabriel Biwott Kanda [2018] eKLR*** is that the 2nd defendant herein was not in breach of the agreement over the sale of the land he purchased from the plaintiff in that suit, who is the son to the plaintiff in the instant suit. The 2nd defendant’s possession of the suit land therefore remained undisturbed after that judgment. By then this suit though filed earlier than ***Kitale ELC No 23 of 2017*** had not been prosecuted, and it appears that it was not brought to the court’s attention during the pendency of the ***Kitale ELC No. 23 of 2017***. It must for all purposes be regarded as the “*second suit*” or the “*subsequent suit*”.

7. It is clear that though the plaintiff in the instant suit would rather the court believe that the defendants invaded the land without basis, there were sale agreements that granted them access to the land and these are known to the plaintiff, a section of her family having been involved in the sale. It is improper for the plaintiff to feign ignorance of the sale agreements. In the case ***E.T. v Attorney General & Another [2012] eKLR*** Majanja, J correctly warned that:

“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 a form a new cause of action which has been resolved by a court of competent jurisdiction.”

8. In the case of the ***Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others [2017] eKLR***, the Court of Appeal held as follows:

“Thus, for the bar of *res-judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

a) The suit or issue was directly and subsequently in issue in the former suit.

b) The 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.

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.”

9. The court in that case also stated as follows:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

10. In view of the facts revealed herein I find that the matters as between the plaintiff and the defendant in the instant case were resolved with finality in **Kitale ELC No. 23 of 2017 - Joseph Makarios Masinjila v Gabriel Biwott Kanda [2018] eKLR**. The suit land in both cases being the same and one of the administrators having sued the 2nd defendant in **Kitale ELC No. 23 of 2017 - Joseph Makarios Masinjila v Gabriel Biwott Kanda [2018] eKLR** and failed to obtain judgment, and the plaintiff herein being not only a fellow administrator but also a member of the same family alongside the other administrator in respect of the same estate, I find that the doctrine of *res judicata* embodied in **Section 7 of the Civil Procedure Act** applies to the instant case and this court should not proceed to determine it with regard to the 2nd defendant.

11. This court's attention has also been drawn to the contents of **paragraph 4** of the plaint that indicates that the plaintiff is only one of the administrators of the estate of the late Barnabas Ambutsi Masinjila. That is correct because as per the grant of letters of administration issued on **11/9/2008** in **Eldoret HC Succession Cause No. 184 of 2006** there are four named administrators who include the plaintiff. No explanation has been given as to why other administrators were not enjoined as plaintiff's in the suit. In the case of **Joram Kaberia v District Land Adjudication and Settlement Officer Igembe South District & 2 others [2018] eKLR** the court stated as follows:

"23. I have already noted that there was only one administrator named as the applicant in these proceedings. There is no averment in the verifying affidavit of the applicant that he swears the affidavit on behalf of the other administrator. Indeed it is not even known from the record whether the other administrator is aware of these proceedings.

24. Order 31 Rule 2 of the Civil Procedure Rules provides as follows:

Joinder of trustees, executors and administrators [Order 31, rule 2.]

"2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors, and administrators outside Kenya, need not be made parties."

25. It would appear that though the rule provided for joinder of all trustees, executors or administrators to a suit commenced against them, where a suit is commenced by trustees, executors or administrators they must all be enjoined as parties. Several decided cases illustrate this point.

26. In the case of **Raffaella Adiyakhiso Ntotoi V Robert Obrian Lenguro [2012] eKLR** an objection was raised to an application for an injunction on the basis that the application is fatally defective and both cannot stand as the suit and the application was not filed by both administratrix and the administrator. Makau J, after citing the decision of Ojwang J (as he then was) in the case of **The Attorney General-Vs-Kenya School of Flying Ltd Civil Suit 215 of 1999**, observed as follows:

"The application cannot stand and as such I find that no prima facie case has been established with probability of success. As the plaintiff's application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.

The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent."

12. This court followed the position set out above in the case of **Mary C. Kitur v County Government of Trans-Nzoia [2019] eKLR** and struck out the claim.

13. In the present case the situation is made the worse in the present case when the plaintiff depones in her verifying affidavit as follows:

"That I have instructed Ms. David Ingosi & Co Advocates to institute and pursue on my behalf my claim against the defendants herein."

14. Clearly the plaintiff expresses herself to have brought the claim on her own behalf and not on behalf of the estate or its beneficiaries or the other administrators (perchance that was possible) and she is not afraid to explicitly express that position.

15. It is clear that this case too can not lie as against all the three defendants by the present plaintiff for the reason that not all the administrators of the estate of the late **Barnabas Ambutsi Masinjila** have been enjoined.

16. Consequently I hereby dismiss the plaintiff's suit. On the issue of costs, I note that the 1st and 2nd defendants put up a spirited defence in the matter and I think that they are entitled to costs of the suit and I hereby award them costs. The 1st defendant never appeared and he is not entitled to costs.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 22nd day of June, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.