



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 83 OF 2020(O.S)**

**IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER; OF ORDER 37 , RULE 7 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTIONS 30(F) AND 30(G) OF THE**

**REGISTERED LAND ACT, CAP 300 ( REPEALED)**

**AND**

**IN THE MATTER OF SECTION 28(H) OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF LAND PARCELS KNOWN AS GITHUNGURI/KIMATHI/ 2395, 2396 & 2404**

**HANNAH NJERI KARIUKI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ESTHER NJERI IBONGO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GEORGE NGIGI MUIRURI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SIMON GATHATA WAINAINA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

There are **two matters** for determination. One is the Notice of Motion Application dated **2<sup>nd</sup> December 2020**, by the Plaintiff/ Applicant and the **Notice of Preliminary Objection** dated **30<sup>th</sup> September 2020** by the Defendants/ Respondents.

In the Notice of Preliminary Objection dated **30<sup>th</sup> September 2020**, the 1<sup>st</sup> Defendant/ Respondent objected on the hearing of the Summons dated **22<sup>nd</sup> September 2020**, on the grounds that ;

- 1. THAT the suit is contrary to Section 7 of the Civil Procedure Act, Cap 21, the matter having been finally determined in Kiambu CMELC No. 55 of 2019.**
- 2. That the suit is fatally and incurable defective and the same ought to be struck out.**
- 3. The suit is incompetent and bad in law**

The Plaintiff/ Applicant filed grounds of opposition dated **26<sup>th</sup> October 2020**, to the Notice of Preliminary objection by the **1<sup>st</sup> Defendant/ Respondent** on the grounds that;

- 1. The Notice is misconceived, bad in law and an abuse of the Court process.**
- 2. The Defendants Notice thereof has completely and utterly missed the grundnorm of the suit which is filed pursuant to Section 7, 17 and 38 of the Limitation of Actions Act.**
- 3. The 1<sup>st</sup> Defendant's Preliminary Objection is misplaced and does not adhere to the established tenets as was established in the case of Mukisa Biscuits Company ....Vs... Westend Distributors Limited (1969) EA 696.**
- 4. The Defendant has failed to disclose to this Court that the facts in CMELC 55 of 2019, are completely and utterly different from the present facts.**
- 5. The Preliminary Objection dated 30<sup>th</sup> September 2020, is bad in law and does not disclose a pure point of law.**

By a Notice of Motion Application dated **2<sup>nd</sup> December 2020**, the Plaintiff/ Applicant sought for orders that ;

- 1. That an injunction do issue against the 1<sup>st</sup> Defendant restraining her whether by herself, her servants and /or agents from evicting, destroying the Plaintiffs property, interfering with the Plaintiff's user and occupation .plucking her coffee plantation, charging or encumbering , selling , transferring and alienating the land parcel known as Githunguri/Kimathi/2014, pending the hearing and determination of this Application in the first instance and thereafter pending the hearing and determination of the suit.**
- 2. That the officer in charge of Githunguri Police Station does ensure compliance of the order.**
- 3. That the costs of this Application be sourced by the Defendants.**

The Application is premised on the grounds that the Plaintiff / Applicant has a prima facie case with a probability of success. That damages shall not be adequate remedy to the Plaintiff/ Applicant. Further, that the balance of convenience tilts in favour of maintaining the status quo and it is only fair and just that interim orders of injunction be issued to preserve the suit property.

In his Supporting Affidavit, **Hannah Njeri Kariuki** averred that on **23<sup>rd</sup> September 2020**, she filed a suit for **Adverse Possession** in respect of the suit property. Further that in the said Application, she informed the Court that she had been in open, continuous and uninterrupted occupation of the suit property for more than **36 years**. That the Defendants/ Respondents were personally served with the proceedings on **28<sup>th</sup> September 2020**, and they acknowledged the same. That on **1<sup>st</sup> December 2020**, she received a call from **Githunguri Police Station** to collect an order from Court issued on **2<sup>nd</sup> November 2020**, from Kiambu Chief Magistrates Court.

That she was never served with any Application dated **3<sup>rd</sup> September 2020**, as alleged in the said order granting Police assistance to maintain law and order during eviction. Further that on **20<sup>th</sup> July 2020**, her Advocate on record wrote a demand letter to the **1<sup>st</sup> Defendant/ Respondent** to cease trespassing on the suit property and the **1<sup>st</sup> Defendant/ Respondent** appointed the Law Firm of **Chege Kibathi Advocates**, who responded back to the demand through her Advocate stating that the date of eviction notice dated **30<sup>th</sup> June 2020**, but failed to attach the same on their letter. That she has never been served with any **eviction notice** from the Defendants/ Respondents, but was only served with **Police Order** to enforce the eviction process. Further that the Defendants/Respondents are planning to forcibly evict her from the suit property, thus rendering her family destitutes, homeless and with no place to go, considering her age. That it is only fair and just that interim orders of injunction be issued, to preserve the suit property. That unless the injunctive orders are issued, the suit property will be disposed off and wasted.

The Application is opposed and the **1<sup>st</sup> Defendant/ Respondent Esther Njeri Ibongo**, swore a Replying Affidavit filed on **23<sup>rd</sup> March 2021**, and averred that the ownership of the suit property was determined in Kiambu **CMELC 55 of 2019**, where the Court affirmed her ownership of the suit property, dismissing the Plaintiff's/ Applicant's claim to the suit property. That the Plaintiff's/ Applicant's claim to the land having been extinguished, was confirmed as being a trespasser and in illegal occupation of the same and it ought to have triggered the Plaintiff to commence vacating.

That on **30<sup>th</sup> June 2020**, she issued the Plaintiff/ Applicant with a notice to vacate her land, and she ignored to which she sought the services of the Auctioneers. That upon receipt of the Notice, the Plaintiff / Applicant instructed her current Advocates on record, who wrote a letter dated **20<sup>th</sup> July 2020**, stating that she was strangely trespassing on her own property, which letter was responded to by her Advocates.

That the Auctioneer informed her that the Plaintiff/ Applicant and her family had turned hostile, hence the need to seek Police assistance. That she has been informed by her Advocates on record, which advises she believes to be true that the Application is made **ex parte** and the Court so directs, service is not necessary, That if the Plaintiff/ Applicant was dissatisfied with the said order, there is a proper channel to challenge it. That the Plaintiff's/ Applicant's suit and the current Application discloses no prima facie case as the ownership of the suit property has already been determined by a Court of competent jurisdiction and the Plaintiff's Application is thus an abuse of the court process and ought to be dismissed.

The Application and Notice of Preliminary Objection were canvassed by way of written submissions, which the Court has carefully read and

considered. The Court has also read and considered the pleadings adduced, the annexures thereto and finds that the issues for determination are;

1. Whether the Notice of Preliminary Objection is merited
2. Whether the suit is Res Judicata
3. Whether the Notice of Motion Application dated 2<sup>nd</sup> December 2020

#### 1. Whether the Notice of Preliminary Objection is merited.

The 1<sup>st</sup> Defendant/ Respondent objected to the Originating Summons filed by the Plaintiff/ Applicant on the grounds that the same offends provisions of **Section 7 of the Civil Procedure Act**, as the matter had been heard and finally determined in **Kiambu CMEL 55 of 2019**.

A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

Further Sir *Charles Nebbold, JA* stated that: -

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”**

A **Preliminary Objection**, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

In the case of *Oraro...Vs...Mbaja(2005) 1KLR 141*, the Court held that:-

**“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.**

The 1<sup>st</sup> Defendant/ Respondent has contended that the suit is **Resjudicata** as the same issues were heard and determined in **Kiambu CMEL 55 of 2019**. The Plaintiff/ Applicant has disputed this facts and averred that the issues in the two suits are different and further the matter had not been heard on merit and hence cannot be Res Judicata. . In the case of *Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) EKLR*, the Court held that:-

**“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”**

Further in the case of *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR*, where the Court held that:-

**“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”**

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court's considered view that it will have to ascertain facts and probing of evidence and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that what has been raised by the 1<sup>st</sup> Defendant/Respondent does not amount to a **Preliminary Objection**, hence the same is dismissed.

#### 2. Whether the suit is Res Judicata

Though the Court has held above that issues of Res Judicata cannot be raised by way of a Preliminary Objection, the 1<sup>st</sup> Defendant/ Respondent raised the said issue on her Replying Affidavit to the Plaintiff's/ Applicant's Notice of Motion Application dated **2<sup>nd</sup> December 2020** and this Court must therefore determine the same.

In opposing the Application, it has been the 1<sup>st</sup> Defendant's/ Respondent's contention that the suit is **Res Judicata**, being that the Court had already heard and determined the issues raised in the Originating Summons in **Kiambu CMEL 55 of 2019**.

The principle of *res judicata* is found in **Section 7 of the Civil Procedure Act** 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.”**

**Further In the case of *The Independent Electoral and Boundaries Commission ...Vs... Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)*, the Court of Appeal held that:**

**“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 disjunctive but conjunctive terms;**

- 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.**
- 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.”**

The principle of **Res Judicata** requires that the suit must have been heard and finally determined. Neither of the parties herein annexed in Court the pleadings in relation to the suit **Kiambu MCEL 55 of 2019**; What was however annexed was a Court's Ruling and Decree. Though this Court was unable to ascertain the prayers sought from the Plaintiff, the Ruling of the Court together with the parties submissions reveal that the Plaintiff/ Applicant had sought to restrain the 1<sup>st</sup> Defendant/ Respondent from interfering with her occupation and use and further sought for the cancellation of 1<sup>st</sup> Defendant's Title over **L.R Githunguri/Kimathi/610**, and the same was struck out for being time barred.

The Court notes that in the instant suit the Plaintiff/ Applicant has sought for orders that a Declaration be made that the Defendants/ Respondents title to the suit property had been extinguished by Adverse Possession. Essentially, the Plaintiff/ Applicant is seeking to be declared as having acquired proprietorship of the suit property and thus the issue then in question is proprietorship. Further the Court notes that in the present suit the Plaintiff/ Applicant seeks orders against **L.R Githunguri/Kimathi /2395, 2396 & 2404**, while in the Kiambu suit she had sought orders against **L.R 610**. However, from the Plaintiff's witness statement, it is clear that **L.R 610** is the one that had been subdivided and given new numbers and therefore the two suits relate to the same. Further, it is clear from the Decree dated **4<sup>th</sup> May 2020 in CMELC 55 of 2019**, that the Plaintiff was also claiming ownership of the suit property.

The Court of Appeal in the case of **The Independent Electoral and Boundaries Commission ...Vs...Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, held that:

**“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 disjunctive but conjunctive terms;**

- 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.**
- 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.”**

**“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 a 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 foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

There is no doubt that the issue of who owns the suit land had been litigated upon and determined. Though the Plaintiff/ Applicant contends that the same was not determined on merit, it is not in doubt that if a suit has been dismissed due to being time barred, it then cannot be said that the same was not heard on merit as no other suit can be brought forth to cure the same. The Plaintiff/ Applicant ought to have brought all her cases in the said suit and can thus not evade the doctrine of *Res Judicata* in this instant. See the case of *Omondi v National Bank of Kenya Limited and Others (2001)E.A 177*, where 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. They are bound to bring all their cases at once.”**

Consequently, having carefully looked at both cases, the court finds and holds that the issues raised by both cases are the same as whatever is to be determined is the ownership of the suit property, which issue had already been determined. Therefore, the court holds and finds that the instant suit is *Res Judicata*.

#### **4. Whether the Notice of Motion Application dated 2<sup>nd</sup> December 2020 is Merited.**

The Plaintiff/ Applicant had sought for orders of temporary injunction. However, the Court has already held and found that the suit herein is *res judicata*. Therefore, the court finds the Plaintiff’s/applicant’s Application is **not** merited and the same is dismissed entirely.

Having now carefully read and considered the pleadings by the parties and the rival written submissions, the Court finds and holds that the that the suit herein is *Res Judicata*.

Consequently, the Court finds that the **Notice of Preliminary Objection** is **not** merited. Further the Notice of Motion Application dated **2<sup>nd</sup> December 2020** is also **not** merited and that the suit herein is **Res Judicata**, and therefore cannot be sustained. For the above reasons, the said suit is struck out entirely.

Costs usually follow the event, the Court has found that the Notice of Preliminary Objection is **not merited** and has equally found the suit is **Res judicata**. Therefore, each party has partly succeeded and thus each party will bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**