



**Ngala & 16 others v Rapam Limited (Civil Case E059 of 2023)
[2024] KEHC 12200 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E059 OF 2023
JK NG'ARNG'AR, J
OCTOBER 15, 2024**

**IN THE MATTER OF: PARCEL OF LAND KNOWN AS L.R. NO. 2129/1/
MAINLAND NORTH/UTANGE MOMBASA (ORIGINAL NUMBER 1244/3)**

AND

**IN THE MATTER OF: SECTION 38 OF THE
LIMITATION OF ACTIONS CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT
THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF THE
ABOVE NAMED PARCEL OF LAND BY WAY OF ADVERSE POSSESSION**

BETWEEN

**HAMIDA KAHONZI NGALA 1ST PLAINTIFF
LISTON KALU K. NGALA 2ND PLAINTIFF
LUCY BAHATI HARRISON 3RD PLAINTIFF
KATANA KAZUNGU NGALA 4TH PLAINTIFF
BARAKA KAZUNGU NGALA 5TH PLAINTIFF
SIDI KAZUNGU NGALA 6TH PLAINTIFF
FRIDA KAZUNGU NGALA 7TH PLAINTIFF
DANIEL KAZUNGU NGALA 8TH PLAINTIFF
MAURINE KABIBI KAZUNGU 9TH PLAINTIFF
CECILIA KAHONZI KAZUNGU 10TH PLAINTIFF
ZABLON NGALA KAZUNGU 11TH PLAINTIFF**



MAPENZI REHEMA KAZUNGU 12TH PLAINTIFF
DAUDI KAZUNGU NGALA 13TH PLAINTIFF
ZUBERI KAZUNGU NGALA 14TH PLAINTIFF
BAI KAZUNGU NGALA 15TH PLAINTIFF
DAMA KAZUNGU NGALA 16TH PLAINTIFF
SALMA KAZUNGU NGALA 17TH PLAINTIFF

AND

RAPAM LIMITED DEFENDANT

RULING

1. The Plaintiffs filed a Chamber Summons application dated 19th December 2023 pursuant to Order 37 Rule 16 and 17 of the Civil Procedure Rules, 2010. The Plaintiffs pray for orders that this court be pleased to give directions that the Originating Summons dated 21st July 2023 be heard by way of *viva voce* evidence and that costs of this application be in the cause.
2. The grounds are premised on the face of the application and the Supporting Affidavit of Hamida Kahonzi Ngala sworn on 26th January 2024 that the Originating Summons was filed in court on 27th July 2023 and copies of the same were served upon the Respondent on 2nd August 2023. That on 17th August 2023, M/S Lewa and Associates Advocates filed in court a Memorandum of Appearance on behalf of the Respondent. That on 3rd October 2023, the Respondent through M/S Lewa and Associates Advocates filed in court a Replying Affidavit. That it is necessary that this court gives directions as to the manner of hearing of the summons preferably by way of *viva voce* evidence.
3. The Defendant filed Grounds of Opposition dated 18th July 2024 in opposition to the Plaintiff's Chamber Summons application dated 19th December 2023 that in view of the provisions of Article 162 (2) (b) of the Constitution, Section 150 of the Land Act and Section 101 of the Land Registration Act, the court herein is without jurisdiction to hear and determine the application dated 19th December 2023 and the suit herein in general. That by dint of a decree of the honourable court dated 9th February 2023, Mombasa ELC Case No. 186 of 2013, Rapam Limited v Keith Ngala Kazungu, the suit herein violates the provisions of Section 7 of the Civil Procedure Act and is therefore *res judicata*. That the suit herein and the application dated 19th December 2023 amount to an attempt by the Plaintiff to abuse the due process of the court and must therefore fail. That the suit herein and consequently the application before the court is frivolous and or bad in law and as such it ought to be dismissed with costs.
4. The Plaintiffs filed a reply dated 12th September 2024 to the Defendant's Grounds of Opposition dated 18th July 2024 by relying on Article 159 (1) (2) (b) (d) and (e) of the Constitution of Kenya 2010. That with regard to the contents of paragraph 2 of the Defendant's Grounds of Opposition, the matter herein does not constitute *res judicata*, the Plaintiffs are not parties to the alleged civil suit MSA ELC No. 186 of 2013, the Plaintiffs are strangers to the decree dated 19th December 2023, the Plaintiffs have been in actual possession of the suit land uninterrupted for a period of over 12 years, parties to this suit are not the same as the ones in MSA ELC No. 186 of 2013, and the subject matter herein is not directly and substantially in issue as the subject matter in MSA ELC No. 186 of 2013.



5. The Plaintiffs further stated that with regard to the contents of paragraph 3 and 4 of the Defendant's Grounds of Opposition, the Plaintiffs relied on Order 37 Rules 16 and 17 of the [Civil Procedure Act](#) which provides for listing of the originating summons for direction and hearing of the same in the chambers before a judge. That the Defendant's Grounds of Opposition therefore has no merit and should be dismissed with costs.
6. The Respondent filed a Notice of Motion application dated 15th July 2024 pursuant to Order 2 Rule 15 (1) (b) and (d) of the [Civil Procedure Rules](#), Section 1A, 1B, 3A, 7 and 8 of the [Civil Procedure Act](#), and all other enabling provisions of the law. The Respondent prays for orders that the Plaintiff's suit against the Defendant be struck out in view of the fact that this court does not have the requisite jurisdiction to hear and determine it. That in the alternative the Plaintiffs' suit against the Defendant be struck out for being res judicata.
7. The Respondent's application is based on grounds on the face of the application and the Supporting Affidavit sworn by Muchiri Wahome on 15th July 2024 that the Defendant purchased all the parcel of land known as CR 14327, Plot Number Subdivision No. 2129 (Orig. No. 1244/3) I/MN on 22nd May 2009 at a public auction conducted by M/s Garam Investments outside the main post office in Mombasa city during which auction the Defendant's bid of Kshs. 4,100,000.00 for the suit plot was the highest at the fall of the hammer. That the sale was pursuant to instructions by M/s Kenya Tourist Development Corporation, a charge which sold the suit plot in exercise of its statutory power of sale after one Kazungu Ngala alias Kazungu Ngala Kasunji, the charger defaulted in payment of monies advanced to him by Kenya Tourist Development Corporation.
8. The Respondent averred that it was registered as the proprietor of the suit plot on 24th November 2010 after complying with all the conditions of sale and payment of the consideration in full. That the Plaintiffs in this suit are members of the family of Kazungu Ngala alias Kazungu Ngala Kasunji who died on 28th October 2015 and are included as beneficiaries of the estate of Kazungu Ngala alias Kazungu Ngala Kasunji (deceased) in Mombasa Chief Magistrate Succession Petition No. 393 of 2019, in the matter of the estate of Kazungu Ngala Kasunji (deceased) which was filed on 9th October 2019. That after the Defendant acquired the suit plot, it set out to take vacant possession of the same but all efforts in this regard were in vain as Kazungu Ngala alias Kazungu Ngala Kasunji (deceased) and members of his family, the plaintiffs in this suit included declined to hand over vacant possession of the suit plot to the Defendant herein and instead resorted to threats of dire consequences if they ever set foot on the suit plot.
9. The Respondent in enforcing its right to quiet possession of the suit plot did file Mombasa ELC Case No. 186 of 2013, [Rapam Limited v Kazungu Ngala](#). That Kazungu Ngala alias Kazungu Ngala Kasunji died before the suit was heard and determined. That his eldest son, Keith Ngala Kazungu, applied for and was granted leave to enjoin the previous suit as a Defendant since he was the personal representative of his deceased father by dint of a Limited Grant of Letters of Administration Ad Litem issued by the High Court at Mombasa on 19th July 2016, in High Court Succession Cause No. 22 of 2016, in the matter of the estate of Kazungu Ngala Kasunji (deceased). That judgment in the previous suit was delivered by Hon. Justice L. L. Naikuni on 28th February 2023 in favour of the Defendant herein who was the Plaintiff in the previous suit. That Keith Ngala Kazungu moved the Court of Appeal in Civil Application No. E037 of 2023, [Keith Ngala Kazungu v Rapam Limited](#) by filing an application which he sought leave to file an appeal against the judgment and or decree dated 28th February 2023. That vide a ruling delivered on 7th July 2023, Hon. J. Lesiit, JA, dismissed the application.



10. The Respondent stated that both the judgment and the ruling of the Court of Appeal have not been set aside through an appeal and/or review and/or reference. That the suit herein is therefore res judicata and an abuse of the due process of the court. That the Plaintiffs have come to court with unclean hands, are in contempt of the decree of the court dated 28th February 2023 as they are yet to vacate from the suit plot as previously ordered, and cannot allege adverse possession of having lived in the suit plot since their childhood as the issue ought to have been canvassed in the previous suit.
11. The applications were canvassed by way of written submissions. The Plaintiffs in their submissions dated 12th September 2024 in support of their Chamber Summons application and in opposition to the Defendant's Grounds of Opposition, the Plaintiffs reiterated contents of their Chamber Summons application dated 19th December 2023 and their reply dated 12th September 2024 to the Defendant's Grounds of Opposition.
12. The Defendant in their submissions dated 30th September 2024 in support of their Notice of Motion application dated 15th July 2024 contended that the suit herein was filed in a court without the requisite jurisdiction to hear and determine it. That the Plaintiffs' claim in this suit has everything to do with the use and occupation of and title to the suit land. That the suit herein ought to have been filed in the Environment and Land Court which was established by parliament pursuant to provisions of Article 162 (2) (b) of the Constitution. The Defendant also cited Sections 4 and 13 (2) (a) of the Environment and Land Court Act, 2011 as well as Section 150 of the Land Act and Section 101 of the Land Registration Act, and relied on the case of Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd KLR where the Court of Appeal pronounced itself on jurisdiction.
13. The Defendant submitted on the issue of res judicata that the suit herein has been filed in contravention of the mandatory terms of Section 7 of the Civil Procedure Act. That in the case of Uburu Highway Development Limited v Central Bank of Kenya & 2 Others (1992) eKLR, the Court of Appeal held that in order to rely on the defence of res judicata, there must be: a previous suit in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue has been raised once again in a fresh suit. The Defendant also relied on the holding in the case of Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR and submitted that the Plaintiffs' claim is an attempt to prolong litigation in regard to the ownership, possession and title to the suit plot after a long and prolonged litigation on the same in the previous suit which litigation went all the way to the Court of Appeal. That the omission of Keith Ngala Kazungu as one of the Plaintiffs and allegations of adverse possession is a deliberate attempt by the Plaintiffs to run in circles around the doctrine of res judicata.
14. The Defendants in their submissions in opposition to the Plaintiff's Chamber Summons application dated 19th December 2023 argued that the Plaintiffs are seeking for hearing of the suit as provided for under Order 37 Rule 16 of the Civil Procedure Rules but the suit in its entirety amounts to an abuse of the court process and must fail.
15. I have considered the Plaintiffs' Chamber Summons application dated 19th December 2023, the Defendant's Grounds of Opposition dated 18th July 2024, the Plaintiffs' Reply dated 12th September 2024 to the Defendant's Grounds of Opposition, the Defendant's Notice of Motion application dated 15th July 2024, the Plaintiffs' submissions dated 12th September 2024, and the Defendant's submissions dated 30th September 2024. The issue for determination is whether the applications are merited for grant of the orders sought.
16. The Defendant in the Grounds of Opposition to the Plaintiffs' application raised the issue that the court herein has no jurisdiction to hear and determine the Plaintiffs' application as well as the suit



herein in general. The Defendant has explained at length the background of this case and that the proper forum for dealing with the issue of adverse possession that has been raised by the Plaintiffs is the Environment and Land Court.

17. The issue of jurisdiction was dealt with in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR as follows: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

18. This court has perused the pleadings and evidence on record and established that the claim herein relates to ownership of the parcel of land known as L.R. No. 2129/1/Mainland North/Utange Mombasa. The Plaintiffs are seeking for determination on whether they can be declared as proprietors of the said parcel of land having acquired it through adverse possession and whether they are entitled to be registered as owners of the parcel of land.

19. Jurisdiction of the Environment and Land Court to hear and determine disputes relating to the use, occupation and title to land is provided for under Article 162 (2) (b) and (3) of the *Constitution* and Section 13 (2) of the *Environment and Land Court Act* No. 19 of 2011.

“ Article 162 (2) (b) and (3) of the *Constitution* provide: -

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -
- (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Section 13 (2) of the *Environment and Land Court Act* provides: -

In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes: -

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.

20. From the foregoing, it is clear that the suit herein was filed in a court devoid of jurisdiction. This court therefore need not belabor on the issue of res judicata that has also been raised. In the upshot, this court makes the following orders: -



- a. The Plaintiffs' Chamber Summons application dated 19th December 2023 and the entire suit are hereby struck out.
- b. The Plaintiffs to bear costs

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Obara Advocate for the Plaintiffs

Lewa Advocate for the Defendant

Court Assistant – Mr. Samuel Shitemi

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