



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC MISCELLANEOUS APPLICATION NO. E005 OF 2021**

**JOHN SAMOITA GUTO.....APPLICANT**

**VERSUS**

**SAMWEL OMBUI ONGAKI.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. This Ruling is in respect of a Notice of Motion dated 22<sup>nd</sup> April 2021 filed by Applicant seeking to challenge the Respondent's Notice of Eviction dated 2<sup>nd</sup> February 2021 and all other subsequent eviction notices in relation to Keumbu Market Plot No. 18A (hereinafter referred to as the suit property).
2. The Applicant filed the application as the legal representative of the estate of his late father Thomas Guto Nyamora. He alleged that his late father purchased one half (1/2) of the suit property from the late Francis Ratemo Ongaki on 25<sup>th</sup> January 1985.
3. The Applicant further contends that after the purchase in 1985 his late father took actual possession, developed his part and his beneficiaries are enjoying quiet possession of the same.
4. He avers that on 2<sup>nd</sup> February 2021 he was perplexed when he was served with an eviction notice requiring him to vacate the suit property at the expiry of three (3) months from the date of service.
5. In response to the application, the Respondent filed a Notice of Preliminary Objection, Grounds of Opposition and Replying Affidavit all dated 12<sup>th</sup> May 2021.
6. In the Preliminary Objection he raised the grounds that the application is incompetent as the same is based on an agreement which is *void ab initio* pursuant to the provisions of section 45 of the Law of Succession Act. He also stated that the application is barred by virtue of section 7 of the Civil Procedure Act for being *res judicata* of the Chief Magistrate's Court Civil Case No. 227 of 2007.
7. In the Grounds of Opposition, the Respondent reiterated the first grounds in the Preliminary Objection and added that the application raises matters which have been or ought to have been raised in CMCC Case no. 227 of 2007 and the court is therefore barred by section 7 of the Civil Procedure Act from entertaining the same. He stated that there is no basis for the court to grant the prayers sought as the Keumbu Market Plot No. 18 A belongs to the late Ayako Ongaki's family, the beneficiary of Samson Ongaki-deceased, the registered proprietor who has fully developed the same. He further stated that the application is brought with inordinate delay as the Applicant has had all the time to prove his claims since 1985 but he has not done so.
8. In his Replying Affidavit the Respondent deponed that he is the legal Administrator Ad litem of the estate of Samson Ongaki who died on 22<sup>nd</sup> November 1977. He deponed that prior to the death of Samson Ongaki, he allocated the entire suit property to his son Isaac Ayako Ongaki now deceased. The said Isaac Ayako developed the suit property by building a permanent three storey Commercial Building thereon.
9. It was the Respondent's contention that no valid agreement could be made between the Applicant's late father and the late Francis Ratemo Ongaki as alleged without late Francis Ratemo Ongaki first obtaining letters of Administration in respect of the estate of Samson Ongaki, the registered proprietor of the suit property. According to him, the sale agreement that was being relied upon by the Applicant to block the eviction notice was null and void and could not be relied upon.

10. It was also the contention of the Respondent that the Applicant's late father had raised the issues being raised in the application in respect to the suit property in previous suits. He made reference to Kisii Chief Magistrate Court Civil Case No. 227 of 2007 and Environment and Land Case No. 34 of 2017 which he claimed to have been heard and finally determined. He thus argued that the application offended the Provisions of section 7 of the Civil Procedure Rules.

11. The Court on 22<sup>nd</sup> July, 2021 directed that the application be disposed of by way of written submissions and both parties filed their submissions.

### ISSUES FOR DETERMINATION

12. Having considered the Notice of Motion, rival affidavits and the written submission filed by both parties, the issues for determination are:

- i. Whether the suit herein is *res judicata*
- ii. Whether the eviction Notice dated 2nd February, 2021 and all other subsequent evictions notices issued by the Respondent are valid.

### ANALYSIS AND DETERMINATION

13. Before delving into the above-mentioned issue, it is necessary to get the genesis of the dispute between the parties that led to the issuance of the eviction notices and the subsequent filing of this application. From the evidence provided by both parties, it is common ground that the dispute between the parties started as early as 1992 when one Isaac Ayako, the late father to the Respondent, caused the suit property to be transferred to himself. Later in 2004 he commenced civil proceedings vide **Kisii HCCC No. 86 of 2004** which was subsequently transferred to the Chief Magistrate's Court as **Kisii CMCCC No. 227 of 2007 Isaac Ayako Ongaki v Thomas Guto Nyamora** seeking to have the respondent evicted.

14. The court held that the transfer of the property from the name of the Samson Ongaki to Isaac Ayako Ongaki was illegal. This was because the transfer was done 14 years after the death of the late Samson Ongaki and that Isaac Ayako had not bothered to carry out succession to enable him succeed the property of his father legally. The court held that he did not have a good title. This therefore meant the property was expected to revert back to the name of the late Samson Ongaki.

15. In 2017, the Applicant filed suit vide **ELC Case no. 34 of 2017 John Samoita Guto (Suing as the legal representative of the estate of Thomas Guto Nyamora v Isaac Guto Ongaki)**. The said suit was later transferred to Kisii Chief Magistrates Court as **CMELC Case No. 260 of 2018**. In the said suit the Plaintiff sought to reclaim a portion of the suit property in which he claimed a purchaser's interest. However, his suit was dismissed for being *res judicata*. In its judgment the court observed as follows:

“In this suit I find it very weird that the plaintiff conceded to the fact that there has been a suit under the same subject matter and parties”

16. I will now proceed to determine whether the suit is *res judicata*.

The doctrine of *res judicata* in Kenyan Law is embodied in Section 7 of the Civil Procedure Act CAP 21. This section provides as follows:-

“7. *Res judicata*

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.”

17. In the case of **Uhuru Highway Development vs Central Bank [1996] LLR CAK 2126** the court summarized the test in *res judicata* as follows:

- (i) **There must be a previous suit in which the matter was in issue;**
- (ii) **The parties must be the same or litigating under the same title;**
- (iii) **There must be a competent court which heard the matter in issue;**
- (iv) **The issue must have been raised once again in a fresh suit;**

18. Furthermore, I am guided by the case of **Joshua Ngartu v Jane Mpinda & 3 Others (2019) eKLR** where Lucy Mbugua J relying on the case of **Attorney General & Another v ET (2012) eKLR** held as follows:

“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 an in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi v National Bank & Others (2001) EA 177** 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” In that case the court quoted Kuloba J (as he then was) in the case of **Njanju v Wambugu & Another HCCC No. 2430 of 1991** ( unreported ) where he stated : “ If parties are allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion when he comes to court then I don’t see the use of the doctrine of *res judicata*..”

19. In the instant suit John Samoita Guto who is the son of Thomas Guto Nyamora sued Samuel Ombui Ongaki who is the brother of the late Isaac Ayako Ongaki for threatening to evict him from plot No. 18A Keumbu market. It is not in dispute that the Applicant sued the Respondent’s brother Isaac Ayako Ongaki in CMELC No 260 of 2018 which was held to be *res judicata*. It is also not in dispute that Isaac Ayako Ongaki (Respondent’s brother sued Thomas Guto Nyamora (Respondent’s father) for eviction in CMCC No. 227 of 2007 which was dismissed on the ground that Isaac did not have a good title to plot no. 18A.

20. This case falls squarely within the parameters of *res judicata* described in section 7 of the Civil Procedure Act. I therefore have no hesitation in holding that this matter is *res judicata* as the parties have been litigating endlessly since 2004 over plot No. 18A by giving the suits some cosmetic face-lifts and introducing new angles to it yet a court of competent jurisdiction finally determined the rights of the parties in CMCC No. 227 of 2007.

21. I do not agree with counsel for the Applicant that the said case was not determined on the merits as it is clear from the judgment that even though the Defendant’s case was closed without him offering any evidence as he kept applying for adjournments, the court considered the submissions of both counsel before rendering its judgment. Furthermore, in CMELC No. 260 of 2018, the Applicant admitted that the case was *res judicata*. At any rate, if any of the parties was dissatisfied with the said judgment, he ought to have appealed.

22. Although I have my reservations about the Notice of eviction issued by the Respondent in view of the judgment in CMCC No. 227 of 2007, the said judgment has not been impeached and it therefore still stands.

23. In view of the foregoing and particularly because the suit is *res judicata*, I am constrained to hold that the application lacks merit and the same is hereby dismissed. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**J.M ONYANGO**

**JUDGE**