



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE NO. 117 OF 2019

ELIUD NGUGI MBUGUA (As administrator of

the estate of MBUGUA THUO (Deceased) PLAINTIFF

VERSUS

JOSPHAT MWANGI MUHORO 1ST DEFENDANT

SAMUEL NJOGU MUNGAI..... 2ND DEFENDANT

JOSEPH MWEMA NGANGA 3RD DEFENDANT

CHRISTOPHER KARIUKI KAMAU 4TH DEFENDANT

WANJIKU GATHORONJO5TH DEFENDANT

JACKSON MIRINGU KAMAU 6TH DEFENDANT

DORIS NYAIRURI NJIRI 7TH DEFENDANT

FRANCIS NGUGI MUNGAI 8TH DEFENDANT

DELIVERANCE CHURCH

(Sued through its registered trustees)..... 9TH DEFENDANT

TAYARI FARMERS CO. LTD..... 10TH DEFENDANT

JOSEPH KIRAGU MURAYA 11TH DEFENDANT

MARY MUTHONI KARIUKI..... 12TH DEFENDANT

ESTHER WANGARE NDEGWA 13TH DEFENDANT

CHARITY NJERI MWANGI..... 14TH DEFENDANT

MICHAEL WAWERU MWANGI..... 15TH DEFENDANT

THE REGISTERED TRUSTEES,

MOLO STREET CHILDREN PROJECT16TH DEFENDANT

RULING

1. The Defendants vide the application dated 20th September 2019 and filed on 23rd September 2019 seeks the following orders:

a. That this Honourable court be pleased to strike out this matter for being '*res judicata*'.

b. That the costs of this application and the costs of this suit be borne by the Plaintiff/Respondent.

2. The basis for the application as stated succinctly at its bottom is that the issues raised in the instant suit touch on plots no **625 (Tayari)** and plot No **626 (Tayari)** which were dealt with in **Nakuru ELC Case No 79 Of 2016**.

3. In the instant suit, the **Further Further Amended Plaintiff** dated **17/6/2013** seeks the following orders:

a. **A declaration that the subdivision of the plaintiff's plots no 626 and 625 Tayari Farm to parcel No's Mau Summit Molo Block 7/1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1594, 1593, 1592, 1591, 1590, 1589, 1588, 1604, 1587, 1603, 1403, 1381, 1380, 1379, 1322, 1585, 1584, 1583, 1582, 1581, 1580, 1579, 1578, 1577, 1586(Tayari)**

b. **An order cancelling Title Nos Mau Summit Molo Block 7/1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1594, 1593, 1592, 1591, 1590, 1589, 1588, 1604, 1587, 1603, 1403, 1381, 1380, 1379, 1322, 1585, 1584, 1583, 1582, 1581, 1580, 1579, 1578, 1577, 1586 (Tayari) and that Plots Nos 626 and 625 do revert to their status prior to the illegal subdivision.**

c. **A permanent injunction restraining the defendants from selling alienating or in any other manner interfering with the plaintiff's peaceful possession, occupation, ownership and enjoyment of his plot Nos 625 and 626 or any other portions thereof.**

d. **Costs and interests.**

4. In **Nakuru ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** the plaintiff therein sought amongst other orders, an order of permanent injunction restraining the defendant in that suit from interfering with **Parcel No 625 (Tayari)** and **Plot No 626(Tayari)**.

5. The applicant states that this court issued in the instant suit an order that the Land Registrar and the County Surveyor do prepare a joint report identifying **parcels nos. 625 and 626** and the extent of encroachment, if any. That joint report was prepared and used word for word in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** and judgment was issued in that case in which the plaintiff's case was dismissed. The applicants state the pleadings in both cases are similar and one of them having been determined then the provisions of **Section 7 of the Civil Procedure Act** which embodies the doctrine of *res judicata* in Kenya should apply.

6. In their submissions the defendants stated that the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** is still the registered proprietor of **Plot No 1590** which resulted from subdivision of **Plots Nos 625 and 626 Tayari** and that issue was addressed in the judgment issued on **30/4/2019**; that that parcel of land is one of the parcels mentioned in this suit; that the plaintiff is litigating in instalments; that the only difference is that the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** was not joined in the instant suit as a defendant but was dealt alone in that suit by the plaintiff; that this court would be dealing with essentially the same issues dealt with by the court in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** if it proceeded with this suit; the defendants relied on the cases of **Mombasa ELC No 160 Of 2019 Pangaea Holdings Ltd Vs Hacienda Developments Ltd & 2 Others** (which was quoted in extensor); **Eldoret ELC No 19 Of 2019 Diocese Of Eldoret Registered Trustees Vs The Hon Attorney General and Another**; **Meru ELC No 15 Of 2018 Joshua Ngatu Vs Jane Mpinda**; **Eldoret ELC No 16 Of 2020 Ednah Jebiwott Kiplagat Vs Philip Kiprotich Tuitok & 2 Others**; **And Nairobi Civil Appeal (CA) No 261 Of 2002 Daniel Kirui & Another Vs Monicah W Macharia & Another**.

7. The plaintiff opposed the application. He filed his sworn replying affidavit dated **11/11/2021** stating that the application is baseless; that the affidavit in support of the application is not factual; that the advocate for the applicant lacks competence to swear on matters of fact; that he has filed a notice of appeal against the decision in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau**; that the decision in that case has also been stayed and the issue of *res judicata* does not therefore arise; that the issues in the current case and the other case are different; that **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** only sought to stop interference and the instant suit seek determination of ownership of title.

8. He filed submissions on **9/7/2021**. In those submissions, his response is as follows:

a. The notice of preliminary objection does not meet the threshold required in law; for this he cited **Geoffrey Mungai Njenga & Another Vs Registrar Of Titles & Another 2021 Eklr**; **Quick Enterprises Ltd Vs Kenya Railways Corporation Kisumu HCCC No 22 Of 1999**; **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank Civil Suit No 53 Of 2004, Kisumu** and finally the classic **Mukhisa Biscuits decision**

b. There are no defences/ counterclaims filed on behalf of the defendants who have brought the application since **2006** when the suit was filed;

c. That the order that dismissed the earlier suit, that is was a negative order not capable of execution; for this he relied on **Executive Estates Ltd Vs Kenya Posts & Another 2005 1EA 53**; **Middle Town Forex Bureau Vs Central Bank Of Kenya 2016 eKLR**; **George Owino Odhiambo & 13 Others Vs Kenya Railways Corporation And Another**

d. That the matter has come up for hearing before and the defendants have indicated that they were ready to proceed and the court gave parties time to comply with the rules;

e. That the conclusions drawn by the Land Registrar and the Surveyor in their report are not agreed by both parties;

f. That there was no counterclaim in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** and the court did not make any declarations with regard to the title of the defendant in that case.

g. That the doctrine of *res judicata* allows a litigant only one bite at a cherry, and it prevents persons claiming under the same title from returning to court to claim further reliefs not claimed in the earlier action.

h. That in the instant case there are several parcels held by various entities being challenged.

i. That the declaration sought and the issue of cancellation of the titles held by those persons or entities are factual issues that require a full trial and upholding the preliminary objection would result in unfairness to the plaintiff;

j. That the plaintiff had sought consolidation of the two cases but the defendants strenuously objected to that course.

k. That the prayers in both cases are different;

l. That the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** was joined in his personal capacity and in any event he is not a party to the instant suit;

m. That this suit has numerous persons who are sued in their personal capacity and three corporates and the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** has no *locus standi* to be sued on their behalf;

n. That at the time the case **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** was heard the defendant therein had no *locus standi* to represent the defendants in the instant suit;

o. That the judgment in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** is not a representative judgment or a judgment in rem, and in any event that is an impossible concept to impose in land matters which consist of competing ownership claims; that the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** had no *locus standi* to be sued on behalf of the 11th defendant company or the other bodies that had been sued in the instant suit through their trustees; for this proposition he relied on the cases of **Law Society Of Kenya Vs Commissioner Of Lands & Others Nakuru HCCC No 464 Of 2000; Alfred Njau & Others Vs City Council Of Nairobi 1982 Kar 229 And Halsbury's Laws Of England 3rd Edition Vol 18 At Para 239; Nairobi Civil Suit No 2824 Of 1997 (OS) Jane Nyambura Joshua Vs Apostolic Faith Church; Moir Vs Wallersteiner 1975 1 ALLER 849 At P 857; Amina Akberali Manji & 2 Others Vs Altaf Abdulrasul Dadani & Aznother 2015 eKLR.**

9. This court has considered the application and the replying affidavit of the plaintiff as well as the submissions of the parties in great detail. The main issue that arises in the matter is whether the application that has been filed by the applicant has established that the instant suit is *res judicata* **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau.**

10. I have considered the decisions cited by the parties in support of their opposing positions and I agree with the propositions of law set out therein. Few can be added with any different results. The main issue is whether the principles of *res judicata* apply so as to bar this court from trying the instant case on its merits. In the case of **Republic v City Council of Nairobi & 2 others [2014] eKLR** it was observed as follows:

“In the case of Lotta vs. Tanaki [2003] 2 EA 556 it was held as follows:

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

11. To determine the instant application this court has therefore to answer the questions as to whether:

(i) Whether the matter directly and substantially in issue in the previous suit is directly and substantially in issue in the instant suit;

(ii) Whether the previous suit was between the same parties or privies claiming under them and whether the parties litigated under the same title in the previous suit;

(iii) Whether the court which decided the former suit was competent to try the instant suit; and

(v) Whether the matter in issue was heard and finally decided in the previous suit”.

12. In respect of the first question the applicants question the use of the Land Registrar and Surveyor's report in both suits. They state that the

Plot Number 1590 is in issue in both suits. However the defendant points out that the case in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** involved only the issue of injunction from interference and no determination of ownership of the title was adjudged in that case. In my view, the latter is the proper position since I have perused the judgment of the court in that matter. In the current case the cancellation of titles of numerous other parcels belonging to persons not involved in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** is in issue. It is not possible to state the same matters directly and substantially in issue in the instant suit were directly and substantially in issue in the former suit that is **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau**.

13. Regarding the second question, the plaintiff's response to the application is that the defendant in **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** could not have possessed *locus standi* to sue or be sued on behalf of the current defendants in the instant suit. Indeed it is not the submission of the defendants that the defendant in the former suit was sued in a representative capacity on their behalf. Some of the defendants in the instant suit are not natural persons and the question that is raised by the plaintiff is whether, if the defendant in the former case was deemed to be representing the defendants herein, that would also include the body corporates and the bodies sued through their registered trustees. I find that the issue of whether such representation could be deemed to have been possible to be a vital issue in this application. It cannot be by the mere fact that one portion of land that is commonly mentioned in both suits that the defendant in the suit that has been already determined can be deemed to be representing the defendants herein. One of the grounds for holding this is that that defendant was not joined in the instant suit.

14. The statement by the plaintiff that the plaintiff's counsel sought consolidation of the two suits and that the defendant's counsel objected to such consolidation is also vital. That statement has not been responded to by the defendants. The defendant's objection to consolidation thus comes back to haunt them in the present suit as they seek to declare it *res judicata*. In this court's view the issue of *res judicata* would not have arisen had consolidation been done. In light of the fact that consolidation was proposed and rejected and not effected by the court it is clear that the defendants considered the two suits to be entirely different in terms of the issues they raised and that can be seen in the manner this court has addressed the previous issue herein above.

15. In the end this court does not find that the former suit was between the same parties as this suit or privies claiming under them and the defendants never litigated under the same title as in this suit since they were not named at all in the previous suit.

16. As to the third and fourth questions this court must state that since the first and second questions have been answered in the negative as seen in the foregoing paragraphs, the twin issues of whether the court that determined **ELC Case No 79 Of 2016 Mbugua Thuo Vs Laban Gatonye Kamau** was of competent jurisdiction and whether the matter in issue was heard and finally decided in the former suit do not arise. In this court's view, all the ingredients of *res judicata* have to be construed conjunctively.

17. The upshot of the foregoing is that the defendants have failed in their quest to establish that the instant suit is *res judicata*. The application dated **20th September 2019** is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16TH DAY OF DECEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU