REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURTAT MURANG'A

ELCA NO.20 OF 2019

JOHN MWANGI NDIRANGU.....1ST APPELLANT

ELISIPHA WANGARI NDIRANGU.....2ND APPELLANT

VERSUS

RAPHAEL MURIGI KARIUKI..... RESPONDENT

JUDGMENT

1. The background of this suit can be traced to the High Court case No 91 of 2001 (O.S) where the parties were; Raphael Murigi Kariuki as the Plaintiff and Joseph Ndirangu Mwangi, Mwangi Kariebu, Elisipha Wangari Ndirangu and Evanson Waweru Gichoya as the 1st - 4thDefendants respectively. In the Originating Summons the Plaintiff sought to be declared owner of LOC 2/GACHARAGE/748/1471, 1472 and 1473 by way of adverse possession. He argued that he had been in quiet exclusive and uninterrupted possession of the original suit land to wit 3 LOC 2/GACHARAGE/346 since 1968 which was then registered in the name of Joseph Ndirangu Mwangi. That in the month of May 1981 the said 1stDefendant subdivided the original suit land into parcels LOC 2/GACHARAGE /1473, 1472,1471 and 748 which parcels were transferred to the 1st -4thDefendants respectively.

2. It would appear, as averred by the Plaintiff in his further affidavit, that during the pendency of this suit (OS 91 of 2001) the 1st Defendant further subdivided parcel LOC 2/GACHARAGE/1473 into parcel LOC 2/GACHARAGE/2206 and LOC 2/GACHARAGE/2207.

3. The OS No 91 of 2001 was filed on the 15/5/2001. On the 7/7/2001 Mwangi Kariebu died and was substituted with his son namely Samuel Warui Mwangi on the 15/5/2002.

4. The Defendants opposed the Plaintiffs application (OS) through the Replying Affidavit filed by the 1stDefendant who deponed on his own behalf and that of the other defendants.

5. The Originating Summons (OS) was finally canvassed by way of written submissions before my Senior Brother Hon Mr. Justice Makhandia(as he then was). The Defendants did not file their written submissions to the said summons and it is only the Plaintiff who did.

6. On the 26/2/2009 the Court rendered its decision and allowed the prayers as follows;

   a. That the Applicant (Plaintiff) is entitled to land parcel No LOC 2/GACHARAGE/748, 1471,1472 and 1473 having acquired them by way of adverse possession.

   b. That the partitioning of the Land parcel No LOC 2/GACHARAGE/1473 into two parcels namely LOC 2/GACHARAGE/2206 and 2207 be and is hereby revoked.

   c. That the registered land parcel LOC 2/GACHARAGE/1473 be restored.

   d. That the Respondents/ Defendants shall execute all the necessary documents to effect transfer of land parcels LOC 2/GACHARAGE/748, 1471, 1472 and 1473 to the Plaintiff/Applicant and default thereof the Deputy Registrar of this Court will execute the same on behalf of the Respondents/Defendants.

   e. That the Applicant/Plaintiff shall have the costs of the suit.

7. On the 6/10/14 pursuant to the said judgement the Plaintiff became registered as owner of the suit lands namely LOC 2/GACHARAGE/748, 1471, 1472 and 1473 as shown on the official searches dated the 5/5/2015.

8. I must add that there is no evidence on record that this judgment has been set aside vacated and or appealed.

9. For reasons best known to the Plaintiff, the Plaintiff on the 25/5/2015 filed a suit by way of Originating Summons against the Defendants (as named in the OS 91 of 2001) at the Chief Magistrates Court at Kandara vide OS No 7 of 2015 seeking for orders of eviction of the Defendants and the Court to determine the following questions;

a. Is the Plaintiff the registered proprietor of LOC 2/GACHARAGE/748, 1471, 1472 and 1473?

b. Is the Plaintiff entitled to vacant possession of LOC 2/GACHARAGE/748, 1471, 1472 and 1473?

c. Are the Defendants illegally in occupation and/or possession of LOC 2/GACHARAGE/748, 1471, 1472 and 1473?

d. Is the Plaintiff entitled to costs of the suit?

10. I say so because the rights of the parties had been adjudicated and determined in the above judgement of a superior Court. By this time the judgment has been executed fully and the Plaintiff registered as the owner of the suit lands. It is lost on me why a party with a lawful judgement would detour to the lower Court to seek that the same rights be determined. This at best is a misadventure which I shall return to later in the Judgment.

11. At the hearing of the application (OS) the Defendants did not file any responses despite having Counsel on record who latter ceased acting citing lack of instructions from the Defendants. It is on record that they were served with the hearing notices and indulged by the Court for a month before the suit was heard exparte in the end.

12. Without the benefit of the Defendants defence for the reasons adduced above, the Court proceeded to hear the matter. The Hon Court noted that the Plaintiff had been adjudged to be entitled to the suit lands by way of adverse possession by the High Court in OS 91 of 2001and in the words of the Hon Learned Magistrate he stated as follows;

> **“** all the Applicant , read Plaintiff is asking for is less or more confirming the orders given in the High Court(sic) OS 91 of 2001. I see no reason why I should not grant the said orders as nothing like an Appeal has been preferred or anything done in the contrary**”.**

13. In the absence of any defence or documents from the Defendants the Court having considered the suit rendered its decision on the 20/11/15, interalia, as follows;

a. The Defendants are illegally in occupation and or possession of the LOC 2/GACHARAGE/748, 1471, 1472 and 1473.

b. That the Plaintiff is the registered proprietor of LOC 2/GACHARAGE/748, 1471, 1472 and 1473, the Defendants are illegally in occupation and or possession of LOC 2/GACHARAGE/748, 1471,1472 and 1473.

14. On the 18/11/2015 the 4th Defendant filed a Notice of Motion seeking orders of stay of any further proceedings in the matter pending the hearing and determination of another application dated the 2/11/2015 filed in the High Court ELC 267- Nyeri(Formerly OS 91 of 2001).In the latter application the 4th Defendant sought orders to set aside the whole judgement delivered by the High Court in OS 91 of 2001 on the 26/2/2009. He also sought for stay of the execution of the decree in Misc Application No 7 of 2015 in the CMCC -Kandara.

15. On the 8/12/2015 the Hon Court delivered a ruling to the Notice of Motion dated the 18/11/15 allowing the application in the following terms;

> “that there be a stay of proceedings in this case as against the 4thDefendant in the application dated the 25/5/15 pending the hearing and determination of the application dated the 2/11/2015 formerly Nyeri High Court OS No 91 of 2001.”

16. Effectively the proceedings in respect to Misc No 7 of 2015 at the CM Court at Kandara were stayed in respect to the 4th Defendant in paper only as the judgement of the Court in this suit as seen in para 9 seems to have included the land held by the 4thDefendant. In any event by this time the suit land parcel 748 was now registered in the name of the Plaintiff.

17. Fast forward, on the 9/2/2018 the Plaintiff filed another Notice of Motion against the Defendants (as listed in the High Court OS 91 of 2001) seeking the following orders;

a. an eviction order against the 1st 2nd and 3rdRespondents/Defendants from parcel Nos LOC 2/GACHARAGE/ 1471,1472 and 1473.

b. An injunction order stopping the Respondents their agents and or servants from entering or interfering in any way with the quiet enjoyment of the Applicant on LOC 2/GACHARAGE/1471,1472 and 1473.

c. The officer in charge Kigumo Police Station do provide security to facilitate execution of the eviction order.

d. Costs be provided for.

18. Substitution of the 2nd Defendant by his son Samuel Warui Mwangi was allowed by the Court on the 5/7/18 by the consent of the parties. According to the judgement of the Court in OS 91 of 2001, the said Mwangi Kariebu died on the 7/7/01 and was substituted by Samuel Warui Mwangi on the 15/5/2002. See grant of letters of administration issued on the 9/1/2008 on record. Accordingly, it would appear that the 2nd Defendant had been substituted way back in 2002.

19. It is to be borne of the record that Joseph Ndirangu Mwangi (died on 27/8/18) was substituted by John Mwangi Ndirangu on the 25/10/18 (see limited grant ad litem issued on the 7/2/2019). On the same date the 4th Defendant – Evanson Waweru Gichoya was substituted by Jackson Gachoya Waweru. All by the consent of the parties.

20. The 1st Respondent/Defendant opposed the application through his Replying Affidavit filed on the 9/5/19 and stated that he is the administrator of the late Joseph Ndirangu Mwangi, who died on the 27/8/18 and that the subject suit was filed before the death of his father and continued after his demise. That orders cannot be granted against a dead party as in the case of his father. That he and his family learnt of the suit after they were served with the application for eviction. That they have lived on the suit land all their lives and if the orders of eviction are granted they shall be rendered destitute. He urged the Court to dismiss the application.

21. Equally opposing the application was Samuel Warui Mwangi the 2nd Defendant /Respondent through a Replying Affidavit filed on the 27/11/2018. He deposed that he is the legal administrator of the estate of Mwangi Kariebu, deceased who died on the 7/7/2001.He stated that the suit subject of the application was filed before his father died and continued after his death. He found it mischievous for the Applicant to sue his dead father knowing too well that he was long dead given that the Applicant is a neighbour and had knowledge of his father's demise. That any orders against his dead father would be futile to execute. That he and his family learnt of the suit when they were served with the application for their eviction. If granted he averred, they will be rendered destitute.

22. The 3rd Defendant/Respondent filed a Replying Affidavit on the 27/11/2018 and in opposing the application deponed that the suit land was given to her by her husband the 1st Defendant and she has lived there for over 30 years and built her matrimonial home. She informed the Court that she intended to rely on the evidence of the 1st Defendant her husband who at that time had unfortunately passed on and no substitution had been done. She averred that she risked being rendered destitute if the orders of eviction were granted. She pleaded with the Court to dismiss the application.

23. Upon hearing the application, the Hon Court delivered its ruling on the 1/8/19 and allowed the application as follows;

a. An eviction be and is hereby issued against 1st 2nd and 3rd Defendants in respect to LOC2/GACHARAGE/1471,1472 and 1473.

b. The Respondents, their agents and /or servants are restrained from interfering in any way with the Applicant's quiet enjoyment of the LOC2/GACHARAGE/1471.1472 and 1473.

c. The officer in charge of Kigumo Police Station do provide security to facilitate execution of this eviction order.

d. Costs to the Applicant**.**

24. In arriving at the above decision, the learned Magistrate noted that the Plaintiff is the registered owner of the suit lands having been decreed as such in High Court **No 91 of 2001 (OS) and CMCC Misc Application No 7 of 2015 (OS) at Kandara.**

25. Aggrieved with the ruling John Mwangi Ndirangu and Elisipha Wangari Ndirangu(the Appellants herein) filed an Appeal to this Court on the following grounds;

a. The learned Magistrate erred in law and fact in determining the application when the Court lacked jurisdiction.

b. The learned Magistrate erred in law and fact when she entertained the application and the entire suit Misc Application Nos 7 of 2015-Kandara while the same is subjudice in view of the existing ELC No 312 of 2017- Murang'a hence arriving at the wrong finding.

c. The learned Magistrate erred in law and fact when she allowed and entertained the application where the 1st 2nd and 4th Defendants/Respondent in the suit had met their sad demise and hence occasioning great prejudice to their families.

d. That the learned Magistrate erred in law and fact where she failed to appreciate that the entire proceedings were defective for want of substitution.

26. The Appellants sought the following orders on Appeal;

a. That the Appeal be allowed.

b. That Kandara Misc application No 7 of 2015 be struck out.

27. The Appeal was heard orally in open Court on the 11/12/19.

28. The 1st Appellant submitted that he is the son of the 2nd Appellant and is employed as a security officer at the Royal Media Services. That

his Appeal is in respect to the ruling delivered by Hon Kinyanjui on the 1/8/2019. He relied on the record of Appeal before the Court. In respect to jurisdiction of the Court to entertain Misc Application No 7 of 2015 (OS) he argued that the Court lacked jurisdiction and the power to hear and determine the suit in view of the subsistence of **ELC 312 of 2017 (formerly HCCC No 91 of 2001(OS))** dealing with similar matters. That the suit Misc Ap No 7 of 2015 was therefore subjudice and should not have been entertained.

29. Further that ELC 312 of 2017 – Murang'a was transferred from NYERI ELC being former HCCC No 91 of 2001. That this file is still active and Misc Appl No 7 of 2015 was entertained while the Respondent was duly aware that there were pending applications in ELC No 312 of 2017. In a digressive manner he informed the Court that the Respondent did not serve them with the summons in the suit No 91 of 2001 (OS) and to quote his words, "the Respondent attended Court alone without the representations of the Appellant. That the Respondent obtained title by way of adverse possession in this suit by way of deceit." He urged the Court to strike out the Misc App No 7 of 2015.

30. On substitution, he argued that the 1st and 2ndDefendants in Misc App No 7 of 2015 and the learned Magistrate entertained the suit in their absence causing prejudice to the Appellants. On prejudice he argued that they have lived on the suit land all their lives and they risk being rendered destitute if the orders of eviction are upheld. In addition, he asked the Court to visit the suit lands to appreciate the way they occupy the land on the ground. In addition, that he holds the mother title of the land and no one has asked for its surrender.

31. The 2ndAppellant stated that she comes from Gikoe village and she is a farmer. That she got married in 1954 and has 8 children whom she gave birth and raised on the suit land. She posed the question – where does he (Respondent) want me to go when my husband left me on the land?.She informed the Court that she is utilizing the land and that the Respondent lied to the Court in Nyeri that no one lives on the land except him. She implored the Court to visit the land and see for itself if the said Respondent lives there. She was categorical he does not reside on the land.

32. The Respondent through his learned Counsel on record Sister Wangari Advocate submitted that the issue of jurisdiction should have been raised in the lower Court before the hearing begun. That the Appellants were represented by Counsel in the lower Court but failed to raise the issue. That the issue before the Misc App no 7 of 2015 in Kandara was whether the Appellants with the other Defendants were in illegal occupation of the suit premises hence the orders being appealed are those of the 1/8/19 that ordered for the eviction of the Appellants. The learned Counsel concluded that the Court had jurisdiction to determine the question of eviction.

33. In respect to ELC 312 of 2017, Murang'a(originally 91 of 2001)OS)), the learned Counsel stated that this suit was transferred to this Court at the instance of the 4thDefendant when he sought to set aside the judgement delivered on the 26/2/2009 against himself solely. That the 4thDefendant died before the application was heard and his sons attempt to seek substitution failed and the suit abated.

34. In addition, she submitted that the judgment in 91 of 2001 (OS) is still in force as it has not been set aside, appealed and or vacated.

35. That the Misc App No 7 of 2015 was not subjudice. She said no more.

36. In respect to the substitution of the 1st 3rd and 4thDefendants she submitted that they were all substituted on application of their legal representatives as shown on page 54 and 55 of the record of Appeal on the 28/6/18 and 5/7/18. That the allegations about non substitution are merely untruths by the Appellants.

37. That the Appeal lacks merit as the learned Magistrate applied the law correctly in arriving at her finding and the decision that she did.

38. In a rejoinder the 1stAppellant informed the Court that his substitution in ELC 312 of 2017 was allowed on the 22/7/19 and after a period of one week the ruling in Misc App No 7 of 2015 was delivered prompting him to file this Appeal.

39. Having considered the pleadings in the lower Court, the rival affidavits, the record of Appeal and the oral submissions the key issues that fall for determination are; Whether the lower Court had jurisdiction to determine the application; whether the Misc App No 7 of 2015 was resjudicata and or subjudice in view in view of ELC No 312 of 2017 at Muranga (formerly HCCC No 91 of 2001(OS)) ; Whether the suit Misc App No 7 of 2015 is competent; Whether the proceedings were defective for want of substitution of the deceased Defendants; what orders should the Court give; who meets the costs of the Appeal.

40. I shall now examine the duty of this Court on Appeal. The primary role as a first Appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira& Co. Advocates [2013] eKLR** . The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice. See **Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 Others [2014]eKLR.**

41. In respect to whether the Court was clothe with jurisdiction to hear the suit Misc Application No 7 of 2015 and subsequently the Notice of Motion of 9/2/2018, it is not in dispute that the rights of the parties were determined in the judgment rendered by the Court on the 26/2/2009 and the execution of the decree was fully done with the consequence that the Respondent became registered as owner of the suit lands in 6/10/14. See official searches in respect of the suit lands on record.

42. Section 7 of the Civil Procedure Act is a bar to a Court proceeding with issues that had been legally rested by Courts of competent jurisdiction. It states as follows;

> "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."

43. The threshold for determining the principle of res judicata was set out in the case of **Bernard Mugo Ndegwa v James Githae & 2 Others[2010] e KLR** where it was held that the Applicant alleging resjudicata must show that; a) the matter in issue is identical in both suits; b) the parties in the suit are substantially the same; c) there is concurrence of jurisdiction of the Court; d) the subject matter is the same; and e) that there is a final determination as far as the previous decision is concerned.

44. In the Misc Appl No 7 of 2015 the Plaintiffs and the Defendants were the same as in OS 91 of 2001 (now ELC 312 of 2017), the subject properties are the same, the issues revolved around ownership of the properties by way adverse possession, the Court that determined the matter was clothed with the jurisdiction to handle the matter and did adjudicate the matter to its conclusion. In short, the latter suit comprised in Misc App No 7 of 2015(OS) fitted the circumstances that a suit that would be resjudicata in every sense.

45. Consequently prayers Nos a and b of the suit (Misc App No 7 of 2015) were resjudicata in that the question as to whether the Plaintiff was the registered owner of the suit lands and whether he was entitled to vacant possession were already determined. Question no b as to whether the Plaintiff was entitled to vacant possession is at best, illusionary at this point. As to whether the Defendants were in illegal occupation of the suit lands was a consequence of ownership already adjudged by the superior Court in OS No 91 of 2001. The Defendant's occupation of the said premises can therefore be attended to by method or process of enforcement and not by filing a fresh suit.

46. As to whether the matter in Misc No 7 of 2015 (OS) was subjudice, section 6 of the Civil Procedure Act prohibits a Court from proceeding with the trial of any suit or proceedings in which a matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or other Court having jurisdiction to grant the relief sought. Para 14 of the Judgment shows that the Respondent while aware of the application by the 4th Defendant dated the 2/11/15 in OS No 91 of 2001 (now ELC 312 /17) seeking to set aside the judgement of 2009, proceeded to file the application dated the 18/11/15 seeking the execution of the orders in the lower Court whilst the substantive suit in the High Court was still available for purposes of execution as provided under section 34 of the Civil Procedure Act. I shall return to this later. Though it can be said that execution was not an issue in OS No 91 of 2001 (now ELC 312 /17) then it was clear that the judgement the subject of execution was under challenge in another forum.

47. In the main, therefore it is clear that the Hon Court had no business dealing with a matter that had been properly and sufficiently adjudicated by a superior Court of competent jurisdiction. In other words, there was really nothing left for the lower Court to determine. The decision arrived at by the Magistrate was not founded on any cause of action. In any event the cause of action as disclosed in the OS 91 of 2001 had been spent and litigation in respect to the said cause of action had come to an end.

48. In conclusion the Hon Learned Magistrate fell in error when he wrongly assumed jurisdiction in matters that had been determined by the superior Court. In the locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows;

> 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

49. The meaning of jurisdiction is expounded in the writings of **John Beecroft Saunders in a treatise which is no longer published headed Words and Phrases Legally defined – Volume 3: I – N and it states at page 113** the following about jurisdiction:-

> "By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

50. Finally, in the case of **In MACFOY VS UNITED AFRICA LTD (1961) 3 All F.R. 1169** Lord Denning said at p. 1172:

> "If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the Court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

51. It is the holding of the Court that the first ground succeeds.

52. The second bar in jurisdiction that barred the trial Court from entertaining the suit and application for eviction emanates from the provisions of Section 34 of the Civil Procedure Act which states as follows;

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

53. In the case of **James Wainaina Imunyo& 6 Others v Karanja Mbugua& Co. Advocates & Another [2012] Eklr** the Court set out the procedure as;

> ..... if the Plaintiff wishes to contest the execution process in that suit, then the only avenue open is to challenge that process in the same suit, and not by filing a fresh suit. I need not belabour the point, Section 34 speaks for itself. Whereas it is correct that the misjoinder of a party in this suit by naming a non-juridical entity can be cured by way of amendment – such amendment will not cure the violation of Section 34 of the Civil Procedure Act. This limb of the preliminary objection has merit and is sustained".

54. My reading of Section 34 as applied to the current case is that the Respondent/Plaintiff has taken the matter through a detour and misadventure for the sole purposes of seeking the execution of the decree in his favour. The game plan of the Respondent/Plaintiff appears to secure the vacant possession of the suit properties and the eventual enforcement of the original judgement by way of eviction. Section 34 redirects him back to the original suit OS 91 of 2001 now ELC 312 of 2017 to seek the relief there and not file a fresh suit.

55. As to whether the Respondent proceeded in mischief and abuse of Court process when he filed the suit before the lower Court**,** this issue may inevitably be answered in the positive. The pleadings confirm that the Respondent had moved the High Court for orders of adverse possession against the late proprietor. The same Respondent filed a different suit to evict the Defendants/Respondent in the Originating Summons and persons claiming under him. It ought to be noted that by the time he moved the Magistrate Court he had already obtained an express determination of his rights as a proprietor of the lands and a further declaration that he ought to be registered under Section 37 of the Limitation of Actions Act. In compliance with the Court's orders from the High Court in OS 91 of 2001, he later went ahead to obtain title as per the Court decree. The reasonable action would have been to prefer his further cause of eviction before the High Court in like manner that the deceased sought to set aside the judgment. That Court was not *functus officio.* I say so because in the case of **Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR**, the Court set out the doctrine of functus officio as:-

> "I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a Court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other Court deal with it at a different level'. It is designed to discourage reopening a matter before the same Court that has considered a dispute and rendered its verdict on the merits.
>
> It however does not command that the moment the Court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes."

56. From the foregoing cases and decisions, it follows that filing a different suit against the same parties is an abuse of Court process and misuse of minimal judicial resources costs and time. Such action is aimed at vexing the adverse party and in the long run cause prejudice due to relitigating the same issues and exposing the adversary to unnecessary costs of litigation. It is also a fertile ground upon which the authority and dignity of the Hon Court can be eroded and the Court as the temple of justice is brought into disrepute particularly through different hierarchical decisions that may be an embarrassment to the Courts, to say the least.

57. In respect to the issue of whether the proceedings were incompetent for want of substitution of the 1st 2nd and 4th deceased Defendants, while the Court has established that the said parties were duly substituted contrary to what the Appellants want the Court to believe, it must be noted that in the Misc App No 7 of 2015 , upon which the Notice of Motion dated the 9/2/19 was anchored, the Respondent did not disclose any cause of action against the Appellants/Defendants in view of the holding above that the cause of action in OS 91 of 2001 had been spent. In the main therefore the issue of substitution or lack of it is neither here or there in the face of the holding of the Court above. Needless to say, that, all the deceased parties were substituted.

58. There is one issue that still perplexes the Court. In the judgement of 26/2/2009 the Respondent obtained orders in his favour in form of title by way of adverse possession on the grounds that he was in uninterrupted, exclusive, open possession of the suit lands. It is not clear nor is it stated in the proceedings when he became dispossessed of occupation and possession so as to warrant him to seek eviction of the Appellants. When did the Appellants successfully retake possession of the suit lands? Did the Appellants enter the lands after the Respondent had become registered as owner of the suit lands? Possession and occupation that is adverse in nature to the registered owner of the suit land are the fulcrum of adverse possession. No evidence was adduced to address this possibility.

59. The long and short of this Appeal is that it is for allowing. It is allowed as follows;

a. The Appeal is allowed as prayed.

b. Misc. Application No 7 of 2015 be and is hereby struck out.

c. The Ruling dated the 20/11/15 in respect to the Misc. App No 7 of 2015 is set aside in its entirety.

d. The Notice of Motion dated the 9/2/18 is dismissed.

e. The Ruling in respect to the Notice of Motion dated the 9/2/19 and the 1/8/19 are set aside in their entirety.

f. The costs of the Appeal, the Misc. App No 7 of 2015 and the Notice of Motion dated the 9/2/19 shall be borne by the Respondent in favour of the Appellants.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 18TH DAY OF JUNE 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

1st and 2nd Appellants – Present in person

Respondent: Wangare Ms (Sister)

Njeri, Court Assistant