



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 76 OF 2019

MADALINA WAMBUI.....1ST PLAINTIFF

JOSE MICHUYA.....2ND PLAINTIFF

MARY MUTHONI.....3RD PLAINTIFF

VERSUS

JULIUS KIGUTU.....DEFENDANT

RULING

1. The defendant has filed a notice of preliminary objection on 4.2.2020 raising the following grounds:

(a) *“That the originating summons dated 10th December 2019 are non-starter for being res-judicata to the judgment dated 28th November 2018 and the ruling dated 27th November 2019 and all consequent orders thereof in ELC No. 5 of 2018.*

(b) *That the originating summons fatally falls short of the threshold of adverse possession as the applicants are no longer in occupation of L.R No. Nyaki/Kithoka/685 by dint of the eviction order dated 27th November 2019 and a certificate of eviction dated 22.1.2020 having been filed. Further at page 6 of the judgment dated 28th November 2018 in ELC No. 5 of 2018, it is admitted that the applicants and the respondent are related and/or family; being trite law that adverse possession doesn't qualify with family”.*

2. The plaintiffs have opposed the said preliminary objection vide the replying affidavit of Joseph Muchiya, where they allege that the two suits are totally different. The deponent, Joseph, identifies himself as a brother of defendant while the other two plaintiffs are his sisters in law (wives of his deceased brothers).

3. Parties have duly filed their respective submissions in respect of the preliminary objection. Defendant has submitted that in Meru ELC No. 5 of 2018, judgment was delivered on 27.11.2018 in his favour. Thereafter, the plaintiffs were evicted from the suit land pursuant to the court's ruling of 27.11.2019 and that a certificate of eviction has been duly filed.

4. Defendant therefore avers that the plaintiff's occupation on the suit land was disrupted by the judgment in ELC 5 of 2018. In the circumstances, there is no peaceful, continuous and an uninterrupted occupation of the suit premises by the plaintiffs. On this point, defendant has cited the case of:

- **Wambugu vs Njuguna (1983) KLR 173.**
- **Mbira vs Gachuhi (2002) EA LR 137.**
- **Jandu vs Kirplal and another (1975) E.A 225.**
- **Mtana Lewa vs Kahindi Ngala Mwangandi (2005) eKLR.**

5. The defendant contends that the issue of adverse possession ought to have been raised in ELC 5 of 2018. He also contends that the introduction of a 3rd plaintiff doesn't raise a new cause of action. On these points, defendant has relied on the cases of:

- **Joshua Ngatu vs Jane Mpinda & 3 others (2019) eKLR.**

- **Nguruman Ltd vs Jan Bonde Nielsen & another (2017) eKLR.**
- **Bernard Mugi Ndegwa vs James Nderitu Githae & 2 others (2010) eKLR.**
- **Henderson vs Henderson (1843) 67 ER 313.**
- **John Christopher Kamau vs cooperative Bank of Kenya (2014) eKLR.**
- **ET vs Attorney General & another (2012) eKLR.**

6. For the plaintiffs, it has been submitted that the issues raised in the preliminary objection require the calling of evidence as the said preliminary objection raises issues of facts and law. It is averred that the court has to establish whether or not the plaintiff's herein were the plaintiff's in the former suit and likewise whether defendant was the same person. They contend that in the instant suit the plaintiffs are 3 while in the former suit, the plaintiffs were 2.

7. The plaintiffs have cited the case of **Kibundi vs Mukobwa & another (1993) eKLR** where it was stated that *“Given that sometimes different people may bear the same name or similar names or name with very small insignificant differences one requires positive evidence to show that the two respondents in the former suits are the same as the two respondents in the instant case.....”*

8. The plaintiffs further contend that the ELC No.5 of 2018 case was not based on the issue of adverse possession but on trust. The plaintiffs have also cited the cases of **AKN vs JNM (2014) eKLR**, **Mukhisa Biscuit manufacturing Co. Ltd vs West End distributors (1969) EA 696**, **Oraro vs Mboja (2005) IKLR 141**.

Determination

9. The issue for determination herein is whether the present suit is res-judicata to the suit Meru ELC No. 5 of 2018.

10. I find that both sides have given a proper legal analysis of what amounts to a preliminary objection and to this end, both sides have cited the cases of **Mukhisa Biscuit manufacturing co. Ltd vs West End Butcheries Ltd. (1969) E.A 696** and **Oraro vs Mboja (2005) IKLR 141**. Thus the court will interrogate the issues raised herein to determine if the preliminary objection raises pure points of law.

11. I have perused the record in ELC No. 5 of 2018 where I delivered a judgment on 27.11.2018. The plaintiff's therein were claiming entitlement to land parcel no. Nyaki/Kithoka/685 on the basis of trust. The parties in the present suit are the same as in the earlier suit except the 3rd plaintiff. In the current suit, the plaintiffs are claiming entitlement of the suit land Nyaki/Kithoka/685 through the doctrine of adverse possession.

12. I find that in the present suit, the identity of the parties is not an issue in dispute or one which requires investigations. They are close relatives. The 2nd plaintiff has elaborated the relationship of the parties in paragraph 11 and 12 of his affidavit whereby the said 2nd plaintiff and defendant are brothers while the other plaintiffs are their sisters in law (wives of their deceased brothers). This is the same identity revealed by 1st and 2nd plaintiffs in the former suit. The issue of calling evidence in order to identify the parties is hence unfounded.

13. The plaintiffs have however advanced a claim that 3rd plaintiff was not a party in the former suit. It is however quite apparent that her claim is similar to that of her co-plaintiffs.

14. In the case of **Daniel Mesiri Kasoo & 7 others vs Fredrick Nkonge Mutwiri & another (2020) eKLR**, I was dealing with a situation whereby different persons in the family of one Silanga Master Ole Kasoo would file various suits and I held thus;

“The fact that the present petitioners were not parties in the previous suit is not a ground for them to institute this petition.....”.

15. As rightly stated in the case of **Omandi vs National Bank of Kenya Limited & others** cited in **ET vs Attorney General & another (2012) eKLR**,

“Parties cannot evade the doctrine of res-judicat by merely adding other parties or cause of action in subsequent suit”.

16. This time round, the claimants case is anchored on the doctrine of adverse possession and not trust. However it was stated in **Herderson vs Herderson (1843) 67 ER 313** that;

“Where a given matter becomes subject of litigation in adjudication by a court of competent jurisdiction, the court requires that parties to that litigation to bring forward their whole case.... And will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward on part of the subject in contest but which was not brought forward.....”.

See **Joshua Ngatu vs Jane Mpinda & 3 others 2019 eKLR**.

17. In the case of **John Florence Maritime services Limited & another vs Cabinet secretary for transport and infrastructure & 3**

others (2015) eKLR, the court of appeal captured the rationale behind the doctrine of res-judicata as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end of litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgment by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably”.

18. The events leading to the filing of the present suit clearly depict a situation whereby the plaintiffs are keen on scuttling the judgment of the court delivered on 27.11.2018 in **Meru ELC No. 5 of 2018**.

19. It is not lost to this court that the plaintiffs were apparently evicted as per the certificate of eviction filed in court on 22.1.2020.

20. In light of the foregoing I find that the preliminary objection dated 4.2.2020 is meritorious and the same is allowed. This suit is hereby struck out with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 13.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE