



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 35 OF 2018 (O.S)

JAMES KIMATHI KIBUNJA.....1ST APPLICANT

MARATHI ACADEMY.....2ND APPLICANT

VERSUS

EUNICE KARIMI KIBUNJA.....1ST RESPONDENT

MWIRIGI M'RINGERA KIBUNJA.....2ND RESPONDENT

RULING

Background

1. The parties herein are close relatives whereby the 1st plaintiff and 2nd defendant are brothers. The two brothers are in turn nephews of the 1st defendant. The 2nd defendant was registered as the owner of the land parcel no. **Abothuguchi/Githongo/494** way back in 1974. The 1st defendant filed a suit **Meru Hccc. No. 126 of 1992** claiming a portion of this land through adverse possession. After many years in the litigation arena, judgment was granted in her favour in the **Nyeri Court of appeal case no 89 of 2009**, whereby the 1st defendant was to be registered as the sole proprietor of 5 acres out of the said parcel of land no **494**. By then, parcel **494** had been subdivided into parcels **1825, 1826** and **1827**. The Court of appeal judgment was executed through a ruling dated 24.2.2014 in **Hccc 126 of 1992** which gave rise to parcel no.**Abothuguchi/Githongo/4102** registered in the name of the 1st defendant in June 2014. This parcel forms the subject matter in respect of the present suit. It has now been subdivided into 8 parcels running from nos. **4170-4177**.

2. The litigation history touching on the suit premises is aptly captured in the ruling dated 29.4.2019 from the **Supreme Court of Kenya Civil Application No. 14 of 2018** case between the two defendants.

3. The 1st plaintiff is the owner/director of the 2nd plaintiff (the school). On 17. 8. 2018, the plaintiffs instituted the current suit claiming entitlement to parcel no. **4102** registered in the name of the 1st defendant through the doctrine of adverse possession.

The Preliminary Objection dated 13.11.2019

4. The 1st defendant filed the preliminary objection dated 13.11.2019 on the grounds that this suit is **res judicata to Hccc No. 126 of 1992 & Nyeri Civil Appeal No. 89 of 2009**. It is averred that this court is functus-officio and lacks jurisdiction to hear the matter since the issues at hand herein were heard and determined in the aforementioned cases and the judgment was enforced. This court gave directions for the preliminary objection to be canvassed by way of written submissions which have duly been filed.

1st defendant's submissions

5. The 1st defendant has submitted that in **Meru Hccc No. 126 of 1992** and in **Nyeri Court of appeal Case No. 89 of 2009**, the parties were the two defendants but the subject matter was parcel No. **Abothuguchi/Githongo/494** and the resultant subdivisions namely parcels **1825, 1826** and **1827** which were subsequently subdivided to give rise to parcels **4102** and **4103**. That the 1st defendant acquired parcel **4102** pursuant to the Judgment of the court. The 1st defendant avers that 1st plaintiff was aware of the proceedings in **Meru Hccc. No.126 of 1992** and the court of appeal matter **no. 89 of 2009**. It is contended that the 1st plaintiff is even the one who was funding the 2nd defendant to pursue a second appeal at the Supreme Court which failed.

6. The 1st defendant further submits that the 2nd defendant has not filed any cross claim in this matter but from his affidavits, he is attempting to re-litigate in this case.

7. In support of her averments, the 1st defendant has relied on the provisions of **Section 7 of the Civil Procedure Act** and the following authorities;

1 **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others (2017) eKLR,**

1 **ET Vs. The Attorney General & Others (2012) eKLR,**

1 **Kenya Commercial Bank Ltd vs. Benjol Amalgamated Ltd (2017) eKLR,**

1 **Njue Njagi vs. Ephantus Njiru Ngai & Another (2016) eKLR.**

Submissions of the plaintiffs

8. In response to the preliminary objection, the plaintiffs filed Grounds of opposition dated 9/3/2020 averring that the current suit is separate and distinct from the suit; **Meru High Court No. 126 of 1992** and **Nyeri Civil Appeal No. 89 of 2009**. That the plaintiffs have not litigated in any claim against the 1st defendant and have not featured in the aforementioned proceedings. That the applicants claim is genuine and it is necessary to grant them room to ventilate their issues.

9. In their submissions, the plaintiffs have reiterated the averments set out in the grounds of opposition adding that the issues in the present suit are wholly different as they pertain to the use and occupation of 3 acres out of land parcel 494 currently parcel 4102, hence plaintiffs' claim is fresh. The plaintiffs therefore contend that the preliminary objection does not raise a pure point of law.

10. In support of their arguments, the plaintiffs have relied on the following authorities;

- **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA.**
- **Oraro vs Mbaja (2005) 1 KLR 141.**
- **Mehuba Gelan Kelil & 2 others vs Abdulkadir Sharrif Abdirhim & 4 others (2015) eKLR.**
- **Aviation and Allied Workers Union of Kenya vs Kenya Airways Ltd & 3 others (2015) eKLR.**
- **Attorney General of Kenya vs Independent Medical Legal Unit (EACJ Appeal No.1 of 2011).**
- **Attorney General of Tanzania vs African Network for Animal Welfare (ANAW) (EACJ Appeal No 3 of 2011).**
- **Lotta vs Tanaki (2003) 2 EA 556**
- **Peter Wekesa vs Peter Wangusi Wasike, Court of Appeal at Eldoret, Civil Appeal No.62 of 2003, (unreported).**

11. I have not seen the submissions of the 2nd defendant, but I have considered his averments set out in his replying affidavit filed on 25.11.2019. He conceded that the Court of appeal in **Civil Appeal No. 89 of 2009** awarded the 1st defendant 5 acres of land out of parcel no. Abothuguchi/Githongo/494. He however avers that the 1st defendant withheld the beneficial interest of the plaintiffs and himself from the court of appeal thereby denying that court an opportunity to determine particulars of allocation. That pursuant to the judgement, under the directions of the 1st defendant, parcel No. Abothuguchi/Githongo/494 was divided into Parcel Number Abothuguchi/Githongo/4102 & 4103. That being aggrieved by the decision of the Court of Appeal he opted to pursue for review of the court of appeal's decision at the appellate court and eventually at the Supreme Court of Kenya. That the 1st defendant allocated herself Parcel No. 4102 on which the applicant and himself have both planted trees and several crops.

Analysis and Determination

12. The guiding law on the issue of res judicata is **Section 7 of the Civil Procedure Act** which provides 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”.

13. In **George W. M. Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR** the Court in analysing the doctrine of Res Judicata held as follows;

“the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties

cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalment. I wholly agree with the opinion of Kuloba J in Mwangi Njangu v Meshack Mbogo Wambugu (supra) where he said:- 'If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays'. It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter...."

14. This point where courts have found that an issue which ought to have been made a ground of attack or defence in a former suit shall be deemed to have been a matter directly and substantially in issue in such a suit has been buttressed in a number of cases. See- **Joshua Ngatu vs. Jane Mpinda & 3 Others (2019) eKLR, Bernard Mugi Ndegwa vs. James Nderitu Githae & 2 Others (2010) eKLR, ET Vs. The Attorney General & Others (2012) eKLR, John Christopher Kamau vs. Co-operative Bank of Kenya (2014) e KLR.**

15. Though the history of the dispute is well captured in the **Supreme Court ruling civil application no. 14 of 2018 dated 29.4.2019**, I find it necessary to summarize the litigation journey in order to have a better perspective of the dispute at hand. As indicated in the beginning of this ruling, the parties herein are close relatives.

16. In **Meru Hccc No. 126 of 1992 (O.S.)**, the 1st defendant was claiming 5 acres out of land parcel **No. Abothuguchi/Githongo/494** through the doctrine of adverse possession. That suit was dismissed by Hon. Kuloba J on 4.3.1993, but 1st defendant appealed and the suit was reinstated and heard by Hon Emukule J where 1st defendant was granted a life interest in the suit land. She appealed in **Nyeri Court of appeal case no. 89 of 2009**. In a Judgment delivered on 29.5.2013, the appeal was allowed and 1st defendant was to have 5 acres out of the suit premises parcel **494** which had already been subdivided into the three parcels namely **1825, 1826 and 1827**.

17. The 1st defendant executed the Court of Appeal decision through a court process, whereby she filed an application in **Meru Hccc 126 of 1992** to order the Land Registrar to dispense with the production of the original titles to parcels **1825, 1826 and 1827** in the implementation of the court of appeal judgment. In a ruling dated 24.2.2014 in **Meru Hccc No. 126 of 1992**, the Hon Judge P.M. Njoroge ruled as follows;

"I note that this application is meant to facilitate the implementation of a court of Appeal Judgment. Orders of court are just that; they are judicial orders. They cannot be turned into negotiating platforms. They must be obeyed. In the circumstances, this application is allowed....."

18. Thus the execution of the **Court of Appeal Judgment in case no. 89 of 2009** paved the way for the registration of two parcels, namely **4102 (the current suit land)** in the name of the 1st defendant and parcel **4103** in the name of the 2nd defendant. This parcel of land 4102 is the one the plaintiffs are now claiming also through the doctrine of adverse possession.

19. Meanwhile, the 2nd defendant filed an application at the **Supreme Court, Civil Application No. 14 of 2018** seeking to file an appeal out of time. The same was however dismissed as it was noted that the application had been filed five years after the delivery of the judgement and the applicant had not filed a notice of Appeal.

20. Is this a case where the plaintiffs were totally in the dark regarding the aforementioned litigation history? There are tell-tale signs that the two brothers are together in so far as the dispute touching on parcel no. 4102 is concerned,

21. In paragraph 6 in the Supreme Court ruling of 29.4.2019 in **Civil application no. 14 of 2018**, the court had observed as follows;

*"It is the applicant's (read the current 2nd defendant) case that the judgment of the Court of Appeal goes against previous decisions by the same Court thereby undermining the rule of law and the principle of legitimate expectation. That the decision also goes against the greater public interest and, if allowed to stand, will occasion substantial injustice to his brother, **James Kimathi, who has a school by the name: Marathi Academy (emphazize added)**- Registration Number 204225- on the said portion of land which is the only private school in the whole of Marathi location, and that the school employees will also lose their employment which shall adversely affect their families and the applicant's brothers who depend on that portion of the land and the school for their sustenance."*

22. It is clear that the 2nd defendant had embarked on challenging the Court of Appeal decision on behalf of himself and the current plaintiffs.

23. Further, the averments set out in the replying affidavit of the 2nd defendant filed on 25.11.2019 also confirm that the two brothers have been on the same side in so far as the disputed land is concerned even if the 1st plaintiff was not a party in the previous suits. In particular, the contents of the paragraph 7 in the aforementioned affidavit is a pointer to the fact that 2nd defendant is trying to re-litigate the dispute all over again as he was clearly dissatisfied with the outcome of the Court of Appeal decision.

24. The 1st defendant is an Aunt of the two brothers. She started claiming the suit land way back in 1992. She sued the 2nd defendant because he was the registered owner of the original parcel 494 where the school is also situated. It is not fathomable that 1st plaintiff was not aware of the previous litigation. What is crystal clear is that this suit was filed in order to scuttle the **Court of Appeal Judgment in Nyeri Civil Appeal no. 89 of 2009**.

25. In the case of; **Daniel Mesiri Kasoo & 7 others v Fredrick Nkonge Mutwiri & another [2020] eKLR**, I was dealing with a situation where different family members of one **Silonga Master Ole Kaso** would lodge different suits claiming the same parcel of land. A

preliminary Objection was raised anchored on res-judicata, where I allowed the said preliminary objection while stating as follows;

“Thus the fact that the present petitioners were not parties in the previous suit is not a ground for them to institute this petition. I find that indeed this suit is an abuse of the court’s process”.

26. In the case of **John Florence Maritime Services Limited vs. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**, the Court of appeal had this to say on matters res-judicata;

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

27. If indeed the 1st plaintiff was entitled to this land for the last 40 years as claimed in his supporting affidavit to the Originating Summons, then why did he sit pretty all these years watching his Aunt trying to get the same land from his brother the 2nd defendant. I find that the issue as to who was entitled to the suit land through the doctrine of adverse possession has been determined and this court cannot revisit the issue all over again.

28. It is not lost to this court that Judge Njoroge in his ruling dated 24.2.2014 in **Meru Hccc 126 of 1992** did give the 2nd defendant an opportunity to transfer the 5 acres as decreed by the Court of Appeal, but no attempt was made to comply with the said judgment. The court therefore allowed the application made by 1st defendant to have the court of appeal decision executed.

29. The logical conclusion to make is that this suit is a red herring meant to cover the crafty machinations of the two brothers. The 2nd defendant has tried all means to wrestle the suit land from his Aunt (see **paragraph 7 of the Supreme Court ruling civil application no. 14 of 2018 supra**). When it became apparent that he was hitting a dead end, the brother 1st plaintiff sued him! This scheme indeed worked, but just for a while before me whereby on 11.11.2019, I was persuaded to grant orders restraining the 1st defendant from entering the suit-land. This court is now fully aware of the alleged scheme systematically crafted by the two brothers to render the Court of Appeal Judgment which awarded 5 acres of land to the 1st defendant impotent. The two brothers are determined to keep their elderly Aunt in the litigation arena by having a constant bite of the cherry. That is why the 2nd defendant is out-rightly challenging the court of appeal decision (see paragraph 7 of his further affidavit filed on 25.11.2019).

30. Borrowing the words of the Honorable Judges in the **Nyeri Court of Appeal case no 66 of 2015 Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others**, this suit is ***“a misuse of the judicial process in the pursuit of an insatiable greed and avarice that stops at nothing to achieve its ends, including subverting the legal process”.***

31. The upshot of this determination is that; **the preliminary objection dated 13/11/2019 is found to have merits and the same is allowed. This suit is hereby struck out with costs to the 1st defendant. Any orders of maintenance of status-quo or any orders restraining the 1st defendant from dealing with the suit parcel NO. ABOTHUGUCHI/GITHONGO/4102, or the resultant parcels NOS 4170, 4171, 4172, 4173, 4174, 4175, 4176 and 4177 are hereby discharged.**

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH 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 24.6.2020. 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