



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 200 OF 2019**

**KANZE SAFARI NDUNGO .....1<sup>ST</sup> PLAINTIFF**

**JENIFA DOO MUNG'ABWA.....2<sup>ND</sup> PLAINTIFF**

**BENARD KALAMA NGWARU.....3<sup>RD</sup> PLAINTIFF**

**PRISCILLA USHENG NGALA.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ABDUL NASSIR SALIM NAAMAN .....1<sup>ST</sup> DEFENDANT**

**HARIF IQBAL KHAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

(Application to strike out suit for being res judicata; plaintiffs filing suit for adverse possession; defendants claiming that the dispute has been heard before in a different case; the plaintiffs herein not being parties in that case; suit not res judicata; application dismissed)

1. The application before me is that dated 31 January 2020 filed by the respondents to this Originating Summons. The order sought is to have this Originating Summons struck out. The application is opposed.

2. To put matters into context, the applicants to the Originating Summons (who for ease of reference I will refer to as the plaintiffs), filed suit on 12 November 2019 claiming to have acquired by way of adverse possession, title to the land described as Plot Subdivision No. 4098 (Original No. 3241/53/III/MN). The 1<sup>st</sup> plaintiff, in the affidavit in support of the Originating Summons, deposed that he purchased from the 1<sup>st</sup> defendant two portions of the property, each measuring 50 X 80 feet, and has been residing in it with his family since the year 1996. He deposed that in the year 2017 the defendants came to the property and evicted some squatters but he was not asked to vacate. On 26 October 2019, the defendants came and carried out further demolitions and evictions, and he, together with other residents, were arrested. As a condition for release, he was forced to sign a document to the effect that he has agreed to vacate the property before 9 November 2020. The 2<sup>nd</sup> plaintiff swore an affidavit and deposed that she and her family have been on the land since the year 1996, when she and her husband, purchased a portion from the 1<sup>st</sup> defendant. On 20 May 2019, the defendants came to the property and destroyed her five roomed house. The 3<sup>rd</sup> plaintiff swore an affidavit to state that the disputed land has been in possession of his family since 1950s. He stated that on 20 May 2019, the defendants demolished his properties. The 4<sup>th</sup> plaintiff on her part, in her supporting affidavit, claimed to have been on the suit property since the year 1996 when her parents purchased a portion from the 1<sup>st</sup> defendant. She had set up a pub and grill business which was destroyed when the defendants carried out evictions.

3. In the affidavit in support of this motion to strike out the Originating Summons, sworn by Abdul Nassir Salim Naaman, the 1<sup>st</sup> defendant, it is deposed that the plaintiffs are not being honest as they were evicted through execution of the decree in the case Malindi ELC No. 51 of 2009. He has deposed that the judgment in the said suit affected all people who were on the suit property including the plaintiffs. He has averred that the Originating Summons is an attempt to introduce a new cause of action against him through the back door. He has deposed that the plaintiffs have no structures on the property and that he has constructed a perimeter wall around the entire suit property. He has annexed a copy of the judgment in Malindi ELC No. 51 of 2009 and a photograph of the suit property.

4. A replying affidavit sworn by Kanze Safari Ndungo, the 1<sup>st</sup> plaintiff, was sworn to oppose the motion. He has deposed that he and the other plaintiffs were not party to the suit Malindi ELC No. 51 of 2009 and they are therefore not bound by that decision.

5. I invited counsel to file written submissions and I have taken note of the submissions of both Mr. Gekonde, learned counsel for the defendants/applicants, and Mr. Owino, learned counsel for the plaintiffs/respondents.

6. First, the remedy of striking out a suit is a drastic remedy and should only be applied in the clearest of cases though a suit will certainly be liable to be struck out if it is res judicata. The definition of a suit which is res judicata is contained in Section 7 of the Civil Procedure Act, which is drawn 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.

7. The plaintiffs in this suit were not parties in Malindi ELC No. 51 of 2009. The parties therein were Abdul Nassir Salim Naaman (1<sup>st</sup> defendant herein) as plaintiff, and the defendant was Kassim Maona. In that case, Mr. Naaman had sued Mr. Kassim to have him evicted from the suit property. Judgment was entered in his favour on 31 October 2014 and an order of eviction was issued against Mr. Kassim and his agents/heirs or workers or anybody authorised by him to be on the suit property. It has not been demonstrated to me that the plaintiffs herein came into the land through Mr. Kassim so that they would also be bound by the judgment in Malindi ELC No. 51 of 2009. I hesitate to hold that they are litigating under Mr. Kassim's title, based solely on the affidavit evidence before me, for in their own supporting affidavits, they appear to be stating that they came into the land independently of Mr. Kassim. It would require evidence before this court can come to the conclusion that they are actually on the land courtesy of Mr. Kassim. I am thus not persuaded to strike out the suit as being res judicata.

8. The defendants claim that the plaintiffs have already been evicted. The plaintiffs on the other hand assert that the title of the defendants has been extinguished. Again, this calls for evidence before the suit can be struck out.

9. I am thus not persuaded to strike out the Originating Summons based on the application before me. I will allow the case to proceed for the plaintiffs to be heard on merits. For the above reasons, this application is dismissed with costs.

10. Orders accordingly.

**DATED AND DELIVERED THIS 18 DAY OF NOVEMBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**