



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT AND LAND CASE No. 64 OF 2019**

**MARY WANJIKU MANGARA**

**ESTHER WANJIKU MUHIU**

**WANJIKU KIMANI RUO (suing on their own behalf**

**as well as trustees and officials of Nyakiambi Women Group).....PLAINTIFFS**

**VERSUS**

**1. LONARD WAWERU GICHUHI**

**2. MARY WANJIKU GICHUHI**

**3. ESTHER WANGARI THUITA (Sued as the administrators  
of the estate of John Gichuhi Mutego (Deceased))**

**4. JANE GITUKU**

**5. EDWARD RUIRU MAINA**

**6. MOSES MBUTHIA KARIUKI.....DEFENDANTS**

**RULING**

1. By Notice of Motion dated 5<sup>th</sup> May 2020, the first, second and third defendants seek the following orders:

*1. That this honourable court be pleased to strike out this suit for being an abuse of the court process.*

*2. That this honourable court be pleased to strike out this suit for being statutory barred.*

*3. That this honourable court be pleased to strike out this suit for being res judicata as the matters in issue herein were directly and substantially in issue in a previously decided suit between the same parties being Nakuru HCC No. 113 of 1997.*

*4. That this Honourable court be pleased to strike out this suit for being res judicata as the matters in issue herein have been directly and substantially in issue in a previously decided suit between the same parties being Nakuru HC Succession Cause no. 403 of 2009.*

*5. That this honourable court be pleased to strike out this suit for being an abuse of the court process as it seeks to enforce an agreement respecting Agricultural Land whereas no consent of the land control board was obtained and as such the said sale transaction is null and void and the suit a non starter.*

*6. That the costs of this application be borne by the plaintiffs/respondents.*

2. The application is brought under **Order 2 Rule 15** of the **Civil Procedure Rules** and is supported by an affidavit sworn jointly by the first, second and third defendants. They deposed that they are the administrators of the estate of John Gichuhi Mutego (deceased), pursuant to a grant issued to them on 30<sup>th</sup> March 2017 in **Nakuru HC Succession Cause No. 403 of 2009**. They added that this suit seeks to enforce a sale

agreement dated 8<sup>th</sup> December 1989 between the deceased and the plaintiff and that the suit having been filed on 27<sup>th</sup> June 2019, is statute barred. That the plaintiff had filed **Nakuru HCC No. 113 of 1997** against the deceased over the same subject matter and which matter was concluded through a consent recorded on 12<sup>th</sup> October 1999, thereby rendering this matter *res judicata*. Further, that the issues between them and the plaintiff have been the subject of rulings in **Nakuru HC Succession Cause No. 403 of 2009** dated 30<sup>th</sup> March 2017, 12<sup>th</sup> June 2019 and 16<sup>th</sup> April 2020 thus making this matter *res judicata*. They also deposed that the sale agreement dated 8<sup>th</sup> December 1989 was in respect of agricultural land yet no consent of the land control board was obtained thus making it null and void.

3. The plaintiffs opposed the application through grounds of opposition and a replying affidavit sworn by James M. Njonge who described himself as “the chairman of the plaintiff group”. He admitted that **Nakuru HCC No. 113 of 1997** indeed existed and that the consent referred to by the applicants was recorded. He added that the consent was never challenged by the deceased in his lifetime and that the plaintiffs have been unable to execute the consent as the court file disappeared and all efforts to trace it have failed. That the issue of ownership of the suit property was not in issue in **Nakuru HC Succession Cause No. 403 of 2009** and that the High Court in rulings dated 12<sup>th</sup> June 2019 and 9<sup>th</sup> April 2020 stated that ownership of the suit property can only be determined by this court.

4. In the grounds of opposition, the plaintiffs averred that the suit is not statute barred since the first, second and third defendants could not be sued prior to being appointed administrators in 2017, that this is not a proper case for striking out suit as there are various issues that cannot be determined without calling evidence, that the plaint herein raises the issue of adverse possession of the land and also trust, which issues cannot be determined without the suit going to full hearing, that **Nakuru HC Succession Cause No. 403 of 2009** cannot determine ownership of the suit property and that whether or not there was consent of Land Control Board cannot be addressed without case going to full hearing.

5. The plaintiffs did not file any submissions, opting instead to rely entirely on their grounds of opposition and replying affidavit. The applicants filed written submissions.

6. I have considered the application, the affidavits, grounds of opposition and the submissions. The issues that arise for determination are whether this suit is barred by **Limitation of Actions Act** and whether the suit is *res judicata*.

7. I will deal with *res judicata* first. If it turns out that the suit is *res judicata*, there will be no need to consider whether the suit is barred by **Limitation of Actions Act**.

8. The doctrine of *res judicata* has found statutory expression at **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.*

9. The essential ingredients of *res judicata* are that there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others** [2018] eKLR.

10. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) the Court of Appeal stated:

*... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -*

*“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the 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 matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ....”*

*... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.*

11. There is no dispute that Nyakiambi Women Group filed **Nakuru HCC No. 113 of 1997 (O.S)** against the deceased and that a consent was filed in the said matter on 12<sup>th</sup> October 1999. The first, second and third defendants herein are the administrators of the estate of the deceased. Thus, the parties to the former suit and this suit are the same save for the addition of the 4<sup>th</sup> to the 6<sup>th</sup> defendants in this suit. A perusal of the amended plaint herein further shows that the dispute is majorly between Nyakiambi Women Group and the deceased’s estate on the ownership of the suit property and that the 4<sup>th</sup> to the 6<sup>th</sup> defendants have been added on allegations that they interfered with the property. A reading of paragraph 12 of the amended plaint shows that the 4<sup>th</sup> to the 6<sup>th</sup> defendants are sued as beneficiaries of the deceased’s

estate, thus bringing them within explanation 6 of **Section 7** of the **Civil Procedure Act** as persons litigating under the deceased. I am therefore satisfied that parties in this suit are the same as those in **Nakuru HCC No. 113 of 1997 (O.S)**.

12. A perusal of the originating summons filed in **Nakuru HCC No. 113 of 1997 (O.S)** which the plaintiffs have annexed shows that Nyakiambi Women Group sought orders that it be declared as the rightful owner of LR No. 1024 Naivasha having entered into a sale agreement and having paid the purchase price; that the sale agreement was tainted by fraud and misrepresentation; that it had paid the full purchase price to the deceased; extension of the time to apply for consent of the land control board and an injunction to restrain the deceased from interfering with, transferring or alienating the suit property. Parties herein are in agreement that LR No. 1024 Naivasha and LR No. 1024 Mirera Suswa Southern Naivasha Municipality refer to one and the same property.

13. On the other hand, a perusal of the amended plaint herein shows that the plaintiffs have brought this suit as trustees and officials of Nyakiambi Women Group. The suit is brought on behalf of the group. At prayer (a) of the amended plaint they seek a declaration that the parcel of land known as LR No. 1024 Mirera Suswa Southern Naivasha Municipality belongs to the group by sale and/or adverse possession and that the deceased's estate holds the land and the title as constructive trustees for the group. At prayer (b) they seek an injunction to restrain the defendants from entering into, cultivating, selling, charging or doing any other act over the title and possession of the property. The issues of injunction and declaration of ownership pursuant to the sale agreement feature both in this suit and **Nakuru HCC No. 113 of 1997 (O.S)**. The aspect of the deceased's estate holding the land and the title as constructive trustees for the group though not raised in **Nakuru HCC No. 113 of 1997 (O.S)**, is one that falls within explanation 4 of **Section 7** of the **Civil Procedure Act** since it ought to have been raised in the said matter. In sum, I find that the issues raised in this suit were directly and substantially in issue in **Nakuru HCC No. 113 of 1997 (O.S)**.

14. The plaintiffs have also introduced adverse possession angle to this suit. I am however persuaded that the adverse possession claim is simply a cosmetic facelift to the old claim. The court must be wary of such attempts. See **E.T. v Attorney General & another [2012] eKLR**. As noted earlier, the parties to the dispute are the same: Nyakiambi Women Group and the deceased or his estate. The dispute still revolves around the sale agreement dated 8<sup>th</sup> December 1989. It is trite law that possession which is pursuant to a sale agreement cannot be adverse to the vendor. See **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR**. To the extent that the plaintiffs are still seeking to enforce the sale agreement, they cannot be heard to claim to be in adverse possession.

15. The plaintiffs herein confirm at paragraph 14 of the amended plaint that **Nakuru HCC No. 113 of 1997 (O.S)** was determined through consent on 12<sup>th</sup> October 1999. A perusal of the said consent which the plaintiffs included in their list of documents shows it finalized the suit. A consent that concludes a suit operates as a final determination of the suit together with the issues in it. This court (Obaga J.) took a similar position in **Alexander Sabila Chebelyo & another v Oriental Commercial Bank Ltd & another [2015] eKLR**. The Court of Appeal also addressed the issue recently in **Julius Muthoka Ndolo v Park Towers Limited & 2 others [2019] eKLR** where it stated that finality in the decision does not connote a determination made after hearing oral evidence only but extends also to consents properly recorded before the court. I therefore find that this suit is *res judicata*.

16. The plaintiffs may wish to focus their efforts in **Nakuru HCC No. 113 of 1997 (O.S)** and see how to actualize the consent orders therein. If the file is missing as they claim, that cannot be an excuse for filing a fresh case. There are procedures for dealing with missing files.

17. The plaintiffs contend that they filed this suit pursuant to directions given by the High Court in **Nakuru HC Succession Cause No. 403 of 2009** in that court's ruling of 12<sup>th</sup> June 2019. I have read that ruling and I do not see any such directions. I have also the said court's ruling of 30<sup>th</sup> March 2017 and I note that the court restated therein the accepted legal position that the court with jurisdiction on matters of the use and occupation of land as well as title to land is this court. Needless to state, a litigant would have to invoke the court's jurisdiction properly, among others without flouting the doctrine of *res judicata*.

18. I am keenly aware that striking out is a draconian remedy and one that must be resorted to most sparingly. A suit which flouts the doctrine of *res judicata* is that cannot be remedied in any way. To sanitize the situation, it must be struck out.

19. In the result, Notice of Motion dated 5<sup>th</sup> May 2020 succeeds. I strike out this suit with costs to the 1<sup>st</sup> to 5<sup>th</sup> defendants. I do not award any costs to the 6<sup>th</sup> defendant since he did not participate in the proceedings. The 1<sup>st</sup> to 3<sup>rd</sup> defendants shall also have costs of the application.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of November 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Chelule holding brief for Mr Murimi for the 1<sup>st</sup> to 3<sup>rd</sup> defendants/applicants

Ms Kimure holding brief for Mr Ikua for the plaintiff/respondent

No appearance for the 4<sup>th</sup> to 6<sup>th</sup> defendants

Court Assistants: B. Jelimo & J. Lotkomoi