



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**ELC CASE NO. 1314 OF 2013**

**JUNE WANJUGU KOINANGE**

**JANE NJERI NGURE**

**SAMUEL GITAU MBUTHIA** (Suing as Administrators of the  
Estate of Dinah Muthoni Mbutia).....**PLAINTIFFS**

**VERSUS**

**FRANCIS KIRIMA M'KINYUA**.....**1<sup>ST</sup> DEFENDANT**

**PETER KIOKO NDIKU**.....**2<sup>ND</sup> DEFENDANT**

**DAVID MURIGI MWANGI**.....**3<sup>RD</sup> DEFENDANT**

**MOSES KINGATI WANGARE**.....**4<sup>TH</sup> DEFENDANT**

**MICHAEL MWENDA MANYARA**.....**5<sup>TH</sup> DEFENDANT**

**JOSEPH MUSYOKA WAMBUA**.....**6<sup>TH</sup> DEFENDANT**

**SAMUEL ANDIKA MATAHANA**.....**7<sup>TH</sup> DEFENDANT**

**BENADITA NJERI MWENDA**.....**8<sup>TH</sup> DEFENDANT**

**JOHN DICKENS OTIENO**.....**9<sup>TH</sup> DEFENDANT**

**PETER MUTHEE KIHUYU**.....**10<sup>TH</sup> DEFENDANT**

**MICHAEL MWENDA MANYARA**.....**11<sup>TH</sup> DEFENDANT**

(Sued as the officials and members of Githurai Mwihoti Settlement Society and all other persons

unknown to the Plaintiffs who are illegally occupying L.R. NO.3811/6 (Original number 3811/1/2)

**RULING**

The application dated 2/3/2015 seeks orders to set aside the court's ruling made on 13/2/2015 in respect of the Plaintiffs' application dated 7/10/2014 and the subsequent orders issued on 19/2/2015. It also seeks to have the Plaintiffs' application dated 7/10/2014 heard afresh *inter partes*. The application is made on the grounds that the Plaintiffs served the application dated 7/10/2014 and the hearing notice dated 10/11/2014 on the Defendants' Advocates on 11/11/2014, and that these were received by the Defendants' Advocates' secretary who failed to diarise the matter or bring the documents to the attention of the Defendants' advocate as a result of which he failed to attend court when it came up for hearing on 25/11/2014. On that day, the court directed the Plaintiff to file submissions and highlight these on 26/1/2015. The Defendants contended that their Advocates were neither served with the submissions nor were they notified of the mention date for the

highlighting of the submissions. The court delivered its ruling on the Plaintiffs' application dated 7/10/2014 on 13/2/2015 without the benefit of hearing the Defendants and issued further orders on 19/2/2015 to the effect that the Defendants and all persons living on L.R No. 3811/6 (Original number 3811/1/2) were to be evicted from the land.

The instant application is supported by affidavits sworn by Aggrey Odiwour Kenyatta Advocate, Francis Kirima M'Kinyua and Edith Akinyi Alolo. Through his affidavit sworn on 2/3/2015, Mr. Aggrey Odiwour Kenyatta, who has conduct of this matter on behalf of the Defendants deponed that the Plaintiffs' application dated 7/10/2014 sought to have the Defendants' statement of defence dated 5/12/2013 struck out. He did not file a replying affidavit to the Plaintiffs' application because the matter was not brought to his attention due to an inadvertent administrative mistake by a newly employed secretary in his law firm. He annexed entries in his diary for 25/11/2014 as evidence that the matter was not diarised.

On his part, Mr. Francis Kirima M'Kinyua deponed that the Defendants have a plausible defense, and that the orders issued by the court on 19/2/2015 exposed them to possible eviction without being afforded an opportunity to be heard. He further deponed that there are facts which had not been brought to the attention of the court in order to help it make a fair determination. He pointed out the fact that the Defendants had applied for revocation of the grant issued in **Succession Cause No. 287 of 2013** which relates to this matter, and that the application for revocation was still pending before the court, and annexed a copy of that application. It is not clear whether this application has been heard and determined.

Edith Akinyi Alolo swore the supporting affidavit dated 2/3/2015 in support of the application. She deponed that she was employed as a secretary in the firm of Kenyatta Odiwour & Co. Advocates on 1/11/2104, and annexed a copy of her letter of employment. She further deponed that she received the Notice of Motion dated 7/10/2014 and an undated hearing notice in relation to **ELC HCC No. 1314 of 2013** on 11/11/2014. She stamped the documents and concluded that the matter did not have a hearing date because the hearing notice was not dated and went ahead to file the documents without diarising them. She admitted that she committed the mistake, but that it was inadvertent.

Through the grounds of objection dated 13/3/2015, the Plaintiffs opposed the Defendants' application dated 2/3/2015 on grounds that counsel for the Defendants was duly served with the application dated 7/10/2014 and the hearing notice for 25/11 2014, but remained uninterested, hence did not file any reply to the application and that the Defendants' incompetence should not be used to reverse the judicial clock.

Through the Notice of preliminary objection dated 6/7/2015, the Defendants raised an objection to the hearing of the whole suit on grounds that the entire suit violates Section 6 of the Civil Procedure Act. Pursuant to leave granted on 25/3/2015, Francis Kirima M'Kinyua swore a further affidavit dated 6/7/2015 in which he deponed that as members of Mwihoti settlement Society, they had been living on the suit land for over twelve years and annexed photographs showing the developments they had carried out on the suit property. He deponed further that based on the duration of time which the members had occupied the suit land, they filed **High Court Civil Case No.623 of 2009 (OS)** claiming adverse possession of the suit land. He annexed copies of the pleadings filed in that case. That suit is still pending before the court. He further deponed that on 4/2/2010, the Plaintiffs applied to be joined to that suit as the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively, which application was allowed and the court granted interim orders restraining the Defendants from carrying out any further development on the suit property pending the hearing and determination of the said suit. He annexed copies of the said orders.

The application and Notice of Preliminary objection dated 6/7/2015 was opposed by the Plaintiffs through the replying affidavit of **Samuel Gitau Mbugua** sworn on 18/9/2015. He deponed that the Plaintiffs in this suit were not the original parties in **HCCC No. 623 of 2009 (O.S)** and that the orders sought by the Defendants in that suit were directed against Joseph Thugo Mwaura, David Kiarie Waiya and Silas Kinyanjui Kimemia. He deponed that the Plaintiffs obtained injunctive orders in **HCCC No. 623 of 2009 (O.S)** restraining the Defendants from interfering with L.R Number 3811/6 (original L.R No. 38811/2), but the Defendants are in contempt of those orders. He annexed a copy of the application for contempt of court against the Defendants that was filed in that suit.

The court has considered the application, grounds of objection, affidavits and annexures thereto and the submissions of both parties. The court record shows that on 25/11/2014 counsel for the Plaintiff attended court while counsel for the Defendant was absent. The record is silent on whether or not the Defendants were present in court. When the parties appeared on 26/1/2015 for highlighting of submissions, the court noted that counsel for the Plaintiffs had neither served a mention notice on counsel for the Defendant indicating the date for highlighting the submissions nor had they served the submissions. The court notes that after being served with summons to enter appearance, the Defendants duly filed the defence dated 5/12/2013, which shows that they had the intention to defend this suit. Counsel for the Defendants urged that the Defendants had an arguable defence to the Plaintiffs claim as they claim that they have an interest in the suit land based on adverse possession. This is the claim made in ELC No. 623 of 2009 which is still pending determination before this court.

The Plaintiffs' counsel submitted that the Defendants' counsel having admitted that his law firm was served with the application did not deserve the orders they seek. He further stated that the copy of the letter of employment produced by the Defendants' advocate's secretary referred to a different employer and not the Defendants' advocates. Mr. Mbaabu urged that there was no connection between the two suits and that the parties in the two suits were different.

Having considered the matter, the court is satisfied that the failure by the Defendants advocate to appear and file a response to the application dated 7/10/2014 was due to an inadvertent mistake on the part of their counsel as demonstrated by the supporting affidavits. The court allows the application dated 2/3/2015. The costs of that application will be borne by the Defendants.

A notice of preliminary objection dated 6/7/2015 was filed seeking to strike out this suit for offending Section 6 of the Civil Procedure Act. The court notes that the Plaintiffs instituted **HCCC No. 623 of 2009 (O.S)** against three Defendants by way of Originating Summons, seeking to be declared the proprietors of L.R No. 3811/6 (Original Number 3811/1/2) because they claim to have occupied the land for a period longer than 12 years and therefore claim title by way of adverse possession. While that suit was subsisting, Dinah Muthoni Mbugua and David Gitau Mbugua were joined to the suit as the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively. The instant suit was filed by the Plaintiffs who are representatives of the Estate of Dinah Muthoni Mbugua, deceased, and who was the 4<sup>th</sup> Defendant in HCCC No. 623 of 2009 (O.S). This suit which was commenced by way of plaint seeks eviction orders against the Defendants who are the Plaintiffs in HCCC No. 623 of 2009 (O.S). The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in HCCC No. 623 of 2009 (O.S) are not parties to this suit.

The subject matter in this case and that in HCCC No. 623 of 2009 (O.S) is the same and relates to claims for ownership of L.R No.3811/6 (Original Number 3811/1/2). The parties are also the same, save that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in HCCC No. 623 of 2009 (O.S) are not parties in this case. The parties who are common in both cases are represented by the same advocates. The Plaintiffs in HCCC No. 623 of 2009 (O.S) are represented by Kenyatta & Odiwour & Co. Advocates and they are defended by the same firm of advocates in this matter. The Plaintiffs in this matter are represented by Lawrence M. Mbaabu & Associates and they are defended by the same Advocates in HCCC No. 623 of 2009 (O.S).

Section 6 of The Civil Procedure Act bars the court from proceeding with the trial of a dispute that is directly in issue in another court of competent jurisdiction. Both this suit and HCCC No. 623 of 2009 (O.S) raise the same question of facts. Strictly speaking, the claim should have been litigated in HCCC No. 623 of 2009 (O.S), which was filed first. There is no justification for having the two cases heard separately.

On 13/2/2019 this court made an order that **HCCC No. 623 of 2009 (O.S)** would be stayed to await the outcome of the application dated 2/3/2015 and that the two files would be heard together.

The court directs that both suits shall be heard together. Parties are directed to comply with Order 11 of the Civil Procedure Rules and to fix the two cases for hearing without further delay.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April 2019**

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. N. Gasansule holding brief for Mr. Mbaabu for the Plaintiffs

Ms. M. Kavuli holding brief for Mr. Kenyatta for the Defendants

Mr. V. Owuor- Court Assistant