



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CAUSE NO. 110 OF 2018 (O.S)

IN THE MATTER OF LAND PARCEL NO. 1221 KIGANJO SCHEME

AND

IN THE MATTER FOR AN APPLICATION FOR A DECLARATION

OF RIGHT OF OWNERSHIP OF PROPERTY

AND

IN THE MATTER OF ARTICLES 22(1), 22(2) (a) 23(1), 23(1), 23(3) (a)

AND ARTICLE 159(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 13(7) (a) OF THE ENVIRONMENT

AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF THIKA CIVIL CASE NO.487 OF 1992

BETWEEN

REBECCA WAMBUI NJOROGE (suing as the wife and Administrator of the estate of

JOSEPH NJOROGE KUNGU (DECEASED).....PLAINTIFF

AND

NJERI MWANGI.....DEFENDANT

JUDGMENT

The Plaintiff filed an *Originating Summons* dated 26th March 2018 seeking for the following orders:-

1. That A declaration order do issue to the effect that Joseph Njoroge Kungu (Deceased) is the rightful owner of plot No.1221 Kiganjo Scheme and that Plot No.1221 Kiganjo Scheme Thika Municipality is part of the deceased Estate.

2. A declaration that the continued stay in Plot NO.1221 Kiganjo Scheme Thika Municipality by Njeri Mwangi amounts to contempt of court against the judgment issued on 12th November 1999, interfering with the deceased's Estate.

3. That the said Njeri Mwangi or any person who claims from her or stays in Plot No.1221 Kiganjo Scheme Thika Municipality be evicted forthwith.

In her **Supporting Affidavit**, **Rebecca Wambui Njoroge** averred that she is the widow of the late **Joseph Njoroge Kungu** the owner of the suit property. It was her contention that a **Judgment** was entered in favour of the deceased in **1999** in **Thika CMCC No. 487 of 1992** and the court gave the deceased orders of eviction of the defendant from the suit property but unfortunately he died two months after Judgment was issued. She alleged that she discovered that her husband had engaged several lawyers and it took her time to trace the advocates who had handled the matter at the final stage. She subsequently petitioned for **Letters Of Administration Intestate** dated **28th November 2000**, but the same was protested by her co administrator and the same led to a litany of issues culminating into a Judgment being entered on **12th June 2013** and being dissatisfied she lodged an appeal and the same took inordinately too long. She averred that she applied to substitute her husband in **Thika Civil Case No.487 of 1992** and the same was granted on **28th September 2006** and the

Defendant despite being aware of the Judgment has taken advantage of the delay and continues to occupy the suit property and thus the same amounts to intermeddling as she has even constructed on the suit property.

The suit is contested and the Defendant filed a **Replying Affidavit** on the **11th June 2018**, and acknowledged that Judgment was entered in favour of the deceased on **12th November 1999**, against her and that she is advised by her Advocates that the Applicant's Application is bad in law and an abuse of the court process in that the Judgment that the Applicant seeks to execute should have been done in court file **No.487 of 1992** and not by way of **Originating Summons** and therefore the Applicant is barred by the **Law of Limitation** from executing the Judgment which is over 12 years old. She further averred that the allegations by the Applicant that she was prevented from pursuing the matter by lack of knowledge and funds is not true as she filed a suit in **2006** seeking for injunction and eviction and after enjoying ex parte orders, the suit was withdrawn on **21st September 2006** and in **2015**, she further filed a **Notice Of Motion** seeking for orders of eviction and the same was withdrawn when Respondent's Advocate raised a **Preliminary Objection**. She further averred that the matter is **Resjudicata** as the issues raised are the same that were raised in **CMCC No. 487 of 1992**.

The Court has now carefully read and considered the pleadings, the Application and the written submissions of the parties and the Court finds that the issues for determination are:-

- 1. Whether the Court has jurisdiction**
 - 2. Whether the Plaintiff is entitled to the reliefs sought.**
- 1. Whether the Court has jurisdiction**

The issue of *Res judicata* and Limitation goes to the jurisdiction of a court and the court must first deal with the said issue. If a court has no jurisdiction it must down its tools and therefore the court must first determine this issues. See the case of **The owners of the Motor Vessel 'Lillian S'...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1** where the Court held that :-

“..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs it tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Defendant has pleaded that the suit is time barred and that the same is *Resjudicata*. It is her contention that the Plaintiff had filed an Application in the **Subordinate Court** seeking for similar orders and that the suit that was filed in the lower court sought for the same orders and

that are being sought in the current suit. She admitted that the Plaintiff withdrew the said suit but the suit in **Thika CMCC 4887 OF 1992** was heard and determined. **Section 7** of the **Civil Procedure** provides that:-

“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.”

The gist of the said section is that for a matter to be deemed as *Resjudicata*, it ought to have been heard and determined by a court of a competent jurisdiction. As the Defendant has pointed out, the Plaintiff filed various other suits that she has since withdrawn but the suit at **Chief Magistrate Thika** was heard and determined and therefore the present suit is *Res Judicata*. See the case of **Nguruman Ltd...Vs...Jan Bonde Nielsen & Another (2017) eKLR**, where the Court held that:-

“Applying the above principles to the suit herein even without getting into the question of whether the subject matter is the same, or that the parties are the same, or whether there is concurrence of jurisdiction. I find that there is no evidence of any determination of a former decision in a case similar to this case. There can be no plea of *res judicata* where there is no previous or former suit where a final determination has been made.”

This Court has considered the Pleadings from the Lower Court that have been annexed to the instant suit. In the said suit, the plaintiff (deceased) sought to be declared the owner of the suit property and for the eviction of the Defendant therein. In this instant case, the Plaintiff has sought for a declaration that the Estate of the

deceased is the rightful owner of the suit property. The Court finds and holds that the issue of who is the rightful owner of the suit property had already been heard and determined and it was declared that the deceased was the rightful owner. Further the Plaintiff in **CMCC No.4887 of 1992 (Thika)** had prayed for eviction of the Defendant and the same was granted.

Having regard to the foregoing, and given that the Plaintiff is seeking for the same prayers that had already been determined in **CMCC No.4887 of 1992 (Thika)**, then she is asking this Court to litigate on issues that have already been determined but has packaged the same in a different way. This Court therefore finds that the prayers sought have already been heard and determined and therefore this suit is *Res Judicata*.

On the issue of time Limitation, the **Limitation of Action Act** is clear that a party is not able to execute judgment that is over **12 years**. **Section 4 (4)** of the Act provides that:-

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

In this regard, the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession are statute barred after the expiration of **12 years**. However the period for limitation by the Act is not absolute as the same is subject to extension in specified instances as provided in Part III of the act and this has been provided as much under **Section 3** of the Act.

The Court of Appeal in the case of **M'Ikiara Mrinknayanga & Anor...Vs...Gilbert Kabeeru M'mbijiwe (2007)eKLR**, the Court stated that;

“The true in our respectful view is that the periods of limitation prescribed by the Act in Part II are not absolute as they are subject to extension in cases where a party brings himself squarely within the ambit of the provisions of part III”

“This part is subject to part III which provides for the extension of the periods of limitations in the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts.”

This would therefore mean that the Limitation period is subject to some exceptions and when there is acknowledgement then the dynamics change.

In the case of **Charles Masese & Another...Vs...Julius Maina Mwangi (2016) eKLR** the Court held that:-

“We agree with the Learned Judge’s finding that a stale or expired Decree is incapable of execution unless the judgment debtor acknowledges it or makes part payment towards its liquidation.”

Acknowledgement has been defined as the action of confessing or to admit something. The Defendant in her **Replying Affidavit** acknowledge that there was a judgment and in the said Judgment the Court held in favour of

the Plaintiff’s and thereby acknowledging the claim. Acknowledgement may take any form and as long as it is in writing and signed by the party acknowledging then the same is acceptable. It is this court’s opinion that there and then the Limitation stopped running and time began to run afresh. See the case of **Afro Freight Foundation Ltd...Vs...African Liner Agencies (2009)eKLR**, where the Court held that:-

“for the finding that section 23(3) of the Limitations of Actions Act applies to revive a cause of action where there is a proven acknowledgment and time would start running afresh from the date of such acknowledgment.”

In the case of **Telkom Kenya Limited...Vs...Kenya Railways Corporation (2018)eKLR**, the Court held that;

‘As already indicated, to qualify as an acknowledgment under section 23, s, 24 requires that it be in writing and signed by the person making it. There is no prescribed format to be taken by the acknowledgmentit may take any form the document must however be signed.’

Consequently this Court find that this suit is not time barred however the same is *Resjudicata*, the said prayers having been determined in a court of competent jurisdiction

2. Whether the Plaintiff is entitle to the Reliefs sought.

The Court having found that the matter is *Res Judicata*, then it has no option but to down its tools and therefore the Plaintiff sis not entitled to the reliefs sought.

Having carefully considered the available evidence, the Court finds that the suit herein is *Resjudicata* and that the **same is not merited and thus the said suit is dismissed entirely with each party bearing her own costs.**

It is so ordered.

Dated, Signed and Delivered at Thika this 24th day of May 2019.

L. GACHERU

JUDGE

24/5/2019

In the presence of

Mr. Otenyo holding brief for Mr. Magani for Plaintiff

M/S Kanja holding brief for Mr. Ngaruiya for Defendant

Lucy - Court Assistant

Court – Judgment read in open court

L. GACHERU

JUDGE

24/5/2019