



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 488 OF 2017**

**JOSEPH GATHAMBA MAINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NORAH KHANDARI LUSENO.....DEFENDANT/RESPONDENT**

**RULING**

1. Pursuant to a ruling delivered in court on the 7<sup>th</sup> March 2018 for parties to maintain the status quo pending the hearing and determination of the suit herein, the Defendant filed his Preliminary Objection dated the 6<sup>th</sup> March 2018 seeking to dispose of the whole suit for reasons that it was Res judicata by virtue of the matter in Nyahururu Chief Magistrate's Court Land Dispute No. 17 of 2001.

2. Parties took direction that the said application to take precedence and be disposed of in the first instance by way of written submissions.

3. Parties thereafter filed their written submissions to which I shall hereby address.

**Defendant's Submission.**

4. The Defendant filed their submissions on the 12<sup>th</sup> February 2018. She relied on the decided case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** in raising her preliminary objection to submit that the Plaintiff's case and the prayers sought thereto could not lie in law because they were res judicata by virtue of the Nyahururu Chief Magistrate's Court Land Dispute No. 17 of 2001.

5. That the Plaintiff's suit was in contravention of the provisions of Section 7 of the Civil Procedure Act which defines the doctrine of Res judicata for reasons that the Plaintiff in the present suit was the Plaintiff in the Nyahururu Chief Magistrate's Court Land Dispute No. 17 of 2001, that the facts in the present suit were similar to the facts in the Land Dispute case No. 17 of 2001 and so were the prayers sought. The Defendant also submitted that the cause of action and/or prayers sought by the Plaintiff were heard, awarded and/or determined in favour of the Plaintiff in the Nyahururu Land Dispute case No 17 of 2001.

6. That the said rules of res judicata were formulated or enacted to ensure that litigation came to an end and to save the very scarce judicial time and resources. The defendant also submitted that the suit as filed was incompetent and the orders sought could not lie in law because although the Plaintiff's application sought to restrain the Defendant through interim injunction from interfering with the suit land pending the hearing and determination of the suit while in actual sense they had admitted that the Defendant has been in possession of the said suit land since 1982. That the sought for orders would thus amount to eviction orders which were premature in the circumstance.

7. That the Defendant had also raised the doctrine of adverse possession in her defence and therefore she was not only entitled to the quiet use of the suit land, but also to title and registration as proprietor of the same

8. The Defendant further relied on the decided case of **Gulam Mariam Noordin vs Julius Charo Karisa [2015] eKLR** to submit that the Plaintiff's right to institute the present suit which was for recovery of the suit land was diminished and subsequently relinquished the moment the defendant attained a period of 12 years of continued and uninterrupted stay and open use of the suit land.

9. That the suit was filed without leave of the court and therefore the court should not entertain the same.

10. That the jurisdiction of the court to hear the matter was thus ousted by the operations of Section 7 of the Limitations of Actions Act and the only recourse in the instant case was to strike out the suit.

11. Lending credence to the decided case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, the defendant submitted that lack of jurisdiction was buttressed by their earlier submission that the suit herein was *res judicata*.

#### **The Plaintiff's submission**

12. The application on the point of preliminary objection was opposed by the Plaintiff in their submissions dated the 11<sup>th</sup> March 2019 and filed on the equal date.

13. In their submission, the Plaintiff gave the genesis of the matter before submitting the matter before court was not a fresh matter but an attempt to execute the award of the tribunal adopted by the Magistrate's court on the 29<sup>th</sup> April 2004 as the Defendant has been persistent in trespassing on the Plaintiff's parcel of land without any color of right and even advertising the said land for sale without consent, while claiming ownership.

14. The Plaintiff submitted that if the application for interim injunction was not granted, they would suffer irrecoverable and irredeemable losses as the Defendant would continue to trample on his property.

15. The Plaintiff also sought for orders that there be a reconstruction of a skeleton file with the documents he provided together with any other authentic documents that the Defendant may have so as to assist the court and so that the case may proceed from where it stopped.

#### **Analyses and determination.**

16. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

17. In this proceedings, it is the Defendant/Applicant's case *inter alia* that this suit should be dismissed with costs as the same was *res judicata* by virtue of the proceedings in the Nyahururu CMCC Land Dispute No. 17 of 2001.

18. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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"**

19. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

20. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

21. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

22. The matter in issue is identical in both suits;

i. The parties in the suit are the same;

ii. Sameness of the title/claim;

iii. Concurrence of jurisdiction; and

iv. Finality of the previous decision.

23. I have looked at the proceedings in the Skeleton file in the matter before the Nyahururu CMCC Land Dispute No. 17 of 2001. I note that there was an annexure to the Plaintiff's application dated the 9<sup>th</sup> July 2015 which sought to have Nyahururu CMCC Land Dispute No. 17 of 2001 reconstructed so that the matter could proceed for execution of orders made by the then Principle Magistrate Kathoka Ngomo made on the 29<sup>th</sup> April 2004.

24. I also note that the Plaintiff had attached proceedings of the Nyandarua District Land Dispute Tribunal in Land dispute case No. 32 of 2000 which was moved by the Plaintiff Joseph Gathamba Maina the Plaintiff herein against Nora Khandari Luseno the Defendant herein.

25. The finding of the Land Disputes Tribunal was that:

i. The court had established that there is a dispute between the two parties because they are in one Plot No. Nya/Kaimbaga/245.

ii. The court has established that both parties have letters of offer which was self-explanatory. Joseph Gathamba Maina (11.8Acres)  
b. Nora Khandari Luseno (5 acres)

iii. The court has established that originally Plot No. 245 was 16.acres which was later subdivided with the authority from the Settlement into two plots and given new numbers as follows:

a. Nyandarua/Kaimbaga 814 .....11.8 acres

b. Nyandarua/Kaimbaga 815 5 acres

26. Subsequently the an award was delivered to that effect that:

i. Plaintiff to remain in his plot No. Nyandarua/Kaimbaga/814

ii. Defendant to remain in her plot Nyandarua /Kaimbaga/815 and the Defendant to remove anything that belongs to her in plot No. Nyandarua/Kaimbaga/814.

iii. Court to execute all documents

iv. No orders to cost.

27. Joseph Gathamba Maina then filed a Miscellaneous Application No. 17 of 2001 at the Principle Magistrates Court- Nyahururu to have the Tribunal's award adopted as a Judgment of the Court wherein vide an order issued on the 29<sup>th</sup> April 2004, the finding of the Land Tribunal case No. 17 of 2001 was adopted as its award.

28. I also note that there was an appeal filed by the Defendant herein against the Plaintiff to the Appeals Committee who upheld the finding of the Disputes tribunal.

29. Being dissatisfied with the Appeals committee, the Defendant herein moved to the High Court sitting at Nyeri on Appeal in Civil Appeal No. 81 of 2007 wherein the appeal was dismissed for want of prosecution on the 17<sup>th</sup> July 2009.

30. Before the Plaintiff could execute the court order of 29<sup>th</sup> April 2004, the file went missing wherein he filed an application dated 9<sup>th</sup> July 2015 to reconstruct the Nyahururu Chief Magistrate's Court Land Dispute No. 17 of 2001.

31. Vide a ruling delivered on the 17<sup>th</sup> September 2015, the Hon Magistrate did not allow the said application but decided to adjourn it so as to allow the Execute officer time to trace the file.

32. By then, however, the Tribunal award had, as was required under the **provisions of Section 7 of the** Land Disputes Tribunals Act Cap 303 (now repealed), been filed at the Nyahururu Chief Magistrate's Court Land Dispute No. 17 of 2001 and Judgment entered in favour of the Plaintiff in terms of the Tribunal's award on 29<sup>th</sup> April 2004.

33. Although the original file had disappeared, the Plaintiff herein had all the relevant pleadings and orders to enable him reconstruct the file. And since those pleadings and orders had not been disputed by the Defendant, the trial Magistrate was entitled to presume that they were genuine, so as to enable the Plaintiff reconstruct the file and grant the orders sought.

34. In the case of **Mathew Wanyonyi & 2 others v Shaddy Kuloba Manyasi Respondent [2019] eKLR** it was held that

The disappearance of the Court file did not mean that a party who can provide authentic copies of the previous pleadings and orders should be shut out from the seat of justice. That would be a serious precedent as it would allow parties who want to defeat justice to simply ensure that the Court file disappears from the registry once orders that are unfavourable to them are made. That would be a

serious blow to the administration of justice.

35. The Court of Appeal considered such a scenario in the case of a criminal trial in **Pius Mukabe Mulewa & Another vs. R. C.A Criminal Appeal No. 103 of 2001** and held:-

“Indeed, if it were to be known that as soon as the Court file and that of the police disappear, that would be the end of the matter, the Courts would expect many more disappearances and justice would be the loser”

36. In the case of **Peter Muiruri Kamau v. Lee Mburu [2004] eKLR** the court held as follows:-

“In my view, the Tribunal rule (sic) made an order that a person has trespassed onto land but it has no power to order eviction or award compensation arising out of such findings. The proper forum for an order for eviction is in the Courts of law. However, where the Tribunal has found that there has been an act of trespass, this should be sufficient evidence to enable a Court of Law to make the appropriate orders”.

37. Since the Tribunal could not enforce an order of eviction, the only recourse for the Plaintiff in whose favour the order was made was to move to Court have a decree drawn encompassing an order for eviction so that it could be executed in accordance with the Civil Procedure Rules as set out in **Section 7(2) of the Land Disputes Tribunals Act Cap 303A (now repealed)**

38. The Plaintiff herein filed the present suit seeking orders that:

- i. A declaration that the Land known as L.R Nandarua/Kiambaga/814 belongs to the Plaintiff herein.
- ii. A permanent injunction restraining the defendant, his servants/agent from entering trespassing, tilling or in any manner alienating the plaintiff's land known as L.R Nandarua/Kiambaga/814.
- iii. An eviction order against the Defendant, her servants, agents from the land known as L.R Nandarua/Kiambaga/814.
- iv. Mense profits
- v. Cost of this suit.

39. From the foregoing, it is not in dispute that the Plaintiff filed his claim against the Defendant before the Land Disputes Tribunal to assert his right of ownership to L.R Nandarua/Kiambaga/814.

40. I find that although the Plaintiff by filing the present case was litigating under the same title and that the Defendant was the same and so was the subject matter of the suit before the Tribunal, yet the orders sought in the present suit were orders that the Tribunal had no jurisdiction to issue. I therefore find that the matter before court was not Res judicata, I find that the Preliminary objection on the first issue fails.

41. On the second issue raised by the Defendant to the effect that the jurisdiction of the court to hear the matter was ousted by the operations of Section 7 of the Limitations of Actions Act, I find that:

42. Section 7 of the Limitation of Actions Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

*43. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Land Disputes Tribunal having been adopted as award by the court on the 29<sup>th</sup> April 2004, the Plaintiff ought to have executed the same within 12 years to recover his land it from the Defendant.*

44. This suit having been filed on the 7<sup>th</sup> November 2017, there is no doubt that the period of about thirteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time he filed this suit, the claim was statute barred.

45. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

46. I therefore find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, Section 3 of the Civil Procedure Act provides as follows:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

47. The *locus classicus* on jurisdiction is the celebrated case of “**Lillian S**” (supra) where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

48. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds with the result that the Plaintiff's suit is herein struck out with costs to the Defendant.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of May 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**