



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 406 OF 2016 (O.S)**

**1. HARUN WAIHARO GITONGA**

**2. LEAH WANGUI GITONGA**

**3. TABITHA NJERI GITONGA**

**4. RUTH MUTHONI GITONGA**

**5. MWANGI GITONGA MBUGUA**

**6. STANLEY GITONGA NJERI**

**7. JAMES MWANGI WANYOIKE**

**8. JAMES GITONGA KARANJA**

**9. ELIJAH MAINA WACHIRA.....PLAINTIFFS**

**VERSUS**

**RONALD MWANGI NJUGUNA.....DEFENDANT**

**RULING**

1. Proceedings herein commenced through Originating Summons filed on 3<sup>rd</sup> October 2016, through which the plaintiffs seek judgment against the defendant for:

1. A declaration that the Plaintiffs are entitled to be registered forthwith as the owner of title Number Bahati/Kabatini Block 1/2281 which the Plaintiffs have been in adverse possession since 19<sup>th</sup> September, 1984 and or for more than 12 years immediately preceding the presentation of this suit on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendant or his predecessor in the above title and that the Defendant's title or that of his predecessor in parcel No. Bahati/Kabatini Block 1/2281 have been extinguished in favour of the Plaintiffs under section 37 and 38 of the Limitation of Actions Act Chapter 22 of the laws of Kenya.

2. An order that the Defendant do transfer Bahati/Kabatini Block 1/2281 to the Plaintiff and in default the Deputy Registrar be authorized to do and/or sign all documents to effect transfer of Bahati/Kabatini Block 1/2281.

3. In alternative a declaration that the Defendant holds the title for Bahati/Kabatini Block 1/2281 in trust for the Plaintiffs.

4. An order for costs of this summons.

2. The Originating Summons is supported by an affidavit sworn by the 1<sup>st</sup> plaintiff. He deposed that the plaintiffs occupied the suit property when it was owned by one Muthama Kamau and that they have been in occupation of it for more than 12 years.

3. The defendant reacted to the Originating Summons by filing Notice of Motion dated 18<sup>th</sup> June 2018, seeking striking out of this suit for being *res judicata*. The Notice of Motion is the subject of this ruling.

4. The application is supported by an affidavit sworn by Joseph Karanja Mbugua, advocate on record for the defendant. He deposed that this suit is res judicata since there was another suit being **Nakuru HCCC No. 146 of 2010 Ronald Mwangi Njuguna vs Wanyoike Gitonga** wherein the subject matter was also the parcel of land known as Bahati/Kabatini Block 1/2281 and wherein judgment was delivered on 10<sup>th</sup> November 2016. He annexed a copy of the judgment.

5. The plaintiffs opposed the application through Grounds of Opposition citing the following grounds:

1. *THAT the instant application is bad in law, overzealous and does not meet the minimum threshold for striking out a suit as being res judicata.*

2. *THAT for a suit to be struck out as res judicata, there has to be a previous suit between the same parties and in respect to the same subject matter. That suit ought to have been heard and determined by the court and a decree issued.*

3. *THAT in the instant case, the previous suit (Nakuru HCCC 146 of 2010) was between the respondent in this case and one Wanyoike Gitonga. The parties in the previous suit are not the same parties in this suit.*

4. *THAT the issues which were determined and settled by the court were between the two parties. It has not been pleaded that the plaintiff in the previous suit was a representative or proxy of the plaintiffs in this suit.*

5. *THAT in view of the foregoing, this application ought to be dismissed.*

6. Parties relied entirely on the material on record and urged the court to render a ruling.

7. I have considered the application, the supporting affidavit and the grounds of opposition. The sole issue for determination is whether this suit is *res judicata*. The Court of Appeal discussed the essence of *res judicata* in **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR** as follows:

**30. The essence of the doctrine of res judicata was aptly set out by this Court in William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR-**

***“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***

...

***The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.***

***See also Ngugi vs. Kinyanjui & 3 Others [1989] KLR 146.***

**31. Therefore, for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;**

**a. The suit or issue was directly and substantially in issue in the former suit.**

**b. That former suit was between the same parties or parties under whom they or any of them claim.**

**c. Those parties were litigating under the same title.**

**d. The issue was heard and finally determined in the former suit.**

**e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

...

**... one of the fundamental tenets of the doctrine as espoused by wigram VC in Henderson vs. Henderson [1843] Hare 100, 115 [is] that-**

***“The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce 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.”***

8. There is no dispute that another suit being **Nakuru HCCC No. 146 of 2010 Ronald Mwangi Njuguna vs Wanyoike Gitonga** existed and that judgment in the said matter was delivered on 10<sup>th</sup> November 2016. The defendant annexed a copy of the judgment. I also note that the judgment is reported as **Ronald Mwangi Njuguna v Wanyoike Gitonga [2016] eKLR**. Upon reading the judgment I note that the defendant herein was the plaintiff in the said matter while the defendant therein was one Wanyoike Gitonga. Although Wanyoike Gitonga is not a plaintiff herein, it is noteworthy that the name Gitonga is shared by 7 out of the 9 plaintiffs herein and that out of the remaining 2 plaintiffs, one of them bears the name Wanyoike. I believe that there is a direct relationship between the plaintiffs herein and the defendant in **Nakuru HCCC No. 146 of 2010 Ronald Mwangi Njuguna vs Wanyoike Gitonga**. I further take into account that the plaintiffs herein have not sworn any affidavit to specifically show or explain that they are not related to Wanyoike Gitonga.

9. I further note that the parcel of land known as Bahati/Kabatini Block 1/2281 which is the subject matter in this suit was also the subject matter in **Nakuru HCCC No. 146 of 2010 Ronald Mwangi Njuguna vs Wanyoike Gitonga** wherein Janet Mulwa J. stated in part as follows:

*1. The plaintiff is the registered owner of land parcel Title No. Bahati/Kabatini Block 1/2281 having been so registered on the 13<sup>th</sup> May 2010 ...*

*3. In his counterclaim, the defendant reiterated being the lawful and or beneficial owner of the subject land parcel and therefore entitled to all proprietary interests and rights over the same as the son of the late Gitonga Karanja purchased and took possession of the land from one Muthama Kamau in 1977 and has been in occupation of the suit land since then.*

*He prays for declaration that the suit land is his lawful inheritance and the plaintiffs title is illegal, unlawful and null and void as the previous title had determined in law.*

...

*26. I have stated above that the Defendant's family occupation and use of the suit land was open and continuous from the year 1977 for 22 years by the time this suit was filed. This doctrine of prescription and better known as adverse possession affects the registered owners as well as their predecessors.*

*That means that Muthama who was the registered owner before passing title to the plaintiff was too subject to prescription. He (Muthama) could therefore not pass a valid title to the plaintiff.*

*In its entirety I find that the plaintiff has failed to establish that he holds a valid title to the suit land to the exclusion of the Defendant who I have found to be entitled to ownership of the suit land by adverse possession and/or prescription.*

*27. For the above reasons the plaintiffs suit is dismissed with costs and the Defendant's counterclaim is allowed. A declaration is thus issued that the suit land is the property of the late Karanja Njoroge and the defendant by virtue of being his heir in title together with his entire family (heirs). It is further declared that the Title Deed registered in the plaintiff's favour on the 13<sup>th</sup> May 2010 is null and void as it has determined in law. Following therefore the Nakuru County Land Registrar is directed to cancel the said title deed Title No. Bahati/Kabatini Block 1/2281 in favour of the plaintiff and rectify the register in favour of the defendant to hold it in trust for the defendant and his family. [Emphasis supplied]*

10. It is notable that the plaintiffs herein claim that they occupied the suit property since the time it was owned by the same Muthama Kamau who is mentioned in the judgment and that they have been in occupation of it for more than 12 years. They claim to have become entitled to it by adverse possession. Again, the issue of adverse possession was determined in the judgment. Further, in **Nakuru HCCC No. 146 of 2010** the court found that the family of Wanyoike Gitonga had been in open and continuous occupation and use of the suit land from the year 1977 for 22 years by the year 2010 when the said suit was filed. It is thus clear to me that the court had conclusively determined the question of whether or not the family of Wanyoike Gitonga had become entitled to the suit property by adverse possession. Simply put, the issue is *res judicata*. Notice of Motion dated 18<sup>th</sup> June 2018 has merit.

11. In view of the foregoing discussion, I strike out this suit with costs to the defendant. I also award the defendant costs of Notice of Motion dated 18<sup>th</sup> June 2018.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of October 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiffs/respondents

Mr Karanja Mbugua for the defendant/applicant

Court Assistants: Beatrice & Lotkomo