



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 09 OF 2019(OS)

BEDFORD MUTEKI MBOANI.....1ST PLAINTIFF

JAMES MUTWIRI MBOANI.....2ND PLAINTIFF

ERICK MUGENDI MBOANI.....3RD PLAINTIFF

ROSEMARY KANYUA M'BOANI.....4TH PLAINTIFF

EPHANTUS NYAMU MBOANI.....5TH PLAINTIFF

VERSUS

JAMES MBAKA.....DEFENDANT

RULING

1. This application has been brought to court pursuant to Section 7 of the Civil Procedure Act and Order 2 Rule 15(1)(b), d & 3 of the Civil Procedure Rules, 2010. It seeks the following orders:

1. That this honourable court do strike out this suit.
2. That costs of this application be provided for.

2. The application has the following grounds:-

1. That this suit is res judicata Chuka ELC No. 110 of 2017.
2. That the suit is scandalous, frivolous and vexatious.
3. That the plaintiffs' claim is an abuse of the court process.

3. The application is supported by the affidavit of James Mbaka, the plaintiff, sworn on **5th July, 2019** and which states:

SUPPORTING AFFIDAVIT

I, JAMES MBAKA an adult male person of sound mind do hereby make oath and state as follows:-

1. That I am the Defendant/Applicant herein properly versed with the issues stated herein.
2. That with the guidance of my advocates on record I have fully understood the nature of claim lodged by the plaintiffs/Respondents.
3. That the Plaintiffs/Respondents are the children of M'Mbaoni M'Thaara.
4. That the said M'Mbaoni M'Thaara had sued me in Chuka ELC No. 110 of 2017 (Formerly Meru ELC No. 40 of 2004) claiming

ownership of the suit lands herein by way of adverse possession.

5. That upon a full trial the court found no merit in the suit and dismissed the same while requiring M'Mbaoni M'Thaara and all those who were claiming the land through him to vacate the land.

6. That being dissatisfied with the findings of the Environment and Land Court, the said M'Mbaoni M'Thaara preferred Nyeri Court of Appeal No. 38 of 2017.

7. That the Court of Appeal agreed with the decision of the superior court and proceeded to dismiss the appeal (Attached hereto and marked 'JM (a) and JM (b) are copies of the judgments).

8. That Plaintiffs' are claiming the suit properties through their father M'Mbaoni M'Thaara, a fact they have deliberately concealed from the court.

9. That claim by M'Mbaoni M'Thaara was adjudicated upon by a court of competent jurisdiction and the decision thereof affirmed by the appellate court.

10. That having lost his case at all levels, the said M'Mbaoni M'Thaara has employed the aid of his children, who claim through him, to re litigate a concluded suit.

11. That the issues in dispute herein are similar to those dealt by the court in Chuka ELC No. 110 of 2017.

12. That the Plaintiffs' are in their quest to revive the dispute, placing the court in an awkward position that may result in conflicting decision particularly since the plaintiffs' have failed to disclose the decisions made previously.

13. That this suit is thus scandalous, frivolous and vexatious and amounts to an abuse of the court process.

14. That I depose to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and understanding.

4. The application was heard by way of written submissions.

5. The defendant's written submissions are reproduced herebelow without any changes whatsoever:

SUBMISSIONS FOR THE DEFENDANT/APPLICANT ON APPLICATION DATED 05/07/2019

Introduction:

Your Lordship, the Defendant/Applicant has moved the court seeking that the entire suit be struck out for offending Section 7 of the Civil Procedure Act in view of the existence and subsequent determination of CHUKA ELC NO. 110 OF 2017 and NYERI COURT OF APPEAL CIVIL APPEAL NO. 38 OF 2017.

The relevant facts

Your Lordship, from the outset, the Defendant's contention that the Plaintiffs are the children of M'MBAONI M'THAARA has not been controverted in any manner and must hence be construed to be factual and accurate.

The said M'MBAONI M'THAARA moved the court in MERU ELC NO. 40 OF 2004 and which was later transferred to this court and registered as CHUKA ELC NO. 110 OF 2017 against the Defendant herein seeking to be registered as the proprietor of L.R. Nos. KARINGANI/MUGIRIRWA/907 and 908 vide the doctrine of adverse possession.

Upon a full hearing, the said claim was dismissed and the court inter alia directed that

“the Plaintiff and any other person laying claim on land parcel No. KARINGANI/ MUGIRIRWA/907and land parcel No. KARINGANI/MUGIRIRWA/908 should vacate the lands within 6 months”

M'MBAONI M'THAARA was vexed by the decision of the trial court and preferred an appeal being CIVIL APPEAL NO. 38 OF 2017 at NYERI.

The Appellate court in its decision agreed with the finding of the trial court that the issue of adverse possession had not been established and proceeded to dismiss the appeal.

The Plaintiffs thereafter instituted the present claim against the Defendant claiming ownership of the same parcels of land by way of adverse possession.

The applicable law:

Your Lordship, Section 7 of the Civil Procedure Act provides as follows; regarding the issue of res judicata

“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”.

Your Lordship, contrasting the issues raised by the Plaintiffs in their responses to the application, and the issues raised in the application plus the Provisions of the law, the following issues arise for determination.

- (a) Whether the issues in the instant suit were directly and substantially in issue in the previous suits.
- (b) Whether the Plaintiffs can be said to be litigating independent of their father’s previous claims.
- (c) Whether the other requirements of Section 7 of the Civil Procedure Act have been met.

On the first issue, the Plaintiffs contend that the previous suits were premised on a sale of land agreement while the present one relates to a claim under the doctrine of adverse possession and hence is implied that the causes of action are different.

This assertion by the Plaintiffs is completely misleading as the initial suit was instituted specifically claiming ownership through adverse possession. This can be deduced from the opening statement of the Court of Appeal decision that is attached to the application.

The issue of how the alleged possession came to be adverse is merely evidentiary in nature and cannot thus be a tool to distinguish two suits that are clearly predicated on a similar legal doctrine.

It is our submission therefore that the issues in the present suit are directly and substantially related to those in the previous suit.

On the second issue, the Plaintiffs have paraded themselves as independent litigants claiming ownership of the two parcels of land on their own right.

It must be noted that not only did the Plaintiffs not deny their relationship to the claimant in the concluded suits, they did not also deny knowledge of the existence of the said suits.

In MBEYU WANGOME & ANOTHER Vs PATANI VIRPAL & 2 OTHERS [2015] eKLR the court made the following observation when faced with an issue almost similar to the present one:-

“Since the suit property is the same and the Plaintiffs herein have not denied their relationship to the defendants in CMCC No. 92 of 2012, I am satisfied that they fall under the group of people litigating or who would have litigated under the same claim. I find that although the names are different, the family relationship ties them together and they cannot deny not being aware of CMCC No. 92 of 2012, or being parties to it as laid out in explanation No. 6 of Section 7. They are indeed bound by the findings and decree made in that suit”.

The trial court in CHUKA ELC No. 110 of 2017 was actually explicit in its directive that all those laying claim to the parcels of land through the Plaintiff therein must vacate therefrom.

Further, the Court of Appeal in **GODFREY SHIMONYA PETER & 3 OTHERS Vs MARY ANYANGO AMEKA & ANOTHER [2018] eKLR** addressing the issue at hand stated:-

“The appellants’ contention is that they were not parties in the previous suit as they were minors. Indeed, the learned Judge found that they could not sue in their own right as they were not of age. That being so it is clear that their interests were being represented by their parents or other relatives who were parties to the suit. The orders of the court were not just against Omumia Ingambi, who was claiming the land from his brother Andrea Salamu but against all those claiming through him, meaning all those who were residing on that plot because they were related to Omumia Ingambi one way or another.

“That being so, we are in agreement with the determination of the learned Judge that the appellants were affected by the orders of the High Court in HCCC No. 190 of 1988 and the orders of the tribunal in this regard were res judicata”.

In another suit with related facts, the Court of Appeal in **MARY IGANDU KIGOTHO Vs MICHAEL WANG’OMBE GATITU [2018] eKLR** the appellate court decreed as follows:-

“In our view, the issue before Waithaka J was directly and substantially an issue in Nyeri C.M Award No. 65 of 1999, the suit between the respondent and the appellant’s husband. That suit was heard and determined and the court that determined the issue was a competent court. We have no hesitation in finding that the learned trial Judge was right in coming to the conclusion that the suit before her was res judicata. It does not matter that the appellant was not a party in Nyeri C.M Award No. 65 of 1999. It also matters less that she has not brought this suit as a legal representative of her late husband but in her own capacity. The High Court and this court is able to see through the appellants’ ingenuity of bringing a suit in her

own capacity yet she is the widow of the late Kigotho Kariithi who had litigated with the respondent and lost. This was a clear attempt to evade the doctrine of res judicata. Like the trial Judge, we are of the view that the suit between the appellant and the respondent was res judicata”.

Regarding the other elements of Section 7 of the Act, we submit that it is not in dispute that the courts that adjudicated the previous suits were of competent jurisdiction.

It is also not disputed that the two previous claims were heard and finally decided by both the Environment and Land Court and the Court of Appeal.

In that regard Your Lordship we urge the court to find that the instant suit offends the provisions of Section 7 of the Civil Procedure Act.

Finally, courts have often stated that striking out of suit without hearing parties is drastic and draconian. In **MBEYU WANGOME & ANOTHER Vs PATANI VIRPAL & 2 OTHERS [2015] eKLR** the court stated:-

“This court is alive to the law and principle that striking out suits is a harsh measure that must be exercised sparingly and in the clearest of cases. I have considered the matters in issue in totality and I am satisfied that on the basis of the decree arising from CMCC No. 92 of 2012 which has not been appealed and on the basis of the relationship of parties in this suit and the former suit, the present suit is res judicata. It amounts to abuse of the court process and it is a clear case for striking out”.

Your Lordship, in conclusion we urge the court to find that this suit is a violation of Section 7 of the Civil Procedure Act and is hence an abuse of the process of court and proceed to strike it out with costs to the defendant/applicant.

We so humbly pray.

DATED AT CHUKA THIS ...19TH .. DAY OFAUGUST,....2019

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FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE DEFENDANT/APPLICANT

6. The plaintiffs’ written submissions are reproduced herebelow without any changes whatsoever:

PLAINTIFFS’ /RESPONDENTS’ SUBMISSION

ON THE APPLICATION DATED 5TH JULY, 2019

A. THE APPLICATION

Your Lordship, the application before the court is dated 5th July, 2019. It is brought under Section 7 of the Civil Procedure Act and Order 2 R 15 (1) (b) (d) and (3) of the Civil Procedure Rules.

The application has two prayers:-

1. THAT the Honourable Court do strike out this suit.
2. THAT the costs of this application be provided for.

The application is supported by 3 grounds on the body of the application and a supporting affidavit sworn by the defendant JAMES MBAKA.

The application is opposed by each of the Respondents/Plaintiffs who have sworn Replying Affidavits in opposition thereto.

Each of the Respondent rely on his/her individual affidavit.

B. GROUND IN SUPPORT OF THE APPLICATION

There are three grounds in support of the application.

1. THAT this suit is res judicata ELC NO. 110 of 2017.
2. THAT the suit is scandalous, frivolous and vexatious.

3. THAT the plaintiffs' claim is an abuse of the court process.

We will look at each ground at a time to show that this application is farfetched and it has no merit.

i. **IS THE SUIT IN COURT RES JUDICATA**

The expression "res judicata" means a thing or matter adjudged. A thing judicially acted upon or decided a thing or matter settled by judgment.

In many decisions which we will attach to those sub-missions it is clear from the observations that the doctrine of res judicata is applicable only where the former judgment was:

- a. THAT of a court of competent jurisdiction
- b. directly speaking upon the matter in question in the subsequent suit
- c. between the same parties or their privies.

The applicant/defendant has attached two judgments one, from this Honourable Court and another from the court of appeal.

Obviously, the parties are not the same and the issues before the court are in that case were completely different from the present case. Look at paragraphs, 49, 50, and 51 (3) of the judgment in ELC NO. 110 of 2017. We quote them:-

“ 49. I agree with the defendant that there is need to bifurcate a claim for adverse possession from a claim predicated upon a purchaser's interest. The two should not be conflated.

50.No claim for adverse possession can be made against a minor. A minor has no capacity to be sued in a suit claiming ownership of property by adverse possession. The plaintiff has also not proved by way of evidence the time from when the period required for adverse possession to accrue started running.

51 (3) The plaintiff having sued a person who was a minor at the time he claims he took possession of the land after the land had allegedly been sold to him by a minor and at a time when no succession cause had been instituted in respect of the estate of the defendant's deceased father and when the defendant has not given evidence regarding when the opposite agreement for sale between the plaintiff and the defendant collapsed so that time necessary for adverse possession to accrue would start running H AS NOT obtained title to the suit land through the doctrine of Adverse possession.”

It is also instructive to look at the Judgment of the Court of Appeal and we reproduce paragraph 21 of the said Civil Appeal No. 38 of 2017.

21. If indeed the respondent was a minor and there was no evidence to show he was not. The appellant could not have obtained a colour of right as against a minor that he could have acquired colour of right through an invalid sale agreement which was entered into with strangers without the necessary letters of administration. What was also lacking in the appellant's evidence which is the that would bind him to the land was the time when permission ceased and adversity started to run. It bears repeating that even if the appellant occupied the suit lands pursuant a valid sale agreement in this case there was no proof of a valid sale transaction. Time does not start running for purposes of adverse possession until the agreement is terminated. Therefore the claim of adverse possession was not proved and the learned judge was right in holding so.

The pleadings from the previous case have not been disclosed to the court. It is clear that what was in issue here is completely different from the case now in court. See the case of HAWKESWORTH VS ATTORNEY GENERAL (1974) EA. 406 also see court of Appeal Civil Court Case No. 55 of 2017 HOSEA SITIENEI VS UNVERSITY OF ELDORET AND OTHERS.

ii. **IS THE SUIT IN COURT SCANDALOUS, FRIVOLOUS AND VEXATIONS**

Your Lordship, we will not waste your time by going into the meaning of what suit is scandalous, frivolous and vexatious because this is a serious suit and the defendant has no defence to the claim from what appears on his defence.

The claim is not denied except that the defendant wants to say that there are claiming through their father. This is completely wrong as the plaintiff's are claiming on their own, they are adults of many years and the defendant is also an adult of many years. This is a serious claim. The plaintiffs are in possession and the claim cannot just be washed away.

iii. **IS THE CLAIM AN ABUSE OF THE COURT PROCESS**

This is farfetched from the truth. Each of the plaintiffs is entitled to what he/she claims in our Law. There is no other forum mandated to deal with their plea except our courts' as constituted by our constitution and the general Law. The plaintiffs are rightly in court and the issue of the abuse of the court process does not arise.

We therefore humbly pray that the application be dismissed.

We pray that the matter be ordered to proceed to hearing and decided on merits.

We have attached the following authorities for court's perusal and consideration.

A. HAWKESWORTH VS ATTORNEY V/S ATTORNEY GENERAL (1974) 406

B. CIVIL APPEAL NO 55 OF 2017 HOSEA SITINEI VS UNIVERSITY OF ELDORET & OTHERS

C. NGUYAI VS NGUNAYU (1985) KLR 606

We so pray.

DATED AT MERU THIS....5TH....DAY OFAUGUST

MAITAI RIMITA & CO.

ADVOCATES FOR THE PLAINTIFF

7. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically opposed assertions. I find it superfluous to regurgitate the authorities proffered by the parties in view of the fact that the principles of law they enunciate are fully elaborated upon in their written submissions (op.cit) which have been reproduced in full in the earlier part of this ruling. All these authorities are good precedents in the facts and circumstances of the apposite cases. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. In coming to my decision/determination in this ruling, I have taken into account all those authorities.

8. The plaintiffs have a close familial nexus with M'Mbaoni M'Thaara who had sued the defendant, James Mbaka, in MeruELC No. 40 of 2004 which upon transfer to Chuka became Chuka ELC No. 110 of 2017. He was claiming ownership of Land Parcel Numbers Karingani/Mugirirwa/907 and 908 through the doctrine of adverse possession. His case was dismissed. He filed Civil Appeal No. 38 of 2017 at Nyeri. His appeal was dismissed.

9. I agree with the plaintiff's assertion that as individuals they have rights to postulate and canvass their claims in courts of law. They argue that this suit does not involve the same parties as in ELC 110 of 2017 and in the court of Appeal Civil Appeal No. 38 of 2017 at Nyeri.

10. In this suit they seek a declaration that they have been entitled to ownership of parcel Nos. Karingani/Mugirirwa/907 and 908 by way of adverse possession. This court in ELC No. 110 of 2017 held that the suit lands belonged to James Mbaka, the defendant. The court dismissed the claim by M'Mbaoni M'Thaara that he had become proprietor of the suit lands by way of adverse possession. He went to the Court of Appeal and his appeal was dismissed.

11. There is no doubt that the plaintiffs occupied the suit land through their nexus with M'Mbaoni M'Thaara. Any claim over the suit lands is through him. If he failed in his claim for ownership of the suit lands by way of adverse possession, the plaintiff's, his close relatives, cannot attain a better claim over the suit lands than him. The plaintiffs were his licensees and their claim must have a nexus with him.

12. I have come across cases where parties have lost cases filed in court through plaintiffs. Then they have filed other cases claiming ownership by way of adverse possession (OS's). After they lose they have filed petitions. Whereas some of these suits may have merit, many have the effect of delaying final determination of suits. Litigation must somehow come to an end. What if children of a person who lost a claim by way of adverse possession also lose their suit. Then what will prevent his grandchildren to file another suit claiming ownership of the same land by way of adverse possession? I opine that such a scenario will spawn total confusion in the administration of justice. Veritably, litigation will never come to an end.

13. I find that this court in Chuka ELC No. 110 of 2017 and the Court of Appeal at Nyeri in Civil Appeal No. 38 of 2017 were courts of competent jurisdiction. I also find that the suit lands and those in Chuka ELC No. 110 of 2017 are the same. I also find that through M'Mbaoni M'Thaara, their close relatives, the parties in both cases are the same. This is because the plaintiffs have occupied the suit land under M'Mbaoni M'Thaara's claim.

14. In the circumstances, I uphold the defendant/applicants application and find that this suit is res judicata Chuka ELC No. 110 of 2017.

15. Therefore, I dismiss this suit in its entirety.

16. Costs are awarded to the defendant.

Delivered in open Court at Chuka this 24th day of October, 2019 in the presence of:

CA: Ndegwa

Muturi Kirimi h/b Rimita for the Plaintiffs

Mark Muriithi present for the Defendant

P. M. NJORGE,

JUDGE.