



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC Case No. 2 OF 2018 (OS)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LR LAIKIPIA /MARMANET/2765,

LR MARMANET/SIRON/BLOCK 1/ 124, 125, 126, 127, 128, & 129

JULIUS A. AYABEI CHERUIYOT.....RESPONDENT/PLAINTIFF

VERSUS

SOLOMON KIGURU NJUGUNA.....APPLICANT/DEFENDANT

RULING

1. Pursuant to the filing of the present Suit on the 23rd January 2019 by way of Originating Summons pursuant to the provisions of Section 7 and 38(1) of the Limitation of Actions Act, order 37 Rule 7(1) & (2) of the Civil Procedure Rules, where the Respondent herein sought for declaratory orders of adverse possession in reference to land parcel No. Laikipia Marmanet 281 measuring 23 hectares, the Applicant herein vide his application dated the 30th April 2019 raised a Preliminary Objection seeking to have the Plaintiff's suit dismissed by virtue of being Res judicata vide the judgment delivered in the Nyahururu SPMCC No. 71 of 1990. The application was supported by the Applicant's sworn affidavit dated the 30th April 2019.

2. By consent, the parties had agreed to have the said application disposed of by way of written submissions. I have considered submissions by the Applicant/Defendant.

3. The Applicant's submission was based of five issues for determination being:

- i. Where this suit is Res judicata
- ii. Whether this suit is time barred
- iii. Whether the suit is scandalous frivolous vexatious or otherwise an abuse of the court process
- iv. Whether the suit is incurably defective in law
- v. Whether this suit offends the rule of sub Judice

4. On the first issue as to whether the suit was Res judicata, it was the Defendant's submission that he had been embroiled in litigation with the Plaintiff for a period of 29 years over parcel of land No. Laikipia Marmanet 281. That it was not in dispute that parties herein were engaged in Nyahururu SPMCC No. 71 of 1990 wherein judgment had been entered against the Plaintiff/Respondent herein and a Decree issued which Decree was never challenged on Appeal. That the parties involved in this suit were the same parties in the previous case and litigated over the same subject. The matter hereof is Res judicata to Nyahururu SPMCC No. 71 of 1990 as per the provisions of Section 7 of the Civil Procedure Act and this court cannot try it.

5. It was further the Applicant's submission that after the matter in Nyahururu SPMCC No. 71 of 1990 had been finalized as between the parties the Plaintiff herein had instituted Nakuru HCC No. 285 of 1995 against the Defendant on the same subject suit. The Defendant had raised the plea of Res judicata in his statement of defence wherein the Plaintiff suit had been dismissed on the 4th May on 1999 on this ground. There was no Appeal filed by the Plaintiff.

6. This dismissal notwithstanding, the Plaintiff again instituted Nakuru HCC No. 252 of 2005 vide an Originating Summons against the Defendant in respect of the same subject matter, which suit was dismissed with costs to the Defendant on 28 May 2014. The Defendant did not Appeal. The dismissal of the said Originating Summons bars the Plaintiff from presenting a similar case under the doctrine of Res judicata.

7. Undeterred by the court rulings dismissing his suits, on the 18th February 2013, the Plaintiff filed another suit at the Nakuru HCCC No 193 of 2013 in respect of the same parcel of land. The court dismissed the suit for being Res judicata and time barred which orders again were never appealed against. That the orders of dismissal of the various cases filed by the Plaintiff still stand.

8. As to whether this suit was time barred, it was the Applicant's submission that it was very clear that the Plaintiff was trying to recover land parcel No. Laikipia/Marmanet 281 which "he lost to the Defendant upon being defrauded by him"

9. From the documents filed it was clear that the relationship between the Plaintiff and the Defendant was contractual. There was a sale agreement dated 16th March 1983, a consent dated 12th March 1983 and a certificate of outright purchase dated 3rd May 1985 confirming the same was delivered. The aforesaid sale agreement formed the Plaintiff's bone of contention.

10. The Applicant relied on section 7 of the Limitation of Actions Act to submit that the cause of action in favour of the Plaintiff had accrued to him on the 16th March 1983, when he signed the said agreement for disposal of the subject land. 12 years had since expired and he cannot be allowed by virtue of the provisions of Section 7 of the Act to take action designed to recover land.

11. That further the Plaintiff had alleged that the Defendant had defrauded him the suit parcel of land. That although he had not provided the specific particulars of the fraud, yet he was barred by the provisions of Section 3 of the Limitation of Actions Act, which provided for three years to within which an aggrieved person who relies on fraud as this course of action, to seek redress.

12. The Applicant also submitted that they Plaintiffs claim for adverse possession is not maintainable by the law as a claim for adverse possession is discontinued and time can only start running in his favour upon the completion of a case. In the present instance litigation has been active since 1990 when the first case was filed to the 21st June 2016 when the court delivered its last ruling.

13. That going by the history of the institution of a multiplicity of suits filed by the Plaintiff and against the Defendant regarding the same subject matter herein it, was the Applicant's submission that the present suit was scandalous frivolous and vexatious and otherwise an abuse of the process of the court. That the Plaintiff was a serial and notoriously litigious person whom the court should not allow to engage the Defendant forever in court. That the law abhors parties to a suit filing a multiplicity of suits in respect of one subject matter. The Applicant prayed for the dismissal of the Plaintiffs suit with costs

14. In response to the Applicant's application it was the Plaintiff/ Respondent's submission that it was not in dispute that there had been several cases between the parties herein involving the suit land.

15. After considering the provisions of section 6 and 7 of the Limitation of Actions Act the Plaintiff submitted that apart from Nyahururu SPMCC No. 71 of 1990 which was conclusively decided all the other suits were not heard and conclusively determined which explained the reasons why none of them had a Decree. That in the circumstance, the doctrine of Res judicata could not be raised on the basis of any of these matters.

16. That further, none of the suits were pending in court and therefore the issue of sub-judice could not arise in the circumstance. The objection based on Section 6 of the Civil Procedure Rules lacked merit.

17. That in the Nyahururu SPMCC No. 71 of 1990 what was in issue was whether the Defendant herein had proved that he had purchased the suit land from the Plaintiff and as such the interest over it had passed the Defendant. In the present suit, the Plaintiff is seeking a declaration that he has acquired the land by way of adverse possession. The course of action in the instant suit is the fact that the Defendant's right over suit land had been extinguished by the Plaintiff's continuous possession of the same. That although the subject matter was the same, the cause of action was as well as the claims were totally different. To buttress their submission the Plaintiff relied on the case of **James Maina Kinya vs Gerald Kwendaka [2018] eKLR**

18. That the decree issued in Nyahururu SPMCC No. 71 declared the Defendant as owner of the suit land and had ordered for the eviction of the Plaintiff. It had thus conferred upon the Defendant rights over the suit land. The Defendant however did not execute the said eviction order wherein the Plaintiff had continued to be in exclusive possession of the suit land since the 19th November 1990 up to date. The rights of the Defendant were extinguished after 12 years as per the holding in the case of **James Maina Kinya (supra)** and the Plaintiff could not be barred from instituting an adverse possession claim.

19. The Plaintiff also submitted that pursuant to the holding in the case of **Hellen Chelangat Ruto vs Phillip Ngeno & Another [2010] eKLR** their suit was not frivolous vexatious and an abuse of the court process. They sought for the application to be dismissed.

Analyses and Determination.

20. 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 Nyahururu SPMCC No. 71 of 1990.

21. I have considered the Applicant's application herein and find the matters for determination as being:

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether said matter is Res judicata Nyahururu SPMCC No. 71 of 1990

22. 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”

23. 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.

24. 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.

25. 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:

26. 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.

27. I have looked at the proceedings in the skeleton file in the matter before the Nyahururu SPMCC No. 71 of 1990 as well as the pleadings filed therein. It is not in contest that the Applicant herein commenced suit by way of plaint filed on 18th February 2013 as against the Respondent, wherein he had pleaded proprietorship of No. Laikipia Marmanet 281, land which he had purchased from the Respondent. The suit was heard and vide a decree dated the 18th October 1990, it was decreed that;

(i) That the land parcel L.R No. Laikipia/Marmanet/281 belongs to the Plaintiff absolutely the same having been validly and legally bought by the Plaintiff from the Defendant.

(ii) That the Defendant has no legal right to the said plot.

(iii) That the Defendant be and is hereby ordered to vacate the plot unconditionally failing which he should be evicted.

(iv) That the Defendant do pay the costs of the suit to the Plaintiff.

28. There was no Appeal filed against this decree. Thereafter the Respondent herein filed suit at the Nakuru HCCC being No. 285 of 1995, seeking orders that he be declared the owner of the land parcel Laikipia/Marmanet/281 and to have the Applicant herein transfer the title documents to him. Both parties concede that on the 4th May 1999, this suit was struck out for being Res judicata which verdict has not been Appealed against.

29. Pursuant to the order striking out the suit, the Respondent herein filed an Originating Summons in Nakuru HCCC No. 252 of 2009 (OS) wherein his claim was for adverse possession of the suit land herein. Again parties in their pleadings conceded that on the 20th May 2014, this suit was dismissed, with costs to the Applicant herein.

30. This did not deter the Respondent herein who filed another suit being Nakuru ELC No. **193 of 2013 seeking for orders that:**

- a) An order that the 1st Defendant submit the title deed to the 2nd Defendant for cancellation.
- b) An order compelling the 2nd Defendant to register the suit land in the Plaintiff's name.
- c) Alternatively, the Deputy Registrar to sign the necessary documents to effect transfer of the subject suit (sic) into the Plaintiff (sic) name.
- d) General Damages.
- e) Costs of this suit.

31. The trial Judge in this case, see *Ayabei A Cheruiyot v Solomon Kiguru Njuguga & another* [2016] eKLR held as follows:

Having looked at the above suits, I do not think it can be in doubt that the matters pleaded in this case have either been the subject of previous suits or the same have been decided. Sections 6 and 7 of the Civil Procedure Act, CAP 21, Laws of Kenya bars the filing of a suit where the matter is also the subject of a previously filed suit which is still subsisting, or the subject matter in the suit has been decided before.

I have no doubt in my mind that the matters herein were decided in Nyahururu PMCC No. 71 of 1990 or consisted of the subject matter of the suit Nakuru HCCC No. 285 of 1995. It is clear that this suit is Res judicata. Being Res judicata, I have no option but to dismiss it with costs.

Even if the matters were not Res judicata, I would still have dismissed the suit for having been filed out of time. It is trite law, and it is set out in Section 7 of the Limitation of Actions Act, CAP 22, that suits for the recovery of land must be filed within 12 years of the cause of action. The bone of contention seems to be a sale agreement of 1983. The Plaintiff has pleaded in his plaint that the Plaintiff became registered as owner of the suit property in the year 1988. He was clearly aware of the Applicant's registration of the suit property as late as 1995, when he filed the suit Nakuru HCCC No. 285 of 1995. Even if we take the year 1995, as the year in which the cause of action accrued, this suit was filed about 18 years later. It is clearly out of time.

The Plaintiff may still bear a sentiment that the sale agreement of 1983 was not executed in accordance with the terms thereof. But he has had his chances in court, and unfortunately, he has lost. Litigation must come to an end. At times it does not end with the result that a litigant wants, but one has to bear the consequences of a judgment and move on with life. I advise the Plaintiff to do so and not stress his mind thinking that he was shortchanged over the agreement of 1983.

32. I have no reason to depart from this finding.

33. Looking at the circumstance of the present suit as well as the previous suits, this court finds that the decision of the court in Nyahururu PMCC No. 71 of 1990 was that the land parcel L.R No. Laikipia/Marmanet/281 belonged to the Plaintiff (Applicant herein) absolutely the same having been validly and legally bought from the Defendant/Respondent. The Respondent was further ordered to vacate the plot unconditionally failing which he should be evicted This in my view was a decision of finality in the sense of Res judicata.

34. I find that the issues in the previous suit being Nyahururu PMCC No. 71 of 1990, which were substantially the same in the subsequent suit, were determined and covered by the decision in the previous case.

35. I also find that parties in the present case, are estopped from litigating pursuant to the provisions of Section 7 of the Civil Procedure Act.

36. Finally, I find that the previous case was determined by a court of competent jurisdiction.

37. The Respondent herein did not challenge that decision on Appeal and therefore trial of the present suit would amount to sitting on Appeal which is not the case in the circumstance.

38. Reliance is put on the case of *E.T vs Attorney General & Another* (2012) eKLR where it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of Res judicata.....”

39. The upshot of the foregoing is that matters in this case were conclusively decided vide Nyahururu PMCC No. 71 of 1990 and therefore the present case is Res judicata and an abuse of the court process. The Preliminary Objection herein succeeds with the result that the Originating Summons herein dated the 23rd January 2019 is herein dismissed with costs to the Applicant.

Dated and delivered at Nyahururu this 22nd day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE