



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO 11 OF 2019**

**RICHARD THAIRU GACHAGUA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NAFTALI RUTHI KINYUA.....DEFENDANT/APPLICANT**

**RULING**

1. Upon being served with the Complaint dated the 1<sup>st</sup> March 2019 and summons to enter appearance, the Defendant herein filed his defence under protest and a notice of Preliminary Objection dated the 22<sup>nd</sup> March 2019 where he sought to have the suit dismissed for reasons that;

- i. The suit was based on illegality based on the maxim *Extrajuri causa non oritur actio*
- ii. The issues raised therein were all Res judicata the same having been determined in Nyahururu ELC miscellaneous Application No. 21 of 2017 previously Nairobi HC Misc No. 754 of 1996.
- iii. That the suit was contemptuous the orders of this Honorable Court issued on the 16<sup>th</sup> August 1996, 8<sup>th</sup> May 1997 and 20<sup>th</sup> February 2009.
- iv. That this honorable court is functus officio in respect of the issues raised in the Complaint.
- v. That the suit is otherwise an abuse of the court process
- vi. That the Complaint should therefore be struck out and the suit dismissed with costs.

2. On the 27<sup>th</sup> May 2019 by consent, parties were in agreement that the Preliminary Objection be disposed of in the first instance and further that the same be disposed of by way of written submission. The court obliged them.

**Defendant/Applicant's Submissions.**

3. The Defendant gave a history of the matter in question as follows; that the dispute was in relation of parcel of land No. Nyandarua/Ndemi 1436 which the Applicant was allotted in the year 1989, subsequently the title was cancelled and illegally sub-divided into three portions giving rise to No. Nyandarua/Ndemi/ 2286-2288 wherein the Respondent herein lay claim to parcel No. Nyandarua/Ndemi/ 2288
4. That the Applicant sought leave to institute the Judicial Review proceedings for recovery of his land in **Nairobi Misc No. 754 of 1996 Naftali Ruthi Kinyua vs Ministry of Land and Settlement and 2 Others** wherein leave was granted vide an order dated the 15<sup>th</sup> August 1996 by the High Court sitting in Nairobi and which leave also operated as a stay against the Respondent's decision to cancel the allocation of the suit property namely Nyandarua/Ndemi/1436 and also prohibited the Respondents from effecting the sub-division and transfer of the same.
5. On the 11<sup>th</sup> November 1996 the High Court sitting in Nairobi granted the Applicant both Certiorari and Prohibitory orders and quashed the Respondent's decision to cancel the allocation of the suit property namely Nyandarua/Ndemi/1436 and prohibited them from effecting the sub-division and transfer of the same. This order was registered in the Land Registry where the allotment and subdivisions were cancelled.
6. That when the matter was transferred to the Nyahururu Environment and Land Court and registered under No 21 of 2017 for final execution of the orders, the Plaintiff had sought to stall the process by seeking to reopen the case wherein the court had dismissed the said application which dismissal had not been appealed against.

7. The Applicant herein also submitted that in the year 2012 the Plaintiff had also filed an Originating summons at the Nakuru ELC vide Case No. 273 of 2012 seeking the same orders including a claim of adverse possession wherein vide a judgment delivered on the 4<sup>th</sup> October 2013, the Suit was dismissed for reasons that there were orders of certiorari and prohibition issued in the Civil suit No. Nairobi Misc No. 754 of 1996 still in place where there had been no appeal filed.

8. That the present suit has been cleverly filed to stop the execution process but in essence raised the same issues and facts as those that had been raised in the Nyahururu Misc Application No. 21 of 2017 and Nakuru ELC 273 of 2012.

9. The Applicant/Defendant has raised issues for determination as follows;

- i. Whether a party can challenge a judgment by filing a new suit
- ii. Whether the issues raised are res judicata
- iii. Whether the application is an abuse of the court process
- iv. Whether the intended third party has any right, legal or equitable over the suit property.
- v. Whether the contempt of court, illegal occupation, and trespass can create a right legal or equitable over land.

10. On the first issue for determination, it was the Applicant's submission that Nyahururu Misc Application No. 21 of 2017 was concluded in 1997 wherein orders had already been issued, the Plaintiff has thus sought to challenge the said judgment in its application to be enjoined as an interested party.

11. That the Plaintiff has no cause of action against the Applicant in respect of the suit land because the cause of action available to him is against the purported seller and not the Applicant herein. In so submitting, the Applicant relied on the decided case of **Moses Wachira vs Niels Bruel & 3 others [2014] eKLR** to state that the issues in the suit herein were issues that had been placed before court and which issues had been substantially in issue where they had been finally determined in the previous the suit being Nakuru ELC 273 of 2012. That this court cannot therefore vacate the orders therein in the manner suggested by the Plaintiff in his pleadings.

12. On the second issue of determination as to whether the suit herein was res judicata, it was the Applicant's submission that the issues raised herein were raised by the Respondents in Nyahururu Misc Application No. 21 of 2017, that the Plaintiff is litigating under the same title as the Respondent therein who had no right to cancel, subdivide and transfer the suit property to Joseph Kipngeno Korir.

13. The Applicant considered the doctrine of res judicata which was based on three maxims; inter alia that no man should be vexed twice over the same course, secondly that there should be an end to litigation and that a judicial decision must be accepted as correct.

14. That in the Nakuru ELC No. 273 of 2012, the Plaintiff sought for similar orders and was denied. It therefore followed that this court is functus officio in respect of the issue of sub division and purported transfer to third parties. That the Defendant was now being vexed for the fourth time over the same issues.

15. As to whether the intended third party had any right, legal or equitable over the suit property, the Applicant submitted that the court had restrained the transferring or otherwise interfering with the ownership of the suit property on 15<sup>th</sup> of August 1996 wherein Joseph Kipngeno K. Sang purportedly obtained discharge of charge and transfer from the Respondents in October 1996 and December 1996 respectively. The court had then issued final orders on 11<sup>th</sup> November 1996. The Plaintiff had purportedly bought the suit property in December 1996 after the conclusion of the matter. The circumstance of this case was that the law was clear and the Plaintiff could not acquire any legal right or interest in the suit property. The Applicant relied on the case of **Carol Silcock vs Kassim Sharif Mohamed [2013] eKLR** wherein the court had considered the holding in **Malindi HCCC No. 63 of 2013, Addalla Omar Nabhan vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another**. In this matter, the proposed interested party had no cause of action against the Applicant in that he had purchased the land despite knowing that there was already an existing court order.

16. The Applicant's submission on whether an illegal occupation and trespass could create a right, legal or equitable over the land was that the suit property was allocated and transferred to third parties in December 1996 in breach and contempt of court orders issued in August and November 1996 there was therefore no title in the land that was capable of being transferred other than in accordance with the court orders. The proposed interested party was therefore bound by the final orders of the court.

17. In December 1996 Joseph.K.Sang did not have any legal or equitable interest over the suit property capable of being transferred. The principal of Nemo dat quod non habet therefore applied in the circumstance. The sale being illegal, the law provides that no action can be brought upon an illegality which is the maxim of *Extrupi causa non oritur action*.

18. That the provisions of Section 36 (2) of the Land Registration Act provided that any registered instrument can only operate as a contract between the parties. The Plaintiff could not claim to have ownership of the subdivided piece of land since the documents sought to be relied on were all unregistered. That he could only seek remedies from Joseph Kipngeno Korir who sold him the land despite the knowledge that he had no interest over the same. That the agreement between the proposed interested party and Joseph Kipngeno Korir could not override court orders. That the Plaintiff sought for the equitable relief but had come to court with tainted hands seeking to collude with Respondents to continue ignoring and violating court orders.

19. That now that the title deed in favour of the Defendant was in the process of being issued, the claimant has again moved the court on the

same grounds of seeking similar orders. On 17<sup>th</sup> January 2019 the court, having determined that the judgment was enforceable, it cannot rule otherwise in a new suit.

20. The Plaintiff has informed the court that he is in defiance of the court order by swearing an affidavit to demonstrate that he not only took possession of the suit land, but was also developing it after final judgment had been rendered. The present suit therefore seeks judgment condoning his illegal acts and defiance of the court orders.

21. That Applicant relied on the decided case of **Econet Wireless Kenya Ltd vs Minister for Information and Communication of Kenya & Another [2005] eKLR** to submit that it is trite law, plain and an unqualified obligation of every person against whom and in respect of an order which was made by the court of competent jurisdiction, to obey it until that order is discharged. Disobedience of such an order would as a general rule result in the person disobeying it being in contempt and is liable to punishment. That the Plaintiff had no accrued interest over the suit property and should obey the court orders by vacating the suit premises. That the suit should be dismissed with costs.

22. The application on Preliminary Objection was opposed by the Plaintiff Respondents herein using the Applicants grounds for determination where he proceeded to submit on the first ground for determination, that the suit was not based on an illegality contrary to the maxim *Extrupi causa non oritur action* which was an equitable maxim that would require evidence to determine and cannot be a ground for a Preliminary Objection..

23. Secondly on the ground that the suit herein was res judicata having been determined in Nyahururu Misc Application No. 21 of 2017, it was the Plaintiff's submission that he was not party to the said proceedings and that his attempt to be enjoined was refused by the court's ruling of 17<sup>th</sup> January 2019. The doctrine of res judicata cannot therefore apply in the circumstance.

24. On the third ground that the suit was in contempt of the orders of the honorable court issued on 16<sup>th</sup> August 1996, 8<sup>th</sup> May 1997 and 20<sup>th</sup> February 2009, again this was a ground that required evidence to determine as it was inconceivable as to how a person not a party to the suit could be held in contempt and therefore it required that the Defendants adduce evidence to demonstrate that the Plaintiff was guilty of contempt.

25. On the fourth and fifth grounds for determination that the honorable court was functus officio in respect of the issues raised in the plaint, and secondly that the suit was an abuse of court process, it was the Plaintiff/Respondent's submission that both these grounds required production of evidence to prove that the issues raised herein had already been dealt with and decided on merit and therefore the two grounds could not form a basis for Preliminary Objection.

26. The Plaintiff/Respondent relied on the decided case of **Mukisa Biscuits Manufacturing Co. Ltd. vs west end distributors Ltd [1969] EA 696** which was cited with approval in the case of **Oraro vs Mbaja [2005]1KLR 141** to submit that a Preliminary Objection is a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the process of evidence. That any concession which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle, a true Preliminary Objection which the court should not allow to proceed.

27. That in the present case, the court will have to interrogate actual matters so as to determine whether the issues raised by the Defendant as Preliminary Objections which was untenable in law.

28. The plaintiff's Counsel also submitted that the ingredients applicable to the of the doctrine of res judicata were decided in the case of **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR, whether it was held that an Applicant alleging the same had to show that;**

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are substantially the same;
- iii. There is concurrence of jurisdiction of the court,
- iv. The subject matter is the same
- v. That that is a final determination as far as the previous decision is concerned.

29. That the issue before Nyahururu Misc Application No. 21 of 2017 was one for joinder of the current Plaintiff to the suit with a view of being heard on the legality of the orders issued against the Respondents therein which affected his interest over land parcel No. Nyandarua/Ndemi/1436. That application had been dismissed. This was not the issue because the present issue before court was whether the execution of the orders made in 1996 was time barred. The issues in both suits therefore were different.

30. That the court in its ruling in the previous case had acknowledged that the Applicant was not a party to the suit where it had gone ahead to hold that the application for joinder at that stage was of no use as the case had already been concluded, judgment entered and a certificate of the order against the Government issued. The said ruling did not and could not determine whether a declaratory suit as the one filed herein was proper in attacking the earlier judgment as the issue was not before it.

31. That the legal propriety of challenging the execution of a judgment through filing of a fresh suit was considered by the court of appeal and in the case of **M'ikiara M'rinkanya & Another vs Gilbert Kabere M'Mbijiwe [2007] eKLR** in which the court held that;

From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of "action" in section 4 (4) of the Act would be inconsistent with the law of adverse possession.

32. Following the above holding of the Court of Appeal, Counsel submitted that the issues raised in the present suit were not *res judicata* and neither was the honorable court *functus officio*.

33. That although the defence counsel in his submissions referred to Nakuru ELC No. 273 of 2012, the same was not featured anywhere in his pleadings and did not form the basis of the Preliminary Objection and therefore this line of submission amounts to trial by ambush and the annexure ought to be expunged from the record. That a party is bound by his pleadings and the existence of other cases can not to be introduced through Counsel's submission as this would amount to the use of a back door thus denying the other party an opportunity to answer to such allegations. Counsel sought for the Preliminary Objection to be dismissed with costs.

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

34. 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."*

35. 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 Misc No. 21 of 2017 previously Nairobi HC Misc 754 of 1996.

36. 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"*

37. 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.

38. 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:

39. 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.

40. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other

41. The court of Appeal in the case of **James Njuguna Chui vs John Njogu Kimani [2017] eKLR** held that

*The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his*

*dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.*

42. The Defendant/Applicant herein sought leave to institute, the Judicial Review proceedings against the Minister for Lands and Settlement and 2 Others vide Nairobi Misc No. 754 of 1996 Naftali Ruthi Kinyua vs Ministry of Land and Settlement and 2 Others wherein leave was granted vide an order dated the 15<sup>th</sup> August 1996 by the High Court sitting in Nairobi and which leave also operated as a stay against the Respondent's decision to cancel the allocation of the suit property namely Nyandarua/Ndemi/1436 and also prohibited the Respondents from effecting the sub-division and transfer of the same.

43. On the 11<sup>th</sup> November 1996 the High Court sitting in Nairobi granted the Applicant both Certiorari and Prohibitory orders and quashed the Respondent's decision to cancel the allocation of the suit property namely Nyandarua/Ndemi/1436 thereby prohibiting them from effecting the sub-division and transfer of the same. This order was registered in the Land Registry where the allotment and subdivisions were cancelled. This marked the matter as finalized. A certificate of order against the Government was issued on the 18<sup>th</sup> February 2009. However efforts to execute the said court orders of 11<sup>th</sup> November 1996 were fruitless as the parcel file of the subject suit at the lands registry, went missing

44. The Nairobi Misc No. 754 of 1996 was subsequently transferred to this court upon its establishment for execution, wherein it was registered as Nyahururu Misc App 21 of 2017. Following the said transfer, the Richard Thairu Gachagua the Plaintiff/Respondent herein sought to be enjoined to the suit with a view to being heard on the legality of the orders made against the Respondents which orders affected his interest over the parcel of land No. Nyandarua/Ndemi/1436. The application had been dismissed for reason that the same was of no use as the case had been concluded, Judgment entered and a certificate of order against the Government issued wherein no appeal had been filed.

45. The Plaintiff herein has now filed the present suit where he seeks for the following orders against the Defendant.

- i. A declaration that the Defendant is barred from executing the order given on 11<sup>th</sup> November 1996 by virtue of Section 4(4) of the Limitation of Actions Act, Cap 22 laws of Kenya.
- ii. An order for removal of the inhibition registered against title No. Nyandarua/Ndemi/2288.
- iii. Cost of the suit plus interest thereon at court's rate.
- iv. Any other or better relief deemed fit by the honorable court.

46. Following the filing of the present suit, the Defendant herein raised the issue, of the suit being res judicata Nyahururu Misc App 21 of 2017 previously Nairobi Misc No. 754 of 1996.

47. In line with the principles of the doctrine of Res judicata, this court is invited to determine whether;

- 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.

48. I am reminded that in an application of Res judicata is a point of law that must not be blurred with factual details liable to be contested and or proved through the process of evidence. On the first issue as to whether parties in the current suit were the same as parties in the previous suit, I find that the Plaintiff herein was not party to the previous suit and he's attempt to be enjoined in the previous suit was refused by this court in its ruling of 17<sup>th</sup> January 2019. He was therefore not a party to the previous suit.

49. As to whether there was sameness in the title/claim, I find that the Defendant/Applicant in Nairobi Misc No. 754 of 1996 had succeeded in obtaining orders cancelling the illegal sub-divisions of parcel No. Nyandarua/Ndemi/1436 which resulted into parcels No. Nyandarua/Ndemi/2286-2288 and their transfer thereafter. The Plaintiff in the present case seeks for an order for removal of the inhibition registered against title No. Nyandarua/Ndemi/2288. Clearly and without going into the merits of the case, I find that there is sameness in the subject matter.

50. On the third issue as to whether there was concurrence of jurisdiction, I find that the orders issued in Nairobi Misc No 754 of 1996 were issued by the High Court which had jurisdiction to grant the relief claimed and whose determination has never been appealed against.

51. On the last issue as to whether the orders issued in the previous court were of nature of finality, the answer is affirmative in that the High Court sitting in Nairobi granted the Applicant/Defendant both Certiorari and Prohibitory orders quashing the Respondents' decision to cancel the allocation of the suit property namely Nyandarua/Ndemi/1436 and also prohibited them from effecting the sub-division and transfer of the resultant parcels of land. This order was registered in the Land Registry where the allotment and subdivisions were cancelled. This order,

having become a Judgment of a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

52. In the Court of Appeal case of **Siri Ram Kaura – Vs – M.J.E. Morgan, CA 71/1960 (1961) EA 462** the then EACA stated that:-

*“The general principle is that a party cannot in a subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.*

*The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...*

*The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...*

*The point is not whether the Respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.*

*It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”*

53. The upshot of my consideration is that I find in favour of the Applicant's Application dated the 22<sup>nd</sup> March 2019 and hold that the present suit herein is Res judicata Nyahururu Misc App 21 of 2017 formally Nairobi Misc No 754 of 1996 and proceed to dismiss the suit therein with costs to the Applicant/Defendant.

**Dated and delivered at Nyahururu this 12<sup>th</sup> Day of November 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**