REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 3 OF 2014 (O.S)

IN THE MATTER OF A DECLARATION OF ACQUISITION

OF TITLE TO LAND BY ADVERSE POSSESSION

AND

IN THE MATTER OF LR NOS. NYERI/WARAZA/1362,

633 AND 634 (ORIGINALLY L.R NYERI/WARAZA/409)

BETWEEN

MARY NJERI GICHEHA.....APPLICANT

- VERSUS -

BENEDICT OBONYO OMOLLO

PATRICK MURAGURI

ONESMUS KAGEMA.....RESPONDENTS

RULING

1. On 10th January, 2014 Mary Njeri Gicheha (hereinafter referred to as the plaintiff took up the summons dated 9th January, 2014 for determination of the issues raised therein to wit:-

> **i. Whether she has become entitled to the whole of the parcel of land known as Nyeri/Waraza/1362 (the suit property) registered in the joint names of the respondents herein;**
>
> **ii. Whether the respondents should be ordered to execute the requisite documents of transfer of the suit property in her favour;**
>
> **iii. Who should bear the costs of the application?**

2. In support of the application the plaintiff through the supporting affidavit she swore on 9th January, 2013 (read 9th January, 2014 as their appears to be a typing error on the date) has given a detailed account of the historical background of the suit property and contended that despite the original parcel of land having been severally sub-divided and different titles issued in respect of the sub-divisions there from, she has all along been in exclusive use of what used to be the original parcel of land to wit, plot No.593 Waraza Scheme.

3. Vide paragraph 11 of the applicant's supporting affidavit it is deposed that the suit property was transferred to the respondents by the then registered owner, Francis Nderitu Nyingi.

4. Despite the suit property having been transferred to the respondents, the plaintiff has remained in use and occupation of the suit property since 1960s.

5. According to the plaintiff, the respondents only attempted to interfere with her physical possession of the suit property in 2014.

6. To protect her rights to the suit property, the plaintiff filed Nyeri HCCC No.240 of 2013.

7. In view of the foregoing the plaintiff maintains that she has gained proprietary rights to the suit property by adverse possession.

8. In reply and opposition, to the application the respondents filed the affidavit (replying) they swore on 27th June, 2016 in which they contend that the application is an abuse of the process of the court. The following reasons are cited in support of that contention:-

i. The plaintiff had filed another suit against them to wit Nyeri ELC No. 240 of 2013 which suit is still pending before this court (the respondent is said to have lost interest in that suit).

ii. The plaintiff has not at any time been in possession of the suit property;

iii. By the time the respondents bought the suit property from its registered owner there were no encumbrances registered against the title (The respondents are said to have conducted ground search which did not establish any occupation by the plaintiff);

iv. The plaintiff who was aware that the respondents were purchasing the suit property did not raise any objection to the purchase or restrain the seller from selling the suit property to the respondents;

v. The plaintiff had sued the respondents and other purchasers of subdivisions of the original portion of land vide Nyeri CMCC No.59 of 2007 which was dismissed.

vi. That 12 years have not lapsed since they purchased the suit land;

vii. The plaintiff was sued by the person who sold the suit property to them through Nyeri HCC No.41 of 1991 which had not been concluded by the time the applicant filed this suit;

viii. The applicant had at no time brought a claim of adverse possession against their predecessor in entitlement to the suit property, Francis Nderitu Nyingi. (Averments paraphrased and emphasis supplied).

9. Based on the foregoing grounds, the respondents gave notice of their intention to file a preliminary objection against the applicant's claim.

Notice of Preliminary objection dated 16th May, 2018

10. In accordance with their intention to file a preliminary objection (P.O) to the applicant's claim, on 18th May, 2016, the respondents filed the notice of preliminary objection dated 16th May, 2016 through which they contend that:-

i. The plaintiff does not have *locus standi* to prosecute the case as she has not obtained letters of administration in respect of her late husband's estate;

ii. The applicant's claim for adverse possession against them is premature;

iii. The applicant is guilty of non disclosure of material facts to the court. In this regard, the applicant is accused of having failed to disclose to the court that she was sued by the registered owner of the suit property vide Nyeri HCCC No.41 of 1991.

11. On account of what is stated in paragraph 10 above, the applicant's suit is said to be frivolous and an abuse of the process of the court. The court is urged to strike it out in limine.

Applicant's response to the P.O dated 16th May, 2016

12. In reply to the issues raised in the respondents' P.O, the plaintiff filed the reply to the P.O dated 20th June, 2016 in which she contends:-

i. That she is capable of sustaining the claim of adverse possession independently that is to say without tying it to the estate of her deceased husband;

ii. That a claim of adverse possession is not premised on family law;

iii. That no defence (read response) has been filed against her claim;

iv. That no leave of the court was obtained to file the respondent's response.

v. That the predecessor to the respondents' entitlement to the suit property, Francis Nderitu Nyingi, did not have a valid title to pass to the respondents;

vi. That Francis Nderitu Nyingi, and herself were litigating over the same property vide Nyeri HCC No.41 of 1991;

vii. That the respondents were aware that the suit property had an unresolved dispute at the time they bought it and become the registered proprietors thereof;

viii. That her occupation of the original parcel of land has been open and hostile to the titles held by the beneficiaries of the subdivisions in respect thereof, the respondents included;

ix. That Francis Nderitu Nyingi passed on during the pendency of Nyeri HCC No.41 of 1991 and has never been substituted.

13. In view of the foregoing, the plaintiff urges the court to dismiss the respondent's P.O as well as the prayers they sought orally on 18th May, 2016.

14. The oral prayers referred to in paragraph 13 above were for consolidation of the other files related to this suit to wit Nyeri HCCC No.41 of 1991 and Nyeri ELC No. 240/2013 for purpose of being considered together and for leave to file a response to the applicant's claim herein.

15. Besides filing the above response to the P.O filed by the respondents, the plaintiff filed her own notice of P.O dated **8th September, 2016** in which she *inter alia* challenged this court's jurisdiction to entertain any action designed to defeat what she calls the decision of the Central Land Control Appeals Board made vide the board's meeting made on 16th April, 1991. In that regard, it is the plaintiff's case that the jurisdiction of this court to entertain any action designed to defeat the decision of the Central Land Control Appeals Board is ousted by **Section 13(2)** of the Land Control Act, Cap 302 Laws of Kenya.

16. Terming the title held by the respondents null and void, the applicant contends that the respondents have no legal title capable of being defended before this court.

17. The plaintiff reiterates her contention that the responses filed by the respondents, including the respondents' P.O are improperly on the court record as they were filed out of time, without the leave of the court.

18. The plaintiff further contends that she was not served with the respondents' P.O cited herein above.

19. For the foregoing reasons, the applicant urges the court to strike out the respondents' pleadings.

Analysis and determination

20. I have carefully read and considered the P.O filed by the respondents and the response thereto, including the P.O filed by the plaintiff. The following issues arise from the P.Os:-

i. Whether the plaintiff has *locus standi* to bring and prosecute the case herein?

ii. Whether the plaintiff's claim against the respondents is premature?

iii. Subject to the outcome of (ii) above, whether the plaintiff's occupation of the suit property had become adverse to the previous owners of the suit property?

iv. Whether the respondents' responses should be struck out for having been filed out of time without the leave of court?

v. What orders should the court make in respect of the P.Os?

21. Starting with the fourth ground which has the potential of changing the course of this case, whilst it's true that the respondents' responses were filed out of time without the leave of the court, the evidence on the court record shows that the plaintiff got an opportunity to respond to all the issues raised in the respondents' responses, P.O included. The plaintiff has not demonstrated any prejudice which she has suffered or she stands to suffer if the responses are not struck off the court record.

22. Because the plaintiff has not demonstrated the prejudice, if any which she has suffered or she stands to suffer if the respondents' responses, the P.O included, are not struck off the court record, in the spirit of **Article 159** of the Constitution of 2010, and **Sections 1A** of the Civil Procedure Act, which require this court to dispense justice without undue regard to procedural technicalities, I refuse to accede to the plaintiff's request for striking out the respondents' responses, the P.O included.

23. On whether the plaintiff had *locus standi* to bring and prosecute this suit, based on the pleadings filed in this suit which show that the plaintiff's claim for adverse possession is not premised on her deceased husband's claim or entitlement to the suit property but on her alleged occupation and possession of the suit property, I agree with the plaintiff's contention that she had capacity to bring and prosecute the claim for adverse possession without tying it to the estate of her husband.

24. As to whether the plaintiff's claim against the respondents' is premature, the suit herein was filed on 10th January, 2014 to challenge the title held by the respondents and which title was issued to the respondents on 18th December 2008 **barely six (6) years after the suit property was transferred to the respondents**.

25. Whereas the plaintiff case is that on aggregate she has been in quiet and peaceful occupation of the suit property for over 12 years, issues abound as to whether the plaintiff can urge her claim for adverse possession against the respondents' predecessors in entitlement to the suit property, yet she has not made the respondents' predecessors in entitlement to the suit property parties to the suit.

26. There being no single averment in the plaintiff's pleadings that she had successfully prosecuted a case for adverse possession against the respondents' predecessors in entitlement to the suit property, I am of the considered view that the plaintiff cannot sustain any claim for adverse possession against the title held by the respondents. I hasten to point out that even if the plaintiff's occupation and possession of the suit property had become adverse to the title held by the respondents' predecessors in entitlement to the suit property the plaintiff would, nevertheless, not be able to successfully urge a claim for adverse possession against the respondents who, unless their title had similarly been extinguished by her adverse possession would be holding the suit property in trust for her. In this regard the case of **Nduhiu Kanja v. Francis Kanake Wahome Nyeri ELC No. 509 of 2014** where this court stated:-

> **"… Having found that the respondent had only been in adverse possession of the title held by the respondent, if at all for a period of less than a year, and having determined that this court cannot, in the circumstances of this case, determine whether the plaintiff's occupation of the suit property was adverse to that of the defendant's predecessors in entitlement to the suit property, I return a negative verdict to the first issue."**

27. Also see the cases of:

a. Mwinyi Hamisi Ali v. Attorney General & Another; Mombasa Court of Appeal Civil Appeal No. 125 of 1997 where the Court of Appeal observed:

> **"In Order that Mr. Hamisi Ali could claim successfully, title by adverse possession, he had to show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit. In our view, the learned judge erred when he proceeded to decree title by virtue of adverse possession where the registered proprietors were not parties to the suit."**

b. Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another (2015) eKLR where the Court of Appeal observed:

> **"As correctly observed by the trial court, beyond prescribing the limitation period, the Act does not expressly define "adverse possession" as a term. Section 13(1) however, provides that a right of action in recovery of land does not accrue unless the land in the possession of some person in whose favour the period of limitation can run (which possession in this Act is referred to as adverse possession. Tied to this, is section 7 of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From these provisions, what amounts to "adverse possession"? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this court. Suffice to mention but two, Kasuve v. Mwaani Investment Ltd & 4 others (2004) 1KLR 184 and Wanje v. Saikwa (No.2) (1984) KLR 284".**

c. Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others (1197)eKLR where the Court of Appeal stated:

> **"The learned Judge without having the Commissioner before him and without hearing him in his defence has finally condemned him on an interlocutory application for injunction in the following terms: - "It was not open to the Commissioner of lands to re-alienate the same".**
>
> **He could have made only a *prima facie* finding and that too if the Commissioner had been sued and served with the application. Not only that, the learned Judge appears to have finally sealed the fate of this suit which is yet to be heard on merits by holding: " So the alienation was void *ab initio*"**

No such finding *prima facie* or final can be made without the Commissioner's participation in the proceedings.

The gravamen of the respondent's suit is that the Commissioner had no right to alienate a public land to any person for any use other than that for which it has been reserved. The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

> **"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".**
>
> **There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".**
>
> **The learned Judge quite erroneously in our view said:**

" However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not upto the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief.

28. Having determined that the plaintiff's occupation and possession of the suit property, if at all it had been adverse to the title held by the respondents, it had not been for the period provided for in law for acquiring land by adverse possession against a registered proprietor of land; I agree with the respondents' contention that the plaintiff's claim for adverse possession against them is premature.

29. Lest I am accused of having failed to consider the plaintiff's contention that this court lacks jurisdiction to entertain any action calculated at defeating the decision of the Appeals Board which allegedly found the registration of transfers effected in respect of the original parcel of land null and void for want of a valid consent of the relevant land control board when the transfers were effected; firstly, I wish to point out that the decision of the Appeals Board did not have the effect of nullifying the titles issued in respect of the parcels in question to wit Nyeri Waraza/406, 407, 408 and 409. I say this because under the Registered Land Act, Cap 300 Laws of Kenya, which was the applicable law at the material time, it's only the court which could nullify the titles that had been issued in respect of the suit property.

30. Whilst the decision of the Appeals Board is crucial in a suit for determination of the validity or otherwise of the titles issued on account of the impugned consent, it cannot assist the plaintiff in her claim for adverse possession against the title held by the respondents as the claim is not based on the alleged invalidity of the title held by the respondents' but on the allegation that her occupation and possession of the suit property has become adverse to the title held by the respondents.

31. As no order for adverse possession can issue in favour of the plaintiff when her possession and occupation of the suit property has not met the legal threshold for acquiring land by adverse possession against a registered proprietor of land, I uphold the respondents P.O and accordingly strike out the plaintiff's suit with costs to the respondents.

Notice of motion dated 4th December, 2013 (Nyeri HCC No.240 of 2013)

32. The notice of motion dated 4th December, 2013 is by the respondents in the suit herein (ELC No.3 of 2014). It seeks the following orders:-

i. The matter be certified urgent and be heard ex parte within the first instance;

ii. Variation, discharge or setting aside of the order of injunction issued on 25th November, 2013;

iii. Striking out the suit for being an abuse of the process of the court;

iv. Making of such other and further orders as the court deems just and appropriate in order to meet the ends of justice;

v. The costs of the application be borne by the plaintiff/respondent.

33. The application is premised on the grounds that:-

i. The plaintiff/respondent is guilty of non disclosure of material facts;

ii. That the seeking and obtaining of the impugned orders amounted to abuse of the process of the court as the suit is res judicata Nyeri SRMCC No.237 of 1972 and Nyeri CMCC No.59 of 2007 among other suits.

iii. That the plaintiff's claim is time barred;

iv. That the plaintiff lacks *locus standi* to sue in respect of the suit property and that this court lacks jurisdiction to hear and determine the suit as it is res judicata the aforementioned suits.

34. The application is supported by the affidavit of Onesmus Kibera Kagema, one of the defendants in Nyeri HCCC No.240 of 2013 in which the grounds on the face of the application are reiterated.

35. In support of the averments in the motion and the affidavit sworn in support thereof, the deponent of the supporting affidavit has annexed to the affidavit sworn in support of the motion pleadings and proceedings in respect of the former suits.

36. The motion is unopposed.

Notice of Preliminary objection dated 4th December, 2013

37. Alongside the motion, the defendants/applicants filed the P.O of even date challenging the plaintiff/respondent's application for injunction, dated 22nd November, 2013, and the suit on which the motion is premised on the following grounds:-

a. That the suit on which the application is based is res judicata hence both the application and the suit are an abuse of the court process;

b. That the suit as filed is time barred since it challenges issues concluded way back in 1990 and 1991;

c. That the plaintiff/applicant lacks *locus standi* to file and prosecute the suit as she has not demonstrated her interest in the suit property; and

d. That the court lacks jurisdiction to hear and determine the suit.

38. The motion and the P.O were disposed of by way of written submissions.

Defendants/Applicants submissions

39. In the submissions filed on behalf of the defendants/applicants, a detailed account of the historical background of the suit is given and submitted that the suit herein is res judicata. In that regard it is pointed out that:-

a. There was a dispute between the original owners of the property which gave rise to the subject matter of this dispute, upon sub-division to wit, George Gichuki Mwaniki and Gicheha Mwaniki;

b. George Gichuki Gecheha and Gicheha Mwaniki (now deceased) who are brothers cased over the ownership of the suit property vide Nyeri SRMCC No.237 of 1992 in which it was decided that the property belonged to George Gichuki Mwaniki;

c. Despite the court having found in favour of George Gichuki Mwaniki, it ordered him to transfer 3 acres of the suit property to Gicheha Mwaniki (the plaintiff/respondent's husband) out of brotherly love.

d. In accordance with the judgment of the court, George Gichuki Mwaniki sub-divided the original parcel of land into Nyeri Waraza/322 and Nyeri/Waraza 323 and transferred Nyeri/Waraza 322 measuring 3 acres to the plaintiff's husband.

e. The plaintiff's husband unsuccessfully appealed the decision pursuant to which the original parcel of the suit property was sub-divided and a portion thereto issued to him (The plaintiff's husband unsuccessfully appealed against the decision issued in Nyeri SRMCC No.237 of 1972 vide Nyeri HC Civil Appeal No.6 of 1983).

f. The plaintiff also unsuccessfully tried to challenge the decision of the High Court vide Nairobi C.A No.80 of 1990 and Nyeri C.A No.7/90 (It is noteworthy that No. appeal was preferred before the Court of Appeal, as what the plaintiff did was to file an application for leave to file an appeal out of time against the decision of the High Court made in Nyeri H.C Civil appeal No.6 of 1983. She withdrew those applications, so no appeal was ever preferred to the court of appeal against the decision of the High Court in Nyeri H.C C.A No.6 of 1983).

g. The plaintiff brought a case against the 1st defendant/applicant herein and the defendants/applicants' predecessor in entitlement to the suit property (Francis Ndiritu Nyingi) in respect of some of the sub-divisions to the suit property (Nyeri/Waraza 632 and 633, which case was dismissed on among other grounds that her claim was res judicata).

h. The parcels of land known as Nyeri/waraza 632 and 633 were later on combined to become Nyeri/Waraza 1362 which is the subject matter of the suit herein (Nyeri ELC No. 240 of 2013).

40. The contention that the plaintiff's suit is res judicata the above mentioned suits is contested vide the plaintiff's submission's filed on 1st April, 2014 in which it is submitted that the current suit is not res judicata the former suits because the former suits were not between the parties to the current proceedings and that the cause of action in the former suits was different from the suit herein.

41. The cause of action in the current suit is also said to be different from that in the former suits.

42. Since the contention that the suit is res judicata the various suits filed herein above is capable of preliminarily determining the plaintiff's suit, I will determine it first.

43. On whether the suit is *res judicata* the former suits, I begin by setting down what the doctrine of res judicata entails. In so doing I will not reinvent the will but flank out what the law on the subject is. In that regard, the first point of call is **Section 7** of the Civil Procedure Act, Cap 21 Laws of Kenya, which prohibits a court from trying 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.

44. R*es judicata* lies not only for causes of action which were made subject matter of litigation in the former suit but also for those causes of action which ought to have been taken up in the former suits. In that regard see the case of **Housing Finance Company of Kenya v J. N. Wafubwa [2014] eKLR** where the Court of Appel stated:

"The doctrine of *res judicata* bars re-litigation of matters that have already been determined. The doctrine is premised on

the principle that litigation on a particular matter must be concluded and prevents a party from being harassed twice on account of the same subject matter (See Mulla, the Code of Civil Procedure, 16th Ed Vol 1 page 161). Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya 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."

Under explanation (4) of Section 7 of our Civil Procedure Act any matter, which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in the subsequent suit. In effect, a party is required to present his whole case before the court instead of presenting his case in parts or by installments.

For the doctrine of *res judicata* to apply, the matter must be 'directly and substantially' in issue in the previous and in the former suit and the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd. - v- Central Bank & 2 Others – Civil Appeal No. 36 of 1996; Henderson vs. Henderson (1843-60) ALL ER 378)

45. In the case of **Edwin Thuo v Attorney General & another Nairobi Petition No. 212 of 2012 (Unreported)** it was stated:-

" …Courts must always be vigilant to guard against 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 is in the second suit trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

46. **Also see the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 where it was held:-**

"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 v 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 face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata .....*** I **am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, "Guard against attempts to evade the doctrine [of *res-judicata*]" where he states that**, ***"One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more …. Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter."***

47. In applying the above principles to the circumstances of this case, whilst the plaintiff's case is impleaded as being premised on her occupation of the parcel of land known as Nyeri/Waraza/206 which on subdivision became Nyeri/Waraza/322 and 323 among other parcels that arose from subsequent subdivision of Nyeri/Waraza 323; the affidavit evidence provided by the defendants/applicants through the affidavit sworn in support of the motion dated 4th December, 2013 confirms that there was a dispute between the plaintiff's husband and the original registered proprietor of the suit property which resulted in the subdivisions which are the subject matter of the current suit. The dispute was determined in favour of the then registered proprietor, George Gichuki Mwaniki by a court with competent jurisdiction to determine the issue, vide Nyeri SRMCC No.237 of 1972.

48. Although the plaintiff was not a party to that suit, the evidence on record shows that the plaintiff's husband was a party to that suit. To that extend in as far as the plaintiff's claim relates to her husband's claim to the original parcel of land, the claim is res judicata the determination made in Nyeri SRMCC No.237 of 1997. Despite being impleaded as a claim purely based on the plaintiff's occupation of the suit property, it is clear from the pleadings filed in this suit, that the plaintiff's claim to entitlement to the suit property relates to the dispute between her late husband and the brother to her late husband whom she accuses of having unlawfully subdivided the original parcel of land. In that regard see paragraph 4 to 12 of the plaint which attests to that fact.

49. There is also evidence that the plaintiff sued the predecessor in entitlement to the title held by defendants/applicants, among other people, the 3rd defendant/applicant herein included, vide Nyeri CMCC No.59 of 2007 where she inter alia contended that the suit property was fraudulently transferred to the defendants in that suit. The suit was dismissed on among other grounds, the ground that the issues raised in that suit were res judicata.

50. Though packaged as a claim different from the former claims in that the plaintiff's claims to be entitled to the suit property on account of her long possession and occupation of the suit property, it is clear that the issues concerning the plaintiff's claim to the suit property have been litigated in previous proceedings and a decision in respect thereof made by courts with competent jurisdiction to hear those issues.

51. If the plaintiff was aggrieved by the decisions made in those suits, she ought to have appealed those suits instead of filing other suits raising the same issues or substantially similar issues concerning the suit properties.

52. On account of the above revelation concerning the plaintiff's claim, I find the claim to be *res judicata* and to that extent bad in law.

53. As the above determination suffices for the purpose of determining this matter, I will not consider the other grounds on which the plaintiff's claim is challenged.

54. The upshot of the foregoing is that the claim herein is found to be res judicata and dismissed with costs to the respondents.

55. With regard to Nyeri HCCC No. 41 of 1991, the same abated by operation of law one year after the plaintiff passed on without being substituted as by law required. In this regard see the case of **M'Mboroki M'arangacha Vs Land Adjudication Officer Nyambene & 2 others [2005] eKLR** where it was held**: -**

> **"… an application seeking that a legal representative be made party in the place of the deceased Plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased Plaintiff is concerned. The language used by the legislature is mandatory as the words used are "the suit shall abate." It is my understanding and view therefore the abatement of the suit is automatic and does not... need an order of the court to abate the suit."**

Dated, signed and delivered in open court at Nyeri this 28th day of February 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kinyeri h/b for Muchiri Wa Gathoni for the plaintiff.

Mr. Okwabe h/b for Mr. Lutta for Defendants in ELC 3/14 and ELC 240 of 2014.

Court assistant - Esther