



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**  
**ELC CASE NO. 22 OF 2016 (O.S)**  
**IN THE MATTER OF L.R NO. KIINE/KIBINGOTI/NGUGUINI/492**  
**AND**  
**IN THE MATTER OF L.R NOS KIINE/KIBINGOTI/NGUGUINI/3877 AND 3878**  
**AND**  
**IN THE MATTER OF L.R NOS KIINE/KIBINGOTI/NGUGUINI/3877 AND 3878**  
**AND**  
**IN THE MATTER OF SECTION 38 OF THE LIMITATION**  
**OF ACTIONS ACT CAP 22 LAWS OF KENYA**  
**MARY MUTHONI MAINA.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**JOSPHAT MURAGE MIANO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**JAMLICK WAWERU MIANO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**  
**RULING**

This is in respect to the plaintiff's Notice of Motion dated 13<sup>th</sup> July 2016 and brought under **Article 165 (6) and (7) of the Constitution, Sections 5, 6, 7 and 18 of the Civil Procedure Act** and **Order 3 Rule 5 of the Civil Procedure Rules**. The plaintiff seeks the following orders:

1. Spent.
2. Spent.
3. That this Honourable Court be pleased to review and set aside the ruling of the Chief Magistrate's Court delivered on 30<sup>th</sup> June 2016 in KERUGOYA CMCC No. 47 of 2016.
4. That KERUGOYA CMCC No. 47 of 2016 be consolidated with this suit and both be heard and fully determined by this Honourable Court.
5. That the defendants be condemned to pay the costs of this application.

The application is based on the grounds set out therein and supported by the affidavit of **MARY MUTHONI MAINA** the plaintiff herein.

The gravamen of the application is that this suit and **KERUGOYA CMCC No. 47 of 2016** involve the same parcels of land being L.R No.

KIINE/KIBINGOTI/NGUGUINI/492, 3877 and 3878 and also the same parties and that the Chief Magistrate lacks the jurisdiction to entertain **KERUGOYA CMCC No. 47 of 2016** yet he has proceeded to issue orders punishing the plaintiff for contempt of Court. It is the plaintiff's case therefore that those orders were issued without jurisdiction and are null and void and this Court should review and/or set them aside.

The application is opposed and in a replying affidavit, the 2<sup>nd</sup> defendant **JAMLICK WAWERU MIANO** has deponed as follows:

That by the time he filed **KERUGOYA CMCC No. 47 of 2016**, he was not aware about the existence of this case and although the parties are the same in both cases, the orders being sought are substantially different. That the Chief Magistrate's Court has jurisdiction to handle **KERUGOYA CMCC No. 47 of 2016** and has issued orders barring the plaintiff from burying her late mother in law in land parcel No. KIINE/KIBINGOTI/NGUGUINI/3877 which orders the plaintiff disobeyed and she was held in contempt and she ought to have appealed those orders or sought their review by the same Court. Alternatively, if the Applicant wished to challenge the jurisdiction of the Chief Magistrate, she should have filed a Preliminary Objection.

The application was canvassed by way of written submissions and although the Court was informed on 23<sup>rd</sup> November 2017 that both **Mr. MIANO** advocate for the plaintiff and **Mr. KAGIO** advocate for the defendants had filed their respective submissions, it turned out that infact only **Mr. MIANO** advocate had filed submissions.

I have considered the application, the rival affidavits and the submissions by **Mr. MIANO**.

Before I delve into the application, it is important that I highlight the parties' respective pleadings as they are important in determining this application.

The plaintiff moved to this Court by her Originating Summons founded under **Section 38 of the Limitation of Actions Act** and sought the following orders:

- 1. That land titles to parcels No. KIINE/KIBINGOTI/3877 and 3878 be cancelled and reconstituted back to the original title No. KIINE/KIBINGOTI/NGUGUINI/492.**
- 2. That after the said cancellation and reconsolidation, the plaintiff be declared to have become entitled to 1.62 Ha of land parcel No. KIINE/KIBINGOTI/NGUGUINI/492 measuring 3.24 Ha or thereabout by adverse possession.**
- 3. That the title rights and interests over the aforesaid land parcel No. KIINE/KIBINGOTI/NGUGUINI/492 to the defendants be extinguished so that the defendants title be recalled and cancelled.**
- 4. That the Land Registrar Kirinyaga County do register the plaintiff as proprietor of a portion of 1.62 Ha out of land parcel No. KIINE/KIBINGOTI/NGUGUINI/492 by adverse possession.**
- 5. That the costs of this Summons be borne by the defendants.**

The Summons was, as required, supported by the plaintiff's affidavit and annexed to it is a copy of the Green Card to land parcel No. KIINE/KIBINGOTI/NGUGUINI/492 (herein the suit land). The plaintiff's case is that she has been in exclusive and continuous of ½ of the suit land which originally belonged to **MIANO MURAGE** the father of her deceased husband **MAINA MIANO** whom she married in 1965 while the defendants are her brothers in law who have sub-divided the suit land to give rise to two parcels KIINE/KIBINGOTI/NGUGUINI/3877 and 3878 and are denying her and her children access to the portion that she has been occupying.

However, in a replying affidavit in opposition to the Originating Summons, the 2<sup>nd</sup> defendant has deponed, inter alia, that the title to the suit land has been closed upon sub-division resulting in two titles No. KIINE/KIBINGOTI/NGUGUINI/3877 which is registered in his names and KIINE/KIBINGOTI/NGUGUINI/3878 which is registered in the names of his brother the 1<sup>st</sup> defendant herein. Further, that the plaintiff and her family occupy 1/8 acre of his land and he has filed **KERUGOYA CMCC No. 47 of 2016** seeking their eviction therefrom. The 2<sup>nd</sup> defendant then makes the following averments in paragraphs four (4) and ten (10) of his replying affidavit dated 4<sup>th</sup> March 2016 and which are relevant to the application under consideration:

**4: "That the Applicant has deliberately failed to disclose that her brother in law SAMUEL MWANGI MIANO and her son DOUGLAS KARIUKI MAINA had filed a suit in the High Court for a portion of 4 acres each out of parcel number KIINE/KIBINGOTI/NGUGUINI/492 by way of adverse possession. That case was heard through viva voce evidence and the High Court on 19<sup>th</sup> June 2008 dismissed that suit with costs. Annexed and marked JWM-1 is a copy of the judgment in NYERI H.C.C.C No. 154 of 1987 (OS)".**

**10: "That the plaintiff's son DOUGLAS KARIUKI MAINA having filed a similar claim as this one and lost in a judgment delivered on 19<sup>th</sup> June 2008 in NYERI H.C.C.C No. 154 of 1987 (OS) this case therefore becomes res-judicata. Section 7 explanation 6 of the Civil Procedure Act refers whereby where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of that section, be deemed to claim under the person so litigating".**

Among the documents annexed to that replying affidavit is the judgment delivered on 19<sup>th</sup> June 2008 in **NYERI HIGH COURT CIVIL CASE No. 154 of 1987 (OS)** by Justice **MARY KASANGO** in which the subject matter was land parcel No. KIINE/KIBINGOTI/NGUGUINI/492 which the plaintiffs were **SAMWEL MWANGI MIANO** (1<sup>st</sup> plaintiff) and **DOUGLAS KARIUKI**

**MAINA** (2<sup>nd</sup> plaintiff) while the defendants were **JOSPHAT MURAGE MIANO, JAMLECK WAWERU MIANO** and **HANNAH WANGARI MIANO**. The plaintiffs were seeking orders that they have acquired the whole of the land in dispute by virtue of having been in continuous and un-interrupted occupation for a period of over twelve years. That suit was dismissed with costs for also being res-judicata.

Although the issue of res-judicata was not brought up by the parties in their respective affidavits or by **Mr. MIANO** in his submissions, it is obvious that it is central in these proceedings.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** as follows:

**“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”.**

For res-judicata to apply, the Court must be satisfied that:

- 1. The issue in dispute in the former suit between the parties is directly and substantially in dispute between the parties in the suit where the doctrine of res-judicata is pleaded.**
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3. The former suit must have been heard and finally decided.**
- 4. The Court or Tribunal which determined the former suit must have been competent.**

See **KAARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83**. The rationale behind the doctrine of res-judicata is that there should be an end to litigation so that parties are protected from facing repetitive litigation over the same subject matter. It also ensures that the Courts, which are already clogged, expend their limited resources in an economic manner determining live disputes and not those that have already been litigated and finalized by competent Courts. It is therefore important that I determine if this suit is or is not res-judicata because if it is, then the prayers sought in the plaintiff's Notice of Motion dated 13<sup>th</sup> July 2016 become moot and do not fall for any consideration by this Court.

I have perused **NYERI H.C.C.C No. 154 of 1987 (OS)** in which the subject matter was the same suit land in this case. The plaintiffs in that case were seeking the whole of the suit land by way of adverse possession and **JUSTICE KASANGO** dismissed the suit having found that the same had been determined by a subordinate Court and an appeal from that decision was dismissed by the High Court in **CIVIL APPEAL No. 300 of 1980 NAIROBI**. No appeal was filed from the judgment delivered by **JUSTICE KASANGO** on 19<sup>th</sup> June 2008 who also found on the evidence that the plaintiffs had not proved their case. The 2<sup>nd</sup> plaintiff in the **NYERI H.C.C.C No. 154 of 1987** was **DOUGLAS KARIUKI MAINA** who, it has been deposed in the 2<sup>nd</sup> defendant's replying affidavit dated 4<sup>th</sup> March 2016 and quoted above, is the son to the plaintiff herein. Under explanation **6 of Section 7 of the Civil Procedure Act**, it is provided that:

**“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating”**

It is clear from the judgment in **NYERI H.C.C.C No. 154 of 1987 (OS)** that the plaintiff herein was in fact a witness and testified as PW3. She and her son were therefore pursuing common interest in the suit land and clearly, this suit is caught by the doctrine of res-judicata. In the case of **LOTTA VS TANAKI & OTHERS (2003) 2 E.A 556**, the Tanzanian Court of Appeal stated the following in relation to the doctrine of res-judicata:

**“Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit. Further, that a person does not have to be formally enjoined in a suit but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”**

The plaintiff in this case may not have been a party in **NYERI H.C.C.C No. 154 of 1987 (OS)**. However, her son **DOUGLAS KARIUKI MAINA** was the 2<sup>nd</sup> plaintiff in that suit and their common interest in both the former suit and this suit is that both are claiming the suit land by virtue of the fact that **MAINA MIANO** the plaintiff's deceased husband lived on the suit land since 1965. It follows that **NYERI H.C.C.C No. 154 of 1987 (OS)** having been dismissed by **Justice KASANGO** on 19<sup>th</sup> June 2008 both on account of lack of evidence and also for being res-judicata and since no appeal was filed against that judgment, this suit is clearly barred for being res-judicata.

Having found that this suit is res-judicata, there can be no justiciable forum upon which this Court can now proceed to consider the merits or otherwise of the plaintiff's Notice of Motion dated 13<sup>th</sup> July 2016 which must suffer the same fate and be struck out. Once this suit is struck out, as it must, for being res-judicata, the issue of its consolidation with **KERUGOYA CMCC No. 47 of 2016** does not arise. Further, any review of the orders of the Chief Magistrate can only be considered by the subordinate Court as per **Order 45 of the Civil Procedure Rules** and a superior Court can only do so through a writ of certiorari as that is really what **Article 165 (6) and (7) of the Constitution** envisage. Although counsel for the plaintiff in his submissions urged the Court to invoke the provisions of **Section 13 (5) of the Environment and Land Court Act**, I wish to point out that that section was deleted by **Act No. 12 of 2012**. In any case, no evidence was placed before me to

suggest that the Chief Magistrate lacked the requisite jurisdiction to determine the dispute in **KERUGOYA CMCC No. 47 of 2016**. The onus is always on the party alleging lack of jurisdiction to place before the Court all the relevant evidence to prove that assertion.

The up-shot of the above is that this suit is struck out for being res-judicata. The plaintiff's Notice of Motion dated 13<sup>th</sup> July 2016 will suffer the same fate.

The defendants are awarded costs of the suit and the application.

For avoidance of doubt, all the previous orders issued pursuant to the plaintiff's Notice of Motion dated 14<sup>th</sup> April 2016 are hereby vacated including the order issued on 10<sup>th</sup> July 2017 consolidating this suit and **KERUGOYA CMCC No. 47 of 2016**.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**23<sup>RD</sup> FEBRUARY, 2018**

Ruling dated, delivered and signed in open Court at Kerugoya this 23<sup>rd</sup> day of February 2018

Mr. Ngigi for Mr. Miano for Plaintiff present

Mr. Kagio for Defendants absent

Plaintiff present

1<sup>st</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**23<sup>RD</sup> FEBRUARY, 2018**