



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 42 OF 2017 (O.S)

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS
OF KENYA**

AND

**IN THE MATTER OF L.R NOS GICHUGU SETTLEMENT SCHEME/2301, 2302, 2303, 2304,
2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312**

BETWEEN

MUCHAMBI NDWIGA.....1ST PLAINTIFF

JEREMIAH MUCHIRA MUCHAMBI.....2ND PLAINTIFF

VERSUS

OCTAVIAN MWANIKI KARIUKI.....DEFENDANT

RULING

The doctrine of Res-judicata is provided for under **Section 7 of the Civil Procedure Act** which reads:

“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”.

From the above, the ingredients of Res-judicata can be summarized as follows:

- 1. That the issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.***
- 2. That the former suit should be between the same parties or parties under whom they or any of them litigate under the same title.***
- 3. The Court before which the former suit was litigated was competent.***
- 4. The former suit was heard and finally determined.***

See KARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83 and also UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & OTHERS 1996 e K.L.R.

The principle of Res-judicata aims at bringing to an end litigation so that parties are protected from repetitive cases over the same subject matter that has already been determined. It can therefore be pleaded as a valid defence and ought to be determined at the earliest opportunity because it goes to the Court's jurisdiction.

What amounts to abuse of Court process? In MUCHANGA INVESTMENT LTD VS SAFARIS UN-LIMITED (AFRICA) LTD & OTHERS 2009 e K.L.R., the Court of Appeal affirmed the following definition of abuse of Court process as given in the case of BEINOSI VS WIYLEY 1973 (SA 721 SCA) at Page 734 F – G as follows:

“What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process’. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective” Emphasis added

The “**term abuse of process**” is also defined in BLACK’S LAW DICTIONARY 9TH EDITION as:

“The improper and tortuous use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process’s scope”.

On the other hand, the power to strike out pleadings is donated by Order 2 Rule 15 of the Civil Procedure Rules and among the grounds upon which a pleading can be struck out is that it discloses no reasonable cause of action or defence, is scandalous, frivolous and vexatious or is otherwise an abuse of the process of the Court. However, the power to strike out pleadings, as was held in the case of DIT DOBIE & COMPANY (K) LTD VS MUCHINA 1982 K.L.R 1, should be exercised with caution and only in plain and obvious cases. As MADAN J.A held in the MUCHINA case (supra):

“A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”

Finally, as was held by the Court of Appeal in YAYA TOWERS LTD VS TRADE BANK LTD (IN LIQUIDATION) C.A CIVIL APPEAL No. 35 of 2000:

***“A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial..... It cannot be doubted that the Court has inherent jurisdiction to dismiss that which is an abuse of the process of the Court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases*”**

Those broad principles are what will guide this Court in determining the defendant’s Notice of Motion dated 3rd July 2017 which is the subject of this ruling.

But first, a summary of the parties pleadings.

By an Originating Summons dated 27th March 2017, the plaintiffs pleaded that they have been in open, continuous, un-interrupted and exclusive occupation, possession and use of land parcels No. GICHUGU/SETTLEMENT SCHEME/2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311 and 2312 (herein the suit land) since 1995 and have therefore acquired the same by way of adverse possession. They therefore sought the main order that the registration of the current owners of the suit

land be cancelled and the same be registered in their names as tenants in common with equal shares. Annexed to the Originating Summons are copies of search certificates showing that the defendant is the registered proprietor of the suit land.

The defendant filed a replying affidavit in opposition to the Originating Summons and averred, inter alia, that he purchased the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/1357 and 1358 from the 1st plaintiff between 1974 and 1986 but the 1st plaintiff refused to vacate and so the defendant filed **MURANGA SENIOR RESIDENT MAGISTRATE'S CIVIL CASE No. 139 of 1987** and obtained orders directing that the said parcels be transferred to him. However, the 1st plaintiff refused to sign the application for Land Control Board consent which was signed by the magistrate. The 1st plaintiff was subsequently evicted by Auctioneers and his appeal was dismissed. On 24th September 2000, the 1st plaintiff trespassed onto the land but was arrested, charged and fined Ksh. 500. He appealed at the High Court Embu but later withdrew the appeal and was ordered to pay costs of Ksh. 1.2 million which remain unpaid to-date. The defendant later requested the Registrar of Land to sub-divide the parcels thus giving rise to the suit land. However, when the defendant returned from India recently, he found that the 1st plaintiff had again trespassed onto the suit land with his family. He added therefore that the plaintiffs are not entitled to orders in adverse possession because the suit land was legally sold to him and the plaintiffs were evicted and convicted for trespass and neither has their occupation been continuous, exclusive and un-interrupted.

The defendant subsequently filed the Notice of Motion dated 3rd July 2017 in which he seeks the following orders:

(a) Spent.

(b) That this Honourable Court do issue an order dismissing the Originating Summons and the entire claim by the plaintiff against the defendant for being res-judicata and an abuse of the Court process.

(c) That this Honourable Court do issue an order that the plaintiffs exhume the remains of one Mwangi Muchambi buried on the defendant's suit properties immediately.

(d) That this Honourable Court do issue an order for the plaintiff to give the defendant vacant possession of L.R No. GICHUGU/SETTLEMENT SCHEME PLOTS NO. 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311 and 2312 within 21 days from the date of the order in default, an order be given for the eviction of the defendant (sic) his servants or agents from the said suit properties and the officer in charge of GATHOGE POLICE POST to render assistance to the defendant to ensure law and order is maintained when such eviction takes place.

(e) That costs of this application be borne by the plaintiffs.

The application is predicated on the grounds set out therein and supported by the defendant's affidavit. The gravamen of the application is that the defendant is the sole registered owner of the suit land having purchased the same way back in 1974 and although the 1st plaintiff refused to sign the relevant documents, a suit was filed being **MURANGA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 139 of 1987** and the 1st plaintiff was evicted and was later charged and convicted for trespass. That on 1st July 2017, the 1st plaintiff secretly buried his son Mwangi Muchambi on parcel No. 2305. The supporting affidavit has annexed thereto copies of the title deeds to the original land parcels No. GICHUGU/SETTLEMENT/SCHEME/1357 and 1358, a copy of sale agreement dated 2nd June 1974, plaint, eviction orders issued in **MURANGA COURT CIVIL CASE No. 139 of 1987**, judgment in **MURANGA CRIMINAL CASE No. 811 of 2000**, copies of certificates of search in respect to the suit land as well as the Green Cards in respect to the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/1357 and 1358.

In opposing the application, the 1st plaintiff on behalf of the 2nd plaintiff filed a replying affidavit in which he deponed, inter alia, that the defendant has not explained how the suit is res-judicata and in any case, since the defendant obtained eviction orders in 1994, the plaintiffs have nonetheless continued to un-interruptedly and exclusively occupy the suit land to-date. That there can be no basis for the Court to order the plaintiffs to exhume the remains of the deceased as there was no order restraining them from burying him. That the substantive order for eviction cannot be issued before the case is determined.

The application has been canvassed by way of written submissions which have been filed by **Mr. KAGIO** advocate for the plaintiffs and **Mr. MOMANYI** advocate for the defendant.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

I will start with prayers (c) and (d) of the application which seek the substantive orders that the plaintiffs exhume the remains of one Mwangi Muchambi buried on the suit land and further that the plaintiffs give vacant possession of the suit land within 21 days or be evicted therefrom.

To begin with, those two prayers cannot be granted at this time as that will effectively determine this suit even before it is heard. They cannot be granted through an interlocutory application.

Secondly, even if those prayers were available at this stage, they have not been pleaded and even though this Court granted the defendant leave to file further affidavit to include a counter-claim on 11th July 2017, that has not been done. Without a counter-claim, such prayers will not be issued even after full trial because they cannot be granted *in vacuo*.

That leaves only prayers (b) and (e) which takes me back to beginning of this ruling where I set out the principles to be considered in striking out a suit for being res-judicata or an abuse of the Court process.

In pleading res-judicata, the defendant has relied on the fact that the land parcels No. GICHUGU/SETTLEMENT SCHEME/1357 and 1358 which gave rise to the suit land was the subject of **MURANGA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 139 of 1984** (the Muranga case) in which the defendant herein was the plaintiff while the 1st plaintiff was the defendant. There are orders annexed showing that the Court ordered transfer of land parcels No. GICHUGU/SETTLEMENT SCHEME/1357 and 1358 to the plaintiff in that case (defendant herein) and eviction orders were issued. The plaint in the **MURANGA CASE** shows that it was a claim for seeking the enforcement of the sale agreement with respect to a parcel of land No. GICHUGU/SETTLEMENT/SCHEME/1105 of which four (4) acres were to be transferred to the plaintiff in that case. Perhaps that transfer is what resulted in land parcels No. GICHUGU/SETTLEMENT SCHEME/1357 and 1358. That will become clearer at the trial. What is important for purposes of this ruling is that the **MURANGA CASE** did not determine the issue of adverse possession and even if it had been pleaded, that Court would not have been in a position to consider and determine that issue since the jurisdiction to do so was only vested in the High Court and, since 2011, in this Court. Therefore, whereas the parties and the subject matter in this case and the **MURANGA CASE** are similar, the issue in this case is adverse possession which was neither substantially the issue in the **MURANGA CASE** nor was it determined. It follows therefore that the plea of res-judicata cannot be sustained in this case.

The defendant similarly seeks the dismissal of this suit for being an abuse of the Court process. He is therefore seeking a summary determination of this suit by striking it out. As I have already indicated at the start of this ruling, the power to strike off a pleading is to be exercised "*sparingly*" and only in "*plain*" and "*obvious cases*". I do not consider this to be such a case. I also do not consider this suit to be an abuse of the Court process either. It is clear from the previous litigation involving the same parties herein that this is a matter that ought to go to trial and cannot be the subject of summary dismissal. I am equally not persuaded that this suit has been filed for extraneous purposes so as to amount to an abuse of the Court process. In my view, justiciable issues are disclosed from the pleadings herein which are clearly appropriate for adjudication by this Court.

The up-shot of the above is that the defendant's Notice of Motion dated 3rd July 2017 lacks merits. It is hereby dismissed with costs to the plaintiffs.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February, 2018

Mr. Ngigi for Mr. Kagio for Plaintiffs present

Mr. Momanyi for Defendant absent.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018