



Magara & 2 others v Lakeview Investments Limited (Environment & Land Case E005 of 2023) [2024] KEELC 371 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E005 OF 2023
CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

MANWAH BWOSIEMO MAGARA 1ST PLAINTIFF

IAN MAGARA BWOSIEMO 2ND PLAINTIFF

BRENDA KWAMBOKA MANWAH 3RD PLAINTIFF

AND

LAKEVIEW INVESTMENTS LIMITED DEFENDANT

RULING

1. What is before Court for determination are two Notice of Motion Applications dated the 23rd January, 2023 and 17th April, 2023 respectively. In the Notice of Motion dated the 23rd January, 2023 filed by the Plaintiffs, they seek the following Orders:-
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this application and main suit, the Defendant/ Respondent and its employees, agents, servants, purchasers, lessees, lessors be restrained from doing anything with the Plaintiffs' property known as Land Reference 25693 (Grant IR 99992) situated in Mavoko in Machakos County in any way detrimental to the interest of the Plaintiff.
 4. That pending the hearing and determination of this application and main suit, a permanent injunction do issue restraining the 1st Defendant/Respondent, its employees, servants, agents, purchasers, lessee, lessor and any other person through whom it may act from encroaching, entering, trespassing, seizing, possessing, remaining thereon, or from selling, offering for sale, transferring, leasing or in any other way attempting to alienate dispose whatsoever or dispossess



the Plaintiff's property known as LR 25693 (Grant IR 99992) situated in Mavoko in Machakos County in any way detrimental to the interests of the Plaintiff.

5. That pending hearing and determination of this application and the main suit, the Honourable Court do order the eviction and removal of the Defendants/trespassers employees, servants, agents, purchasers, lessees, lessors from Land Reference 25693 and do order the removal of structures erected by the Defendants and their agents or servants.
 6. That the OCPD Athi River Police Station and OCS Mlolongo Police Station to assist in the enforcement of the Court Orders.
 7. That the costs of this application be awarded to the Applicant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 1st Plaintiff Manwah Bwosiemo Magara. In the said Affidavit, he provides the history of Land Reference 25693 hereinafter referred to as the 'suit land' including subdivisions. He confirms the suit land is registered in the names of the 2nd and 3rd Plaintiffs. He explains that together with his wife Jennifer Waithira Ndege, they had entered into a Sale Agreement dated the 16th November, 2009 with the Defendant for the sale of land reference number 25692 but the 2nd and 3rd Plaintiffs did not do so. He contends that the Defendant has trespassed on the suit land yet he subdivided the land and has entered into other agreements with various purchasers. He states that the Defendant filed Machakos ELC 210 of 2011 against him and other parties and judgement was delivered directing them to refund the purchase price including Kshs. 1,950,000 for the costs of constructing the fence. He avers that the Defendant constructed a fence and gate on wrong parcel of land and is fraudulently attempting to take the suit land. Further, that he has been paying premium and land rates to the government for the suit land, yet the Defendant has destroyed beacons and illegally placed their own.
 3. The Defendant opposed the instant Application by filing Grounds of Opposition dated the 17th April, 2023 where it stated that the Application is vexatious, frivolous and an abuse of the court process and ought to be dismissed with costs. It contends that the Plaintiffs suit is barred by virtue of being *res judicata* and therefore offends the provisions of Section 7 of the *Civil Procedure Act*. Further, that the Honourable Court is *functus officio* as far as the instant suit is concerned. It insists that the issues for determination in the instant suit were directly and substantially in issue in Machakos ELC No. 210 of 2011 which was heard and determined by a competent court. Further, the Plaintiffs' Application is premised on an incompetent suit and ought to be dismissed with costs.
 4. The Defendant further filed a Notice of Motion Application dated the 17th April, 2023 seeking the following Orders:-
 1. That the Plaintiffs' suit filed herein filed and dated 17th January, 2023 be struck out and/or dismissed for being *res judicata* and an abuse of the Court's process.
 2. That costs of the suit and of the Application be awarded to the Defendants.
 5. The Application is premised on the grounds on the face of it and the Supporting Affidavit of George Oduor Okwaro, its Director, where he deposes that the Plaintiff is in actual and physical possession of the suit land by virtue of having purchased it from the 1st and 2nd Respondents pursuant to a Sale Agreement dated the 16th February, 2009. He contends that the Defendant has been in possession of the suit land from the year 2009 having been granted the liberty to do so by the 2nd and 3rd Respondents (the registered proprietors) to fence off the said land, upon paying the deposit of the purchase price. He explains that as a result of breaching the terms of the Sale Agreement dated the 16th February, 2009 by the 2nd and 3rd Respondents, the Defendant instituted ELC No. 210 of 2011 against them together



with a Third Party (Al Ruhia Estates Limited). He states that the dispute as regards ownership of the suit land was heard and determined by this Court vide its Judgment delivered in ELC No. 210 of 2011 on 5th October, 2017. Further, that the 2nd and 3rd Respondents through their then Advocates messrs Muchangi Nduati & Co. Advocates later filed an Application seeking to review and set aside the Court's Judgment of the 5th October, 2017, which Application was subsequently dismissed on 22nd March, 2019. He insists that the Court is hence *functus officio* and cannot be called upon to re-open any dispute relating to the suit land as the Court had already made its final decision. He reiterates that the Plaintiffs' herein intend to litigate on issues relating to the ownership of the suit land and which issues were directly and substantially in issue in the former suit ELC No. 210 of 2011 where the Respondents were parties.

6. The Plaintiffs opposed the Defendant's Notice of Motion Application by filing a Replying Affidavit sworn by the 1st Plaintiff Manwah Bwosiemo Magara where he deposes that he is a holder of a Power of Attorney on behalf of the 2nd and 3rd Plaintiffs who are owners of the suit land. He contends that the Defendant/Applicant's director misleads the Court by stating that the Defendant purchased the suit land for valuable consideration, without evidence. He insists that this suit is substantially different from the previous suit between the parties and highlights the prayers sought. He denies being a party in ELC 210 of 2011 *Lakeview Investments Limited v Ian Magara Bwosiemo, Brenda Kwamboka Manwah and Al Ruhia Estates Limited*. Further, that Al Ruhia Estates Limited is not a party to this suit and the issues to be determined are not similar. He reiterates that the Court declared that the Defendant was not entitled to the suit land but remains in unlawful occupation and has purported to sell as well as transfer it to purchasers. He avers that the Defendant's plea of *res judicata* is meant to frustrate the Plaintiffs' from asserting their constitutional rights to the suit land.
7. The two Applications were canvassed by way of written submissions.

Analysis and Determination

8. Upon consideration of the two instant Notice of Motion Applications including the respective Affidavits, Grounds of Opposition and rivalling submissions, the following are the issues for determination:-
 - a. Whether this suit is *res judicata*.
 - b. Whether the Plaintiffs are entitled to orders of permanent injunction as well as eviction orders against the Defendant in respect to the suit land.
9. The Plaintiffs in their submissions reiterated their averments as per the respective Affidavits and insisted they have established a prima facie case to warrant orders of interlocutory injunction. Further, that the Defendant as a trespasser should pay them damages. To support their arguments, they have relied on the following decisions: *Kennedy Otieno v Kengen* (2010) eKLR; *Giella v Cassman Brown* (1973) EA 358; *Nguruman Ltd v Jan Bonde Nielsen* Civil Appeal No. 77 of 2012; *JAJ Superpower Cash and Carry v Nairobi City Council* Civil Appeal No. 111 of 2002 and *George Orago v George Jagalo* (2010) eKLR.
10. The Defendant in its submissions reiterated its averments as per the Grounds of Opposition including Supporting Affidavit and contended that orders of a permanent injunction as well as eviction can only be granted after a substantive hearing. It insisted that the instant suit is *res judicata*. It argued that the Plaintiffs are members of the same family. Further, that the introduction of a new cause of action by the Plaintiffs herein cannot escape the doctrine of *res judicata*. It explained that all the parties in ELC 210 of 2011 filed Notices of Appeal and allowing this suit to proceed would scuttle the matter in the Court of Appeal. To buttress its averments, it relied on Section 7 of the *Civil Procedure Act* as well as the following decisions: *Abok James Odera v Patrick Machira*, Civil Appeal No. Nai 49 of 2001 (cited



in the case of *Gladys Nduku Nthuki v Letshego Kenya Ltd & Another Machakos* HCCC No. E 007 of 2012); *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR and *Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd & 2 Others* (2014) eKLR.

11. As to whether this suit is *res judicata*.
12. The Defendant claims this suit is *res judicata* and should be struck out as the issues herein had been dealt with in ELC 210 of 2011 which fact is vehemently opposed by the Plaintiffs. Before I proceed to make a determination on whether this suit is *res judicata* or not, I wish to highlight an excerpt from the Judgment in Machakos ELC 210 of 2011 *Lakeview Investments Limited v Ian Magara Bwosiemo, Brenda Kwamboka Manwah and Al Ruhia Estates Limited* which fulcrum of the dispute revolved around LR No. 25693 (suit land).

“By a Plaint filed on 17th August, 2011, the Plaintiff seeks Judgment against the Defendant for:

- a. An order declaring the Sale Agreement between the 3rd Defendant and the 1st and 2nd Defendants null and void.
- b. An order of specific performance against the 1st and 2nd Defendants to transfer the parcel of land known as LR No. 25693 as per the Sale Agreement dated 16th February, 2010 and in default, the Deputy Registrar of the High Court of Kenya, do sign all the transfer or necessary documents to the Plaintiff and the 3rd Defendant.
- c. An order of injunction order against the 1st, 2nd and 3rd Defendants or their agents or servants from selling or transferring or disposing the said property or removing or damaging the Plaintiff's fence and beacons or interfering with the said parcel of land in any other way until this suit is heard and determined and also before the application for injunction is heard and determined.
- d. Costs of the suit.
- e. Any other relief that this Honourable Court deems fit and just to grant.

I wish to interrogate the documents presented. I note the Sale Agreement was duly signed by both the Plaintiff and the 1st and 2nd Defendants. Clause 13 of the said agreement reads: ‘Both parties confirm that they have willingly entered into this Agreement without any undue influence or representation or warranty as to the condition of the property except as provided in this Sale Agreement.’ This indeed confirms that the 1st and 2nd Defendant were not coerced to enter into the Sale Agreement (exhibit P2) and they accepted to adhere to the terms and conditions therein. The Plaintiff has established that there was an unchallenged Sale Agreement between them and demonstrated that there was part performance of the said contract by paying 10% of the purchase price amounting to Kshs. 1.1 million and thereafter adding Kshs. 850,000 as requested by the 1st and 2nd Defendants. The 1st and 2nd Defendants granted them possession of the suit land as per Clause 10 of the Sale Agreement. Clause 6 of the Sale Agreement sets out the terms of termination and rescission of the contract. In the current case the court has not been shown any documentation from either party to prove a notice to terminate the contract was done. Since the Defendants failed to enter appearance and file Defence to controvert the Plaintiff's claim, I find that the Sale Agreement dated 16th February, 2010 is valid.... On the issue as to whether the Agreement between the 3rd Defendant and the 1st and 2nd Defendants is valid. Since the Sale Agreement of the suit land



was signed prior to this agreement and the Plaintiff paid 10% purchase price as had been agreed. The 1st and 2nd Defendants hence did not have capacity to enter in to a fresh contract with the 3rd Defendant when the contract with the Plaintiff was still in existence. I find that the Sale Agreement between the 1st and 2nd Defendants and 3rd Defendant is null and void.

In the circumstances I find that the Plaintiff has proved its case on a balance of probability and proceed to make the following order:

- a. The Sale Agreement between the 3rd Defendant and the 1st and 2nd Defendants be and is hereby declared null and void.
- b. The 1st and 2nd Defendant be and are hereby ordered to refund the deposit of the purchase price amounting to Kshs. 1,950,000 including costs incurred to fence the land with interest at 18% per annum.
- c. Costs of the suit to be borne by the Defendants.”

13. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at Section 7 which stipulates *inter alia*:-

“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 can 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.”

14. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) 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 persons so litigating.”

15. On *res judicata*, the Court of Appeal in the case of [Uburu Highway Development Ltd v Central Bank & Others](#), CA No. 36 of 1996 held that: -

“In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title;



a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

16. Further in the case *Nancy Mwangi t/a Worthblin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* (2014) eKLR, J Gikonyo while dealing with the issue of res judicata stated 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 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 new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* 92001) 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 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*.”

17. In this instance the Plaintiffs filed this suit on 17th January, 2023 seeking to declare the Defendant a trespasser on LR No. 25693, general damages for trespass, damages for reinstatement of beacons, vacant possession, loss of income and costs. From the excerpt I have cited above, I note the issue in dispute in both suits was LR No. 25693 in which a Court of Competent jurisdiction after examining the evidence presented, directed in its Judgment, that the Plaintiffs therein to refund the purchase price already paid including certain amount as special damages as well as interest. The Plaintiffs insist that this suit is substantially different from the previous suit which was between different parties. Further, they deny being parties in ELC 210 of 2011 and that the issues determined are not similar. I note the parties in ELC 210 of 2011 were *Lakeview Investments Ltd v Ian Magara Bwosiemo, Brenda Kwamboka Manwah & Al Ruhia Estates Ltd*. While, in the instant case, the parties are *Manwah Bwosiemo Magara, Ian Magara Bwosiemo & Brenda Kwamboka Manwah v Lakeview Investments Ltd*. Further, that the suit land is the same.
18. In applying the parameters of *res judicata* as stated in the legal provisions I have quoted above while associating myself with the decisions cited, I find that the instant suit indeed fulfills the ingredients of *res judicata* as the matter which is in issue had directly and substantially been in issue in ELC 210 of 2011. Further, the parties were the same except that in this instant case an additional Plaintiff has been added while Al Ruhia Estates Limited has been omitted. It is my considered view that the dispute over the suit land was already determined but the only thing the Plaintiffs have done is to shroud their cause of action in a different garment which if stripped off, remains one and the same. To my mind, the Plaintiffs are actually abusing the court process and seek to keep this dispute alive. I opine that this court is *functus officio* and if indeed the Plaintiffs seek to evict the Defendant from the suit, they should have complied with the terms of the Decree in ELC 210 of 2011 which they have not demonstrated to court if they have done, and thereafter sought eviction orders in the said suit.
19. It is against the foregoing that since I have found that this instant suit is indeed *res judicata*, I will not proceed to deal with the Plaintiffs’ Application seeking permanent injunction as well as eviction orders against the Defendant pending the outcome of this suit.



20. In the foregoing I find the Plaintiffs' Notice of Motion Application dated the 23rd January, 2023 unmerited and will strike it out with costs. I find the Defendant's Notice of Motion Application dated the 17th April, 2023 merited and will allow it.

21. I will proceed to strike out this suit with costs to the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF
JANUARY, 2024**

CHRISTINE OCHIENG

JUDGE

