



Kiathe & 38 others v Kajiado Central District Land Registrar (Environmental and Land Originating Summons E020 of 2024) [2025] KEELC 988 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEELC 988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E020 OF 2024
JG KEMEI, J
FEBRUARY 28, 2025**

**BETWEEN
PETERSON KITHENGE KIATHE & 38 OTHERS & 38 OTHERS PLAINTIFF
AND
UNITY 45 HOUSING COOPERATIVE SOCIETY LIMITED DEFENDANT**

RULING

(In respect of the Plaintiffs' Notice of Motion dated 19/3/24 and the Defendant's Notice of Motion dated 17/1/25)

1. This Ruling is in respect of two applications. The first application is by the Plaintiffs dated 19/3/24 whereas the second application is by the Defendant dated 17/1/25.
2. The Plaintiffs commenced this suit vide the Originating Summons dated 19/3/24 seeking among other orders; to be declared as the owners of Plot Numbers 07,430,131,490,455,577,051,407,322,243,406,049,069,256,192,313,385,569,403,129,259,471,484, 329,501,510,271,369,496,248,564,386,251,389,057,456,239,083 being part of LR No. 11531/9 located in Nairobi County having acquired them by way of adverse possession.
3. Alongside the Originating Summons, the Plaintiffs filed an application of even date principally seeking for orders that;
 - a. A temporary injunction be issued restraining the Defendant herein either by themselves, agents, employees, proxies and/or servants from entering, evicting, sub- dividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and/or dealing in any way with plot numbers 07,430,131,490,455,577,051,407,322,243,406,049,069,256, 192,313,385,569,403,129,259,471,484, 329,501,510,271,369,496,248,564,386,251,389,057,456,239,083 being part of LR No. 11531/9 located in Nairobi County.



- b. The costs of this application be provided for.
4. The application is premised on the grounds on the face of it and further supported by the Affidavit of Peterson Kithenge Kiathe, the 1st Plaintiff, sworn on 19/3/24. He avers that he is duly authorized by his Co-Applicants to swear the Affidavit on their behalf. He annexes the authority to act in support.
 5. The Deponent states that the Defendant purchased the suit property from the administrators of the estate of the late Rambir s/o Keharchard Kent on 7/7/1999 and had it transferred to them on 29/7/2002. That in the year 2009, they heard that there were some vacant plots owned by the then City Council of Nairobi and that people were settling thereon awaiting regularization. He avers that being interested, they moved in and occupied the respective plots, erected a fence and constructed semi-permanent structures as evidence of ownership and occupation. That in 2010, the plots measuring approximately 33 by 66 feet in size were surveyed and numbered to factor in basic amenities including roads, sewer lines, among others.
 6. The deponent further avers that in October 2010, they visited the Office of the then City Council of Nairobi, Lands Department for regularization and were informed that the suit property did not belong to it. Upon conducting a search they discovered that the land belonged to the Defendant. That despite the discovery, they continued with the construction of their respective plots which he lists against the respective owners. He asserts that they have not only erected storey buildings but also massionates and bungalows, evident from the annexed photographs. He states that the storey buildings erected thereon have tenants running different businesses.
 7. The Applicants assert that they have been enjoying quiet and peaceful occupation of the subject property since then. That the Defendant never took any action to stop the running of time. That no case was ever filed seeking to evict them. That it is only on 15/2/24 that the officials of the Defendant visited their premises and asked them to pull down their buildings and vacate from the Defendants' property within 30 days in default eviction would ensue at cost.
 8. The Applicants contend that they have never been served with an eviction notice or order hence the Defendant's actions are malicious. That the Defendant has not complied with the legal procedures for eviction hence the prayer for a restraining order. That they stand to lose irreparably without being accorded a chance to be heard.

The Defendants Replying affidavit dated 7/5/24

9. Peter Mburu Kamau deponed that he is the Secretary of and that the claim of the Plaintiffs is not known to them; there are no particulars of such plots as alleged by the Plaintiff; it is the owner of the suit land; no subdivision has taken place on its land; the claim of the Plaintiffs is but baseless.

Ruling on Preliminary Objection

10. In response to the Originating Summons and the application, the Defendant initially filed a Preliminary Objection on the basis that the suit is res judicata. The Objection was however overruled vide the Ruling of this court delivered on 24/9/24.

Defendant's application dated 17/1/25

11. Following the dismissal of the Preliminary objection, the Defendant filed the application dated 17/1/25. The Defendant's application is anchored on the provisions of Section 7 of the *Civil Procedure Act*, Cap. 21 and Rule 6 of the Civil Procedure Rules, 2010 (?) seeking orders that;



- a. The entire Notice of Motion Application and Originating Summons dated 19/3/24 be struck out.
 - b. Costs of this Application be provided for.
12. The application is premised on the grounds that that the suit is res judicata and ought to be dismissed with costs on account of previous matters being;
- a. ELC No. 353 of 2009 (OS); John Muchemi Ndungu, Peter Ngulu Kimuli Kori Kamuyu (As Chairman, Vice Chairman and Secretary respectively of Maili Saba Mwengenyie Self-Help Group) –vs- Upsana Kent (Sued as the Administrator of the Estate of Ranbir s/o Keharchard Kent) and Unity 45 Housing Co-operative Society Limited. Where a claim of adverse possession was dismissed by the High Court.
 - b. ELC Civil Case No. 994 of 2014 Unity 45 Housing Co-op Soc. Ltd –vs- Peter Ngulu Kimuli & Others (Maili Saba Mwengenyie Self Help Group)

The High Court has issued orders of eviction of the Defendants and the Interested Parties from the suit property.

13. The Defendant argues that the suit and the issues raised were directly and substantially in issue in the former suits. That the former suits were between the same parties and that the litigants in the previous suits are litigating under the same title.
14. The Defendant avers that the issue of adverse possession and/or ownership was heard and finally determined in the former suit. It states that the Court that heard and finally determined the issues were competent to try the suits and the issues raised therein. It contends that the application as well as the suit is therefore an abuse of the court process and ought to be struck out.
15. The application is further supported by the Affidavit sworn by Peter Mburu Kamau on 17/1/25 where he deponed that; the Defendant is the registered proprietor of the parcel of land known as LR No. 11531/9, with a Certificate of Title issued on 29/7/2002 measuring 40 acres; in 2010, unknown persons invaded the suit property and began demarcating the land while dumping building materials thereon; That they reported the matter to Kayole Police Station and the invaders were arrested; in 2010 a group calling themselves Maili Saba Mwengenyie Self Help Group obtained judgement in ELC No. 353 of 2009 (OS) declaring them owners of the suit property by way of adverse possession against the previous owner but the said Judgment was set aside vide the Ruling delivered on 25/7/13.
16. The deponent further stated that in 2014 it sued Maili Saba Mwengenyie Self Help Group in ELC No, 994 of 2014 and obtained judgement on 21/2/24 which declared it as the lawful owner of the land and ordered eviction of all persons residing therein. That no sub-division has been carried out on its title and the Plaintiffs claim of alleged survey and demarcation of sub-plots is baseless. The deponent argues that any dispute on ownership of the suit property was settled by the two cases and any claim for adverse possession is res judicata considering the period of litigation, events and rulings held therefrom and thus this court lacks the jurisdiction to re-litigate over the same subject matter

Plaintiffs' Replying Affidavit

17. The Plaintiffs opposed the application vide the Replying Affidavit of Peterson Kithenge Kiathe sworn on 7/5/24. The deponent avers that it is a stranger to the previous suits alluded to by the Defendant and that Maili Saba Mwengenyie Self-Help Group is not known to them neither are they members.



18. In reference to ELC No. 353 of 2009, the deponent avers that it is evident that the suit never proceeded to its logical conclusion as the judgment entered in favour of the group was set aside. This was followed by the striking out of the administrators of the Estate of Ranbir s/o Keharchand Kent on 14/7/14 as Defendants, consequently the whole suit collapsed before being determined on merit. Therefore, the rights and liabilities of the parties were not heard and determined.
19. With regards to ELC No. 994 of 2014, the Deponent avers that the Plaintiff therein (who is the Defendant in the instant suit) sought for orders of eviction against the Defendants therein. The Defendants therein are unknown to them. That in any event, the suit was not a representative suit and could only therefore apply to parties thereof. Further, that there being a stay of execution and a pending appeal, hence the suit is yet to be fully determined.
20. The deponent contends that their claim is that of adverse possession and proceeds to acknowledge the defendant's ownership of the suit land.
21. He maintains that the Plaintiffs have been in occupation, use and enjoyment of their respective plots and constructed their homes thereon. Therefore, striking out the suit without according them an opportunity to be heard will expose them to irreparable damage. He also contends that before the pending appeal is determined, the doctrine of res judicata is not applicable until the stay is lifted. Therefore, in view of the pending appeal, the Judgment which the Defendant seeks to execute is not final and the matter cannot be said to be final.

Court's Directions

22. The court, on 4/10/25 in the presence of Counsel for both parties directed that both applications be canvassed by way of written submissions. The Plaintiffs complied. However, their submissions are only in respect of the Defendant's application. The Defendant on the other hand did not file submissions despite the lapse of the period for compliance. The court has had occasion to read and consider the Plaintiffs' submissions dated 7/2/25.

Analysis and determination

23. Having considered the applications herein and the Originating Summons filed herein, the issues that arise for determination are as follows;
 - a. Whether the instant suit is res judicata as alleged by the Defendant.
 - b. Whether the Plaintiffs have met the threshold for the grant of an order of temporary injunction;

a. Whether the instant suit is res judicata

24. Section 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya provides for the doctrine of res judicata as a bar for the court to determine a subsequent similar suit in the following terms;

“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”.



25. Section 28 of the Environment and Land Court also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.
26. It is therefore clear that to succeed in a plea of res judicata, the following elements must be proved;
- a. The court that heard the matter must have been competent
 - b. The matter directly and substantially in issue must be the same as that formerly determined.
 - c. The parties must be the same and or litigating under the same titles.
 - d. The matter must have been heard and finally decided.
27. These principles were restated in the case of *The Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others*, [2017] eKLR, where the Court of Appeal held that:
- “For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
28. The Supreme Court stated the purpose of the doctrine of res judicata in the case of *John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2021) eKLR, para 54 as follows;
- “The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
29. In the instant matter, the Defendant has argued that this suit is res judicata on account of previous suits being; ELC No. 353 of 2009 (OS) and ELC Civil Case No. 994 of 2014 already dealt with the issues raised herein. I have considered the application and the annexures attached thereto and I note that in ELC No. 353 of 2009 (OS), the Applicants therein were members of Maili Saba Mwengenyi Self-Help Group suing through their officials. Although their claim was that of adverse possession, their claim was against the previous owner from whom the Defendant herein purchased the land from. The claim was struck out on 14/7/14. Consequently, the suit collapsed for lack of a Defendant. Evidently this matter was never determined with finality. I agree with the Plaintiffs herein that the issue of adverse possession was not determined. No contrary evidence has been placed before this court.



30. There is another reason why the doctrine of resjudicata has not been proven. Firstly absent a judgement of the court in ELC 353 OF 2009 and secondly that the Plaintiffs were parties either by themselves or through a representative in the previous suit. In the absence a list of membership of the group, the Court has no way of confirming that the Plaintiffs herein are members of the said group.
31. Turning to ELC 994 of 2014, it was incumbent upon the defendant to show that the current plaintiffs are/were members of Maili Saba Mwengenye Self-Help Group, the defendant therein. None was placed before the court and therefore am not persuaded that the doctrine of resjudicata applies to this case.
32. In the end I reach the conclusion that the suit is not resjudicata. The application is unmerited and therefore it is dismissed.

b . Whether the Plaintiffs have met the threshold for the grant of an order of temporary injunction;

33. The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles applicable in an application for an injunction were laid down in the celebrated case of Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358 where the court held that in order to qualify for an injunction;
 - a. First the applicant must show a prima facie case with a probability of success.
 - b. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - c. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
34. It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.
35. The claim of the Plaintiffs is founded on adverse possession. It is their case that they have been in occupation for a period in excess of 12 years. That each of the Plaintiffs are in possession of a portion of the suit land measuring 33 by 66 feet and that they have constructed storeyed buildings therein, some of which are rented out by tenants and businesses. some photographs were adduced in the affidavit evidence
36. The Defendant on the other hand contends that it is the owner of the 40 acres piece of land and alludes to some frequent illegal entry by land grabbers and other members of public who may have been sold to some portions of the land. Although the plaintiff has not shown evidence of any subdivision, the defendant has not challenged the evidence of buildings on the suit land depicted in the photographs annexed.
37. At this stage the court is not required to determine the claim in its finality but to preserve the suit land pending the hearing and determination of the suit.
38. For that reason, I find the appropriate order is the maintenance of status quo pending the hearing and determination of the suit. The orders of status quo shall subsist for not more than 270 days from the date of this ruling within which time the Plaintiff ought to prosecute the suit to conclusion. For purposes of clarity the orders refer to the named plots occupied by the Plaintiffs being part of LR No. 11531/9 located in Nairobi County.
39. Final orders for disposal



- a. The Defendants application dated the 17/1/25 is dismissed
- b. The Plaintiffs application dated the 19/3/24 is allowed in terms of status quo stated in para 38 above.
- c. Each party to meet their own costs

40. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Coram

N/A for the Plaintiffs

Mr Mbichire for the Defendant

CA – Ms Yvette

