



Gichui ((Suing as a Personal Representative of the Estate of the Late Gichui Kimani)) v Gichui (Sued as the Legal Representative of the Estate of Kaniaru Gichui) & another (Environmental and Land Originating Summons 17 of 2023) [2024] KEELC 398 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 17 OF 2023
BM EBOSO, J
JANUARY 24, 2024**

BETWEEN

**SAMUEL KIMANI GICHUI PLAINTIFF
(SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE
GICHUI KIMANI)**

AND

**JEREMIAH NJOROGE GICHUI (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KANIARU GICHUI) 1ST DEFENDANT
JOHN KARUGA MBOGO (SUED AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF KIMANI GICHU) 2ND DEFENDANT**

RULING

1. Samuel Kimani Gichui, suing as the personal representative of the late Gichui Kimani, initiated this suit on 16/5/2023 through an Originating Summons dated 4/5/2023. Through the Originating Summons, the estate of the late Gichui Kimani sought the following verbatim reliefs against the defendants:
 1. A declaration that the plaintiff, on behalf of the estate of the late Gichui Kimani, is entitled to be registered as the indefeasible owner of two and a half acres of that property known as Ngenda/Wamwangi/28 registered in the name of the late Kaniaru Gichui and two and a half acres of that property known as Ngenda/Wamwangi/25 registered in the name of the late Kimani Gichui by virtue of adverse possession in terms of Sections 7, 13, 37 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, on account of the late Gichui Kimani's continued and uninterrupted possession, occupation and use of the suit properties for a period of more than thirty three (33) years from 1968 to his demise on 2nd November, 2001, and



the continued and uninterrupted possession, occupation and use of the suit properties by the estate of the late Gichui Kimani from the demise of the late Gichui Kimani to date.

2. A declaration that such interests, rights, estate and/or title, if any, that the late Kaniaru Gichui (deceased) and the late Kimani Gichui (deceased), had pursuant to the registration of the suit properties and issuance of title deeds, were extinguished upon expiry of twelve (12) years from 1968 with the result that no interest, right, estate or title to the suit properties could legally be transferred/transmitted to the defendants at any time in view of the provisions of Section 7, 13, 37 and 38 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya.
 3. A declaration that registration of the suit properties, namely, Ngenda/Wamwangi/28 and Ngenda/Wamwangi/25 in the names of the late Kaniaru Gichui (deceased) and the late Kimani Gichui (deceased) and subsequent succession proceedings were subject to the plaintiff's father's overriding rights in the nature of prescription on account of his occupation and possession.
 4. A declaration that the defendants hold the suit properties in trust for and on behalf of the estate of the late Gichui Kimani.
 5. An order be issued directing the defendants to execute, deliver and hand-over transfer documents, the title deed and application or consent(s) in respect of the suit properties, namely, Ngenda/Wamwangi/28 and Ngenda/Wamwangi/25, in favour of the plaintiff, on behalf of the estate of the late Gichui Kimani, failing which the Deputy Registrar of this Honourable Court be empowered and authorized to execute the documents of transfer in favour of the plaintiff, on behalf of the estate of the late Gichui Kimani.
 6. An order of prohibitory injunction be issued restraining the defendants whether by themselves, agents, servants or by any other persons whomsoever from sub-dividing, transmitting, offering for sale, selling, transferring (other than to the plaintiff on behalf of the estate of the late Gichui Kimani), charging, mortgaging, leasing, assigning, disposing, advertising or in any other manner whatsoever dealing with the suit properties, namely, two and a half acres of Ngenda/Wamwangi/28 and two and a half acres of Ngenda/Wamwangi/25.
 7. An order of permanent injunction be issued restraining the defendants whether by themselves, agents, servants or by any other persons whomsoever from trespassing upon, evicting, developing, building upon, damaging, wasting, utilising or in any manner whatsoever from interfering with plaintiff's possession and occupation of the suit properties, namely, two and a half acres of Ngenda/Wamwangi/28 and two and a half acres of Ngenda/Wamwangi/25.
 8. In the alternative and without prejudice to prayers 1, 2, 3, 4, 5, 6 and 7, a declaration that the late Kaniaru Gichui (deceased) and the late Kimani Gichui (deceased) are registered as the owners of Ngenda/Wamwangi/28 and Ngenda/Wamwangi/25 respectively in trust for the plaintiff's late father and the beneficiaries of the estate of the late Gichui Kimani (deceased).
2. The case of the estate of the late Gichui Kimani is that land parcel number Ngenda/Wamwangi/25 and Ngenda/Wamwangi/28 [referred to in this ruling as "the suit properties"] are family land that originally belonged to the late Gichui Kimani's father, also called Gichui Kimani. [I will, in this ruling, refer to the Gichui Kimani whose estate is the plaintiff in this originating summons as the "Junior Kimani". His late father who is alleged to have owned the two parcels will be referred to "the Senior Kimani"]. The estate contends that the suit properties were registered in the names of the two other sons of the Senior Kimani when the Senior Kimani was in detention in the 1950s. The two sons in whose names the two parcels are alleged to have been registered are Kaniaru Kimani and Kimani Gichui. They are the two siblings whose estates are the 1st and 2nd defendants in this suit. The estate of the Junior Kimani



contends that the Junior Kimani was entitled to 2½ acres out of parcel number Ngenda/Wamwangi/25 and 2½ acres out of parcel number Ngenda/Wamwangi/28. They further contend that the Junior Kimani and his estate have acquired title to the above portions through adverse possession.

3. Together with the Originating Summons, the plaintiffs filed a notice of motion dated 4/5/2023, seeking interlocutory injunctive orders against the two defendant estates. In response to the suit and to the application, the defendants filed a notice of preliminary objection contending that the originating summons and the application are res judicata. The court subsequently directed the two defendants to ventilate their objection on the platform of a formal notice of motion supported with relevant evidence of res judicata. This culminated in the notice of motion dated 19/6/2023 which is the subject of this ruling.
4. Through the notice of motion dated 19/6/2023, the two defendants seek an order dismissing the originating summons dated 4/5/2023 and the plaintiff's application of even date. The application is premised on the grounds set out in the motion and in the accompanying affidavit sworn on 19/6/2023 by Jeremiah Njoroge Gichuhi. It was canvassed through written submissions dated 10/8/2023.
5. In summary, the case of the defendants/applicants is that, the estate of the Junior Kimani, through James Njoroge Solomon who is now deceased, sued the defendants through Nairobi High Court Civil Case No 602 of 2006, seeking similar reliefs in relation to the two parcels of land. The defendants contend that the said suit was subsequently dismissed for want of prosecution. The defendants add that Hon. Mary Kasango, in Kiambu Succession Cause No 48 of 2018 - relating to the estate of the late Kaniaru Gichui [1st defendant], dismissed a similar claim by the plaintiff's on 26/5/2022.
6. The plaintiff opposed the application through an affidavit dated 13/7/2023, sworn by Samuel Kimani Gichui. The plaintiff's position is that this suit is not res judicata because Nairobi High Court Civil Suit No. 602 of 2006 was based on a claim of customary trust in relation to land parcel number Ng'enda/Githunguri/T.250 while the present suit is a claim for adverse possession. The plaintiff adds that the parties to the two suits are different. The plaintiff further contends that the issues raised and the reliefs sought in the two suits also differ. The plaintiff adds that Kiambu Succession Cause No.48 of 2018 in which a revocation of grant relating to the estate of Kaniaru Gichui was sought did not dispose the question of adverse possession. He contends that Kiambu Succession Cause No.48 of 2018 concerned the Estate of Kaniaru Gichui (deceased) while the present suit concerns the Estate of Kimani Gichui (deceased). The plaintiff urges the court to dismiss the present application and proceed to hear and determine the suit on merit.
7. I have considered the said application, the response to the application and the parties' written submissions. The key question to be answered in this ruling is whether this suit offends the doctrine of res judicata. The doctrine of res judicata has been codified through statutory enactment under Section 7 of the *Civil Procedure Act* which provides 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.”



8. The rationale in the doctrine of res judicata was outlined by the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR as follows:
- “The rule or doctrine of res judicata serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
9. The Court of Appeal in *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR reiterated that the elements of res judicata are conjunctive rather than disjunctive. This means that for a suit to be deemed as *res judicata* on account of a former suit, the following five elements must be established:
- a. The suit or issue was directly or 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 hear and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.
10. I have read the pleadings in the present suit. I have also read the pleadings relating to Nairobi High Court Civil Case No 602 of 2006. Further, I have read all the documentary evidence that the defendant attached to their motion. Although the defendants contended that Nairobi HCCC No 602 of 2006 was dismissed due to want of prosecution, they did not exhibit the relevant dismissal order. They did not annex certified copies of proceedings of the High Court relating to the said suit. All that they annexed was a notice to show cause, signed by a Registry Staff on behalf of the Deputy Registrar. Consequently, the Court does not know the precise circumstances under which the suit was terminated. Suffice it to state that, at this point, there is no evidence to suggest that the issues that were raised in the said suit were adjudicated upon and determined by the High Court.
11. Secondly, it does emerge from the relevant pleadings that in Nairobi HCCC No 602 of 2006, the plaintiff estate, through James Njoroge Solomon, presented a claim anchored on trust. As observed, there is no evidence that the said claim was adjudicated upon and determined. Further, in the Originating Summons before this court, the estate of the Junior Kimani, through Samwel Kimani Gichui, has mounted a claim of adverse possession. At this point, there is no evidence to suggest that the claim of adverse possession has been adjudicated upon and determined by any other competent court.
12. The defendants contended that Lady Justice (Rtd) Mary Kassango disposed the plaintiff’s claim in Kiambu Succession Cause No 48 of 2018 through a ruling dated 26/5/2022. I have looked at the said ruling which the defendants exhibited. It related to an application for revocation of a grant relating to the estate of the late Kaniaru Gichui. It is clear from the ruling that the High Court did not adjudicate



on the issues that were raised in the application because the application had been filed in the wrong court. The Learned Judge rendered herself thus:

“ 3. I will not go into the core upon which revocation of the grant is sought because there is an error in that the application is filed before the High Court and it seeks to revoke the grant issued before the Thika Chief Magistrate Court being Succession Case No 290 of 2001. The application will fail for the reason that revocation of the grant cannot be sought in a separate file to the file where the grant was issued.”

13. It is therefore clear that in the ruling dated 26/5/2022, rendered in Kiambu High Court Succession Cause No 48 of 2018, the High Court did not adjudicate upon and determine the issue of adverse possession which is the claim before this court.

14. The defendants faulted this suit on the ground that the initiator’s locus is anchored on a limited grant obtained on 18/4/2023. They contended that there was no evidence that the previous limited grant dated 29/5/2006 which had been issued to James Njoroge Solomon had been revoked. I have considered that point. First, the gist of the application under consideration did not raise the issue of locus. Indeed, the key ground is found in the two prayers which read as follows:

“ 1. That the plaintiff’s/respondent’s entire claim in the Originating Summons and the notice of motion dated 4th May 2023 be dismissed as the same is res judicata.

2. That costs be provided”

15. It is clear from the above prayers that the defendants seek dismissal of the plaintiff’s suit on the ground that it is res judicata. The alleged defect in the limited grant is not one of the grounds upon which dismissal is sought. Secondly, the defendants described James Njoroge Solomon as “Now Deceased”, meaning that he is dead. The court does not know the exact date when he died. It nonetheless follows that the validity of the limited grant which the late Samwel Njoroge Solomon held as a sole administrator lapsed upon his death. Besides that, the alleged defect in Samuel Kimani Gichui’s limited grant cannot, in my view, be construed as constituting an element of res judicata.

16. For the above reasons, I do not think the defendants have satisfied the threshold for invoking the doctrine of res judicata to warrant dismissal of this suit in limine. The result is that the notice of motion dated 19/6/2023 is rejected for lack of merit. The defendants will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JANUARY 2024.

B M EBOSO

JUDGE

In the presence of: -

Ms Wainaina for the Defendant

Ms Wairimu for the Plaintiff

Court Assistant: Hinga

