



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 700 OF 2013

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

1. MARTHA WAKUTHII MUTUA)
2. GRACE WAKARIMA MUTUA)
3. JOYCE WANGU MUTUA).....PLAINTIFFS
4. PETER MAINA MUTUA)
5. DANIEL GACHOKI)
6. WANJOHI KAMAU)
7. NJOGU KAMAU NGURE)

VERSUS

1. PAUL KANGANGI MUNENE)
2. JOSEPH MUGARA KANGANGI).....DEFENDANTS
3. BETHA CATHERINE W. KANGANGI)

JUDGMENT

MARTHA WAKUTHII MUTUA, GRACE WAKARIMA MUTUA, JOYCE WANGUI MUTUA, PETER MAINA MUTUA and DANIEL GACHOKI (the 1st to 5th plaintiffs) are the wife (1st plaintiff) and children (2nd to 5th plaintiffs) of the late **MUTUA MUNYONGO**. It is their case that the said **MUTUA MUNYONGO** was registered as the proprietor of land parcel No. INOI/MBETI/24 (the suit land) in 1958 and they have been living there ever since and have made extensive development and even had other children born thereon. That they have been in open, exclusive and un-interrupted occupation of the suit land upto the time of filing this suit on 22nd October 2015 and the only attempt made by the defendants to evict them was in 1991 which the plaintiffs successfully resisted. They therefore plead that they have acquired the suit land by adverse possession and it is on that basis that they filed this Originating Summons seeking the following orders:

- 1. That the plaintiffs herein be declared to be entitled by adverse possession of over twelve years to 4 acres of land comprised in land parcel INOI/MBETI/24 registered under the Registered Land Act Cap 300 Laws of Kenya situated in INOI/MBETI Kirinyaga District.***

2. That the plaintiffs be registered as the joint absolute proprietors of 4 acres of land comprised in parcel of land INOI/MBETI/24.

3. That the costs of this application be provided for.

The 1st defendant **PAUL KANGANGI MUNENE** filed a replying affidavit to the Originating Summons in which he deponed, inter alia, that the 2nd defendant **JOSEPH MUGARA KANGANGI** is his brother who died in 1997 long before the institution of these proceedings and the 3rd defendant **BETHA CATHERINE W. KANGANGI** is his younger sister. That this suit is misconceived, frivolous vexatious and an abuse of the process of the Court and it is not true that the plaintiffs have enjoyed open, continuous, un-interrupted peaceful and exclusive possession of a portion of 4 acres of land parcel No. INOI/MBETI/24 since 1958 to 1999 or at any other time. That the land parcel No. INOI/MBETI/24 measuring 3.4 Hectares was allocated to their late father **JOHN KANGANGI NGUNGI** who was registered as the absolute proprietor thereof on 2nd March 1961 as per the Green Card (annexture **PKM 3**). That one **KAMAU NGURE** and **MUTUA MUNYONGO** who is the father of the plaintiffs instituted proceedings in 1972 seeking to be registered as the proprietor by adverse possession in **NAIROBI HIGH COURT CIVIL SUIT No. 1816 of 1972** which was dismissed with costs by **JUSTICE J.M. WAIYAKI** on 21st November 1972. That upon the demise of their father on 30th January 1983, he and the other defendants instituted succession proceedings and he was appointed as the administrator of their father's Estate which comprised the suit land and which was distributed to the beneficiaries as per the confirmed grant – annexture **PKM 6**. However, the plaintiffs and their father **MUTUA MUNYONGO** have continued to occupy the suit land by force denying the defendants their proprietorship rights. That the defendants filed **KERUGOYA SENIOR RESIDENT MAGISTRATE'S CIVIL CASE No. 85 of 1990** seeking to evict the said **MUTUA MUNYONGO** and **KAMAU NGURE** and a decree was issued on 1st December 1991 (annexture **PKM 9**). **MUTUA MUNYONGO** was dissatisfied with the said decree and appealed in **NAIROBI HIGH COURT CIVIL CASE No. 320 of 1992** which appeal was dismissed (annexture **PKM 10**) and the family of **MUTUA MUNYONGO** including the plaintiffs were evicted but forcibly re-entered the suit land in the year 2000. **MUTUA MUNYONGO** later filed fresh proceedings in **NAIROBI HIGH COURT CIVIL SUIT No. 1115 of 2001** which is still pending. Therefore, this suit is res-judicata and should be dismissed.

In addition to that replying affidavit, the defendants filed a Notice of Preliminary Objection on points of law raising the following grounds:

1. That the entire suit herein is bad in law as it includes JOSEPH MUGARA KANGANGI who is already deceased and no personal legal representative and/or administrator of his Estate has been enjoined.

2. That the suit herein is res-judicata and cannot be entertained in light of Section 7 of the Civil Procedure Act vide KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 85 of 1990 and NAIROBI HIGH COURT CIVIL CASE No. 1816 of 1972 which case relates to the same subject matter and the plaintiffs parent MUTUA MUNYONGO as enumerated in the replying affidavit sworn on 29th March 2005.

When the parties appeared before me for hearing on 27th April 2016, it was agreed that the suit be determined on the basis of the filed statements and attached documents. Counsel would then file their respective submissions.

Submissions have been filed by the firm of **MORRIS NJAGE & CO.** Advocates for the plaintiffs and **KIGURU KAHIGA & CO.** Advocates for the defendants.

I have considered the pleadings, the parties' respective statements and documents attached as well as the submissions by counsel.

The plaintiffs claim is premised on pleadings that they are entitled to the suit land by way of adverse possession having been in open, continuous, un-interrupted, peaceful and exclusive possession thereof

since 1958 to 1991 and between 1991 to-date. The defendants however deny this and have gone further to plead that this claim is res-judicata having been the subject of previous suits involving the plaintiffs father **MUTUA MUNYONGO** and the defendants father **JOHN KANGANGI NGUNGI**.

As res-judicata has been pleaded, it must be first determined whether in fact this suit is barred by that doctrine because if it is, then there would be no need to go into the merits or otherwise of the plaintiffs' Originating Summons. Res-judicata is a doctrine of general application based on the principle that it is in public interest that there should be an end to litigation. It is aimed at protecting parties and those acting under them from repetitive litigation over the same subject matter that has been heard and determined by another Court of competent jurisdiction. It can therefore be raised as a defence as is the case in this suit and once that is done, the Court must first address it.

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”.

It is clear from the above that before res-judicata can be up-held, the following must be proved by the party alleging its application:-

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in issue 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 ***KARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83*** and also ***JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE C.A CIVIL APPEAL No. 42 of 2014.***

From the pleadings and annexures herein, it is not in dispute that the suit land has been the subject of several previous litigation. These are:

- 1. NAIROBI HIGH COURT CIVIL CASE No. 1816 of 1972 - KAMAU NGURE & MUTUA MUNYONGO VS KANGANGI NGUNYI**
- 2. KERUGOYA SENIOR RESIDENT MAGISTRATE'S CIVIL CASE No. 85 of 1990 - PAUL KANGANGI & OTHERS VS KAMAU NGURE & MUTUA MUNYONGO**
- 3. NAIROBI HIGH COURT CIVIL APPEAL No. 320 of 1992 - KAMAU NGURE & MUTUA MUNYONGO VS PAUL KANGANGI MUNENE, JOSEPH MUGERA KANGANGI and BETH CATHERINE WANJIRU**
- 4. NAIROBI HIGH COURT CIVIL CASE No. 1115 of 2001 (O.S) - MUTUA MUNYONGO VS PAUL KANGANGI MUNENE, JOSEPH MUGERA KANGANGI and BETH CATHERINE WANJIRU.**

It is also common ground that all the above cases have been heard and finally decided by competent Courts. In trying to persuade the Court that res-judicata does not apply, counsel for the plaintiffs has

submitted that none of the above cases concerned the plaintiffs herein and though they were sue juris, the defendants did not find it fit to enjoin them in those cases. That may be so. However, **Section 7 of the Civil Procedure Rules** has several explanations one of which is explanation No. 6 which reads as follows:

“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”.

It is clear from the supporting affidavit of **MARTHA WAKUTHII MUTUA** the 1st plaintiff herein that their claim to the suit land is because it was the property of their late husband and father **MUTUA MUNYONGO**. It is therefore in that capacity that the plaintiffs have filed this suit. Paragraph 3 of that affidavit reads as follows:

“That during land adjudication in the INOI/MBETI area in 1958 pieces of land INOI/MBETI/24 then comprising 4 acres was registered in the names of my husband MUTUA MUNYONGO. Annexed hereto and marked MWM 1 is a copy of the national land tenure certificate and MWM 2 is a copy of the receipt for adjudication fees paid by my husband for the parcel”

What the plaintiffs are claiming through this suit is the common interest that their late husband and father **MUTUA MUNYONGO & ANOTHER** were pursuing in **NAIROBI HIGH COURT CIVIL CASE No. 1816 of 1972** where the defendant was **KANGANGI NGUNYI** the father to the defendants herein. That case also concerned a claim to the suit land by adverse possession and it was dismissed by **JUSTICE J.M. WAIYAKI**. Another suit was also **NAIROBI HIGH COURT CIVIL CASE No. 1115 of 2001 (O.S)** in which **MUTUA MUNYONGO** this time sued the defendants in this case also over the same suit land. That suit was also dismissed this time by **K.H. RAWAL J.** (as she then was) on 21st March 2007 and in doing so, the Judge also referred to the suit as misconceived and an abuse of the process of the Court. The fact therefore that the plaintiffs were not parties in the previous cases does not defeat the plea of res-judicata. Res-judicata applies to parties and their privies. The plaintiffs herein are clearly pursuing their late husband and father’s claim over the same suit land and the law is that the mere addition of parties cannot assist parties evade the plea of res-judicata. In **OMONDI VS NATIONAL BANK OF KENYA LIMITED & OTHERS 2001 E.A 177**, the Court said:

“Parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit”.

And in the Tanzanian Court of Appeal case of **LOTTA VS TANAKI & OTHERS 2003 2 E.A 556 (CAT)** which has been followed in this country, the Court said:

“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”

The Court went on to add 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 above decision was followed by our Court of Appeal in the case of **KENYA COMMERCIAL BANK LTD VS MUIRI COFFEE ESTATE LIMITED C.A CIVIL APPEAL No. 100 and 106 of 2010 (2013 e K.L.R)**. As the plaintiffs herein are pursuing the common interest (the suit land) that **MUTUA MUNYONGO** was pursuing both in the **NAIROBI HIGH COURT CIVIL CASE No. 1816 of 1972** and also **NAIROBI HIGH COURT CIVIL CASE No. 115 of 2001 (O.S)** both of which were dismissed, it follows that the plea of res-judicata is properly raised as a bar to this suit and notwithstanding the fact that the plaintiffs herein were not parties to the previous suit filed in 1972, they were parties in the subsequent filed in 2001.

The up-shot of the above is that the defendants Preliminary Objection raised on the basis that this suit is res-judicata is well taken and must be upheld. The result is that this suit is struck out with costs to the defendants.

B. N. OLAO

JUDGE

5TH MAY, 2017

Judgment dated, signed and delivered in open Court this 5th day of May 2017

Mr. Njagi for Plaintiffs present

Mr. Kahiga for Defendants absent but 1st & 3rd Defendants present in person

2nd Defendant deceased

Right of appeal explained.

B. N. OLAO

JUDGE

5TH MAY, 2017