



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.79 OF 2017**

**GEOFFREY NDICHU MUIRURI.....PLAINITFF/APPLICANT**

**-VERSUS-**

**JOSEPH NDURA MBUCHIRI.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff/Applicant herein **Geoffrey Ndichu Muiruri** filed this suit on **6<sup>th</sup> February 2017**, and sought for various reliefs. Among the orders sought in the main claim are:-

- a) General damages.***
- b) General damages for the Plaintiff's trees cut, the coffee and tea bushes harvested by the Defendant.***
- c) Permanent injunction restraining the Respondents, their agents or workers from cutting down the Plaintiff's trees and harvesting the tea and coffee bushes.***
- d) Interest on (a) and (b) above at court rates.***

Simultaneously, the Plaintiff/Applicant filed the instant Notice of Motion and sought for various orders too. These orders are:-

- 1) Spent.***
- 2) Spent.***
- 3) Spent.***
- 4) That this Honourable Court be pleased to grant injunction orders restraining the Respondent, his workers, agents or anyone acting on his behalf from cutting the blue gum trees and harvesting tea and coffee bushes or any other agricultural produce on the land No.LR.Komothai/Gathugu/ 2148 pending hearing and determination of this suit.***
- 5) That this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.***

**6) That the cost of this Application be provided for.**

The grounds in support of the Application are:-

- 1) That on or about 24<sup>th</sup> November 2015, the Respondent trespassed and entered the Applicants land No.LR.Komothai/Gathugu/2148.**
- 2) That the Respondent started cutting down the blue gum trees and also harvesting tea and coffee bushes together with other crops that were growing in the farm.**
- 3) That on or around 19<sup>th</sup> May 2014, a survey was done to the said land No.LR.Komothai/Gthugu/2148.**
- 4) That the Surveyor's report dated 7<sup>th</sup> November 2014 was contradictory.**
- 5) That the Applicant uses the land as his sole source of income and the Respondent's actions has and will continue to cause huge financial losses to the Applicant**
- 6) That it is in the interest of justice that this application is allowed.**

In his **Supporting Affidavit**, the Applicant **Geoffrey Ndichu Muiruri** deposed that on or about the **19<sup>th</sup> May 2014**, a Private Surveyor surveyed his land **No.LR Komothai/Gatjungu/2148**, but did not give a report. But on **7<sup>th</sup> November 2014**, a Government Surveyor surveyed the same land and produced a report which had many contradictions. He further deposed that following the said Government Surveyor's report which was contradictory, the boundaries bordering the deponent's land were re-aligned. He also stated that after the boundaries were re-aligned, his parcel of land **wit Komothai/Gathugu/2148**, was left without access to the river which was contrary to the initial mutation drawing dated **25<sup>th</sup> January 1989** in respect of **Komothai/Gathugu 1283**, upon which the land surveyors and registration whereto rely on. He also alleged that after the boundaries referred to were re-aligned, some trees, tea and coffee bushes were hived off and the Respondent has been harvesting the tea and coffee bushes together and also cutting down the trees without compensating him. He contended that it is unfair and unreasonable for the land surveyor to purport to re-align the boundaries and deny his parcel of land access to a permanent river, yet it had all along had access to the river. He therefore urged the Court to restrain the Respondent from undertaking any further activities on the plot.

**The application is contested. The Respondent John Ndura Mbuchiri**, filed a **Notice of Preliminary Objection** and averred that the instant application is **incurably defective** on the grounds that the said application is **Resjudicata** and offends the mandatory provisions of Order 7 of the Civil Procedure Rules.

Respondent further filed a **Replying Affidavit** dated **10<sup>th</sup> April 2017**, and averred that he has not encroached on land parcel **No.LR Komothai/ Gathugu/2148**, nor have any interest whatsoever in the above stated parce of land. He averred that there was a Civil Suit **No.CMCC No.164 of 2010**, where the Plaintiff herein was the Defendant and there was a consent that was recorded in the said suit on **19<sup>th</sup> May 2005**, in respect of aligning the boundary between the parties herein. He also averred that the **District Surveyor's report** dated **20<sup>th</sup> July 2015**, was adopted and matter marked settled. It was his contention that the Plaintiff/Applicant was a party to the consent to re-align their respective boundaries vide a **Court Order** dated **23<sup>rd</sup> September 2013** and **8<sup>th</sup> April 2014**. Therefore he contended that the Plaintiff's application is an abuse of the court process as the matter was heard and determined on merit in the lower court in **CMCC No.164 of 2010 Kiambu**, which concerns the same issues being raised herein by the Plaintiff/Applicant. Further he denied that he has trespassed on the Plaintiff's parcel of land as he continue to use his parcel of land being **LR.No.Komothai/Gathugu/1283**, in which he is the registered owner. He urged the Court to dismiss the instant application.

The Court directed that both the **Preliminary Objection** and **Notice of Motion** dated **2<sup>nd</sup> February 2017**,

be canvassed by way of written submissions. The Plaintiff/Applicant failed to file his written submissions even after being given a last chance on **21<sup>st</sup> June 2017**. However, the Defendant/Respondent filed his written submissions on **21<sup>st</sup> June 2017** and urged the Court to dismiss the instant application.

The Court will first determine the Preliminary Objection wherein the Defendant/Respondent has alleged that the application is *resjudicata* as the issues raised herein had been determined by consent in ***Kiambu CMCC No.164 of 2010***.

The issue raised herein is the issue of *resjudicata*, which is a point of law. The ***Notice of Preliminary Objection*** raised by the Defendant qualifies to be a preliminary objection as it raises a point of law which is capable of disposing of the matter preliminarily. See the case of ***Mukisa Biscuit Manufacturing Ltd..Vs..West End Distributors Ltd (1969) EA 697***, where the Court held that:-

***“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.***

The law pertaining to *resjudicata* is Section 7 of the Civil Procedure Act which states 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 issues has been subsequently raised, and has been heard and finally directed by such a court.”*** ***Black’s Law Dictionary 9<sup>th</sup> Edition*** defines ***Resjudicata*** as ***“a thing adjudicated...an issue that has been definitively settled by judicial decision”***. Further the said Dictionary gives the three essential elements of *resjudicata*.

- a) ***An earlier decision on the issue.***
- b) ***A final Judgement on the merits.***
- c) ***The involvement of some parties or parties in privity with the original parties.***

In the case of ***Abdul Kassim Hassanah Gulamhussein Khala..Vs...Southern Credit Banking Corporation Ltd, Mombasa HCCC No.270 of 2005***, the Court held that:-

***“The issue of resjudicata is a pure point of law that can be mounted as preliminary objection”.***

The Defendant/Respondent has alleged that this suit is *resjudicata* since it was decided in ***Kiambu CMCC No.164 of 2010***, through a consent adopted by the court. The Plaintiff/Applicant did not file his submissions to either oppose or confirm the above averments by the Defendant.

Courts have variously decided on the issue of *resjudicata* and have all come to the agreement that the doctrine of *resjudicata* is necessary as its object is to bar multiplicity of suits and guarantee finality to litigation. In the case of ***Ngugi...Vs..Kinyanjui & Others (1989) KLR 146***, the Court held that:-

***“In law, any litigation must come to an end. Once a decision has been reached by a competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached if not set aside, it can only be challenged on appeal and cannot be challenged in an inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between those who claim through them to re-open the dispute while the judgement still remains on record.”***

For the doctrine of *resjudicata* to apply, there must be:-

- i. A previous suit in which the matter was in issue.*
- ii. Parties were the same or litigating under the same title.*
- iii. A competent court heard the matter in issue.*
- iv. The issue has been raised once again in a fresh suit.*

In the instant case, the Court finds that indeed there was a previous suit **No.CMCC No.164 of 2010**, at Kiambu Law Courts which involved the same parties and same issues herein. The Plaintiff herein had even filed a **Notice of Motion** dated **13<sup>th</sup> November 2015**, in which he had sought orders to restrain the Defendant herein from cutting down trees and harvesting tea and coffee bushes in **LR.No.Komothai/Gathugu/2148**, which is a similar prayer sought in the instant application.

In Kiambu **CMCC No.164 of 2010**, the parties were the same and they were litigating under the same title. Further, a consent order was adopted by the court of competent jurisdiction which brought the matter to a close.

The Court has considered the issues raised by the Plaintiff herein and they are the same issues that had been raised in CMCC No.164 of 2010 at **Kiambu**. The matter was decided by a Court of competent jurisdiction and there was no appeal filed. The orders issued in **Kiambu CMCC No.164 of 2010** are still in force and have not been set aside. The Court finds and holds that the suit and the instant application are *resjudicata*.

Having now carefully considered the instant **Notice of Motion** dated **2<sup>nd</sup> February 2017**, and the **Notice of Preliminary Objection** dated **11<sup>th</sup> April 2017**, and the submissions filed by the Defendant, the Court concurs with the Defendant that this suit is *resjudicata*. Therefore as provided by Section 7 of the Civil Procedure Act, this Court has no power to try the issues herein as the said issues and matters were directly and substantially in issue in an earlier suit **Kiambu CMCC No.164 of 2010**, wherein the parties were the same. Consequently, the **Court allows the Preliminary Objection and proceeds to dismiss this suit entirely and the instant Notice of Motion application for being incurably defective on the ground that the said suit is resjudicata. The costs shall be borne by the Plaintiff herein.**

It is so ordered.

Dated, Signed and Delivered at Thika this 27<sup>TH</sup> day of **October 2017**.

**L. GACHERU**

**JUDGE**

In the presence of

Plaintiff/Applicant in person

Defendant/Respondent in person

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

27/10/17

Before: HON. L. GACHERU, ELC J.

Court Assistant - Lucy

Plaintiff/Applicant in person - present

Defendant/Respondent present in person - My advocate is on the way.

**Court** – Ruling read in open court in the presence of the Plaintiff and Defendant in persons and absence of their advocates.

**L. GACHERU**

**JUDGE**