



**Macharia v Mwangi & 2 others (Environment & Land Case
39 of 2022) [2024] KEELC 1101 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 39 OF 2022**

JG KEMEI, J

FEBRUARY 28, 2024

BETWEEN

ONESMUS KURIA MACHARIA PLAINTIFF

AND

JOHN NDUNGU MWANGI 1ST DEFENDANT

LAND REGISTRAR 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. By way of a Notice of Motion dated 20/2/2023 and filed on 22/2/2023 pursuant to Section 7 [Civil Procedure Act](#), the 1st Defendant/Applicant moved this Court to dismiss this suit in its entirety for being *res judicata*. The 1st Defendant also prays for costs of the suit and the Application.
2. The Application is based on grounds that there have been previous decided suits involving the suit land between the Plaintiff and the 1st Defendant to wit; Thika CMCC No. 157 of 2011 *David Chege Kariuki v John Ndungu Mwangi*; Nbi ELC No. 16 of 2016 *John Ndungu Mwangi v. David Chege Kariuki*; Ruiru MCE & L No. E058 of 2021 *Mary Wangui Njora & 11 Others v John Ndungu Mwangi* and Thika Misc. Civil App. No. E037 of 2021 *Mary Wangui Njora & 11 Others v. John Ndungu Mwangi*; that the issue in the those suits was claims of ownership of Ruiru/Kiu Block 2 (Githunguri) 4155 from which the Plaintiff's title number Ruiru/Kiu Block 2/24633 was excised from; that the issues in those suits are substantially similar to the issues herein and the issues touching on Ruiru/Kiu Block 2 (Githunguri) 4155 and the resultant titles having been determined with finality, the Plaintiff is barred from further litigation based on the doctrine of *res judicata*.
3. The Application is supported by the Affidavit of even date of John Ndungu Mwangi, the 1st Defendant where he reiterated the grounds cited above in extenso. He deposed that there have been other previous suits touching on the suit land and its subdivisions between him and the Plaintiff (and other persons)



which have been determined with finality. Copies of the pleadings and Court pronouncements of the said suits were annexed as follows:-

- a. Thika CMCC No. 157 of 2011 – JNM1;
 - b. Nbi ELCA 16 of 2016 – JNM2;
 - c. Ruiru MCE & L No. E4058 of 2021 - JNM3&4;
 - d. Thika Misc App E037 of 2021 – JNM5; and
 - e. Copy of notice of appeal – JNM6.
4. The Application is opposed by the Plaintiff / Respondent only. Onesmus Kuria Macharia filed his Replying Affidavit sworn on 14/3/2023. He averred that he has been in possession of land parcel known as Ruiru Kiu Block 2/24633 hence his claim for adverse possession in the instant suit. He denied that this suit is res judicata and avowed that the parties in Thika CMCC No. 157 of 2022 and Nbi ELCA 16 of 2016 were David Chege Kariuki and the 1st Defendant herein and therefore different from the parties herein. That the 1st Defendant did not raise a counterclaim in Thika CMCC No 157 of 2011 for eviction of occupants in Ruiru/Kiu Block 2 (Githunguri) 4155 or their use of the land, which occupants included the Plaintiff. That the claim in the previous suits was for nullification of the sale agreement between the 1st Defendant and one David Chege Kariuki in respect of in Ruiru/ KIU Block 2 (Githunguri) 4155.
5. Conceding the trial Court Ruling in Ruiru MCE & L No E058 of 2021, the deponent averred that the issue of adverse possession was indeed raised in the submissions and declined by the Court. That all that parcel of land in Ruiru/Kiu Block 2 (Githunguri) 4155 was subdivided in the year 2021 as per copy of mutation form marked MGWN2. Further that the suit properties were not in existence at the time of the previous Court decisions and therefore would not have been determined for being non-existent. Accordingly, that the subject matter, parties and reliefs sought herein are distinct from all previous determinations and therefore the plea of res judicata cannot stand.
6. On behalf of the 1st Defendant, the firm of Wanjohi & Wawuda Advocates filed submissions dated 10/5/2023. A singular issue was drawn for determination; whether this matter is Res Judicata. Citing Section 7 *Civil Procedure Act* and the Court of Appeal Judgment in *IEBC v. Maina Kiai & 5 Others* [2017] eKLR the issue was answered in the affirmative. It was submitted that in the previous suits, the issue(s) concerned ownership of Ruiru/Kiu/Block 2(Githunguri)/4155 and in this case it is ownership of Ruiru/Kiu Block 2/24633, a subdivision of Ruiru/Kiu/Block 2(Githunguri)/4155. That for all intent and purposes the ultimate core issue for determination is ownership of the suit land coached in different styles to circumvent the bar of res judicata. That Courts have not shied from condemning that practice as demonstrated in the cases of *Peter Mbogo Njogu v Joyce Wambui Njogu & anor.* [2005]eKLR and *Edwin Thuo v Attorney General & Anor.* [2012] eKLR.
7. Moreover, it was submitted that the parties or parties under whom they can claim in the suits are the same and specifically in the Ruiru case, the Plaintiff herein is the 7th Plaintiff. On final determination by a Court, it was argued that the NBI ELCA No. 16 of 2016 Judgment confirmed the 1st Defendant herein as the owner of Ruiru/Kiu/Block 2(Githunguri)/4155 and the issue of ownership cannot be relitigated.
8. The firm of Ngaramba Njoroge & Co. Advocates filed the Respondents/Plaintiff's submissions dated 25/4/2023. The Respondent submitted that he purchased land parcel Ruiru/Kiu Block 2/24633 from David Chege Kariuki and was issued with a share certificate. That his occupation on the said land has been open without secrecy, without consent and uninterrupted for over 12 years and there has never



been any attempt by the 1st Defendant to evict the Plaintiff therefrom. On whether the suit offends the doctrine of *res judicata*, the Plaintiff's answer was in the negative and maintained that his claim for adverse possession as against the 1st Defendant has never been determined by this Court or any Court of competent jurisdiction. Contrasting the previous suits, the Plaintiff argued that the 1st Defendant has never sought eviction proceedings/orders against him from the suit property. That the subject matter in Thika CMCC No. 157 of 2011 was the validity of the sale agreement dated 25/5/2004 concerning land parcel Ruiru/Kiu Block 2 (Githunguri)/4155 and ownership thereto. That in this case, the issue of adverse possession is a fact that attaches to land and cannot be claimed from a title.

9. The sole issue for determination is whether the Application is merited.
10. The doctrine of *res judicata* is enshrined in Section 7 [Civil Procedure Act](#) in the following terms;

“7. *res judicata*

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.

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.”

11. The doctrine of *res judicata* applies to bar subsequent proceedings when there has been adjudication by a Court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy.



12. The test to determine whether a matter is *res judicata* was well laid in the case of *DSV Silo v The Owners of Sennar*[1985] 2 All ER 104 and repeated in the Kenyan case of *Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others* [2010]eKLR. The Applicant, alleging *res judicata*, must show that;
- (a) The matter in issue is identical in both suits,
 - (b) That the parties in the suit are substantially the same,
 - (c) There is a concurrence of jurisdiction of the Court,
 - (d) That the subject matter is the same and finally,
- That there is a final determination as far as the previous decision is concerned.
13. I shall now analyze the previous suits to determine if indeed they fit in the four corners of Section 7 of the *Civil Procedure Act*. It is not in dispute that the Applicant herein and one David Chege Kariuki entered into agreement for the sale and purchase of parcel No Ruiru/Kiu Block2 (Githunguri)/4155 (original suit land). From the record the transaction fell through and the said David Chege Kariuki sued the Applicant for specific performance long with other orders in CMCC No 157 of 2011. The Applicant herein filed a counterclaim and averred that the said David Chege Kariuki had trespassed onto the suit land and purported to fraudulently subdivide and sell portions of the suit land to third parties, the Respondent herein included. The Applicant sought declaratory orders that the sale agreement entered into between the Applicant and Kariuki was null and void for want of consent of the Land Control Board. Further he sought for a permanent injunction restraining the said David Kariuki from entering and remaining on the suit land and damages for trespass. In its judgement rendered on the 21/1/2016 the trial Court entered Judgment for David Chege Kariuku and granted an order of specific performance in the main.
14. Aggrieved by the trial Court judgement the Applicant successfully filed an appeal to wit ELCA No 16 of 2016. The Court held as follows;
- a. It is hereby declared that the agreement for sale between the Appellant and the Respondent over LR No. Ruiru/Kiu Block 2 (Githunguri)/4155 is null and void and of no legal effect.
 - b. A permanent injunction is issued restraining the Respondent from having any other or further dealings with LR No. Ruiru/Kiu Block 2 (Githunguri)/4155.
 - c. The Appellant shall refund to the Respondent the sum of Kshs. 400,000/- that was paid to him as the purchase price for LR No. Ruiru/Kiu Block 2 (Githunguri)/4155 together with interest at Court rates from 6th October 2011 until payment in full.
 - d. Each party shall bear its own costs in the lower Court and in this appeal.
15. Applying the provisions of section 7 of the *Civil Procedure Act* (already set out above), the Court finds that; the subject matter of the suit was parcel Ruiru/Kiu Block 2 (Githunguri)/4155 is the mother title from which the current suit land was excised from. The Respondent in this Application was not a party to the previous suits, but David Chege Kariuki whom he derives title by virtue of the alleged sale was. The cause of action in the trial Court was for specific performance and a counterclaim for a permanent injunction (eviction) restraining the said David Chege Kariuki from interfering with the land and damages for trespass.
16. Upon the conclusion of the appeal in 2019, the current Plaintiff /Respondent with others not before this Court sued the Applicant in Ruiru MCL & E No 58 of 2021. The current Plaintiff was No 7 and David Chege Kariuki was No 11. Their claim was that they purchased parcel No Ruiru/Kiu Block 2



(Githunguri)/4155 land from Landlink Investments Limited and have occupied the same for over 20 years and sought the following prayers;

- a. A declaration that all parcel of land known as Ruiru/Kiu/Block 2 (Githunguri) 4155 belongs to the Plaintiffs.
 - b. An order of permanent injunction against the Defendant, their servants, agents, employees and all those claiming through or under the Defendant's restraining them from trespassing on the Plaintiffs parcel of land.
 - c. Cost of this suit and interest.
 - d. Any other relief from Court.
17. Vide a Ruling dated the 23/7/2021 the Court held that the suit was *res judicata* in view of the decisions of the Court in Thika CMCC No 157 of 2011 and Nbi ELCA No 16 of 2016.
18. Undeterred, the Plaintiffs moved this Court vide Misc Application No 37 of 2021 – *Mary Wangui Njora & 11 Others v John Ndungu Mwangi* where they sought orders to file an appeal against the decision/Ruling of the trial Court delivered on the 23/7/21 declaring their suit to be *res judicata*. This Court in its considered Ruling delivered on the 17/1/22 dismissed the Application for want of a proper explanation for the delay in filing the Application for leave to file an appeal out of time.
19. Aggrieved by the said decision, the Plaintiffs (Respondent included) filed a Notice of Appeal before the Court of Appeal on the 25/1/2022. This Court has not been given reasons why the Respondent could not prosecute the appeal pending in the Court of Appeal but instead elected to file a fresh suit.
20. From the above analysis although this Court has not been persuaded that the issue of adverse possession *per se* has been determined before the Courts in this matter, the conduct of the Respondent raises a more grave issue of abuse of the process of the Court. It is not in dispute that there exists an appeal that was proffered in the Court of Appeal against the Ruling of the Court.
21. In the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* [2018] eKLR, Justice Mativo (as he then was) said the following;
- “ 22. The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.
23. The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations:-
- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.



- (b) Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.
- (d) Where an Application for adjournment is sought by a party to an action to bring another Application to Court for leave to raise issue of fact already decided by Court below.
- (e) Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an Application at the trial Court in respect of a matter which is already subject of an earlier Application by the Respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent"

22. In my view this suit having been filed while another suit is pending in the Court of appeal is but an abuse of the process of the Court. This Court has inherent power to prevent its processes from being abused. The Court notes that the appeal arises from the question of whether or not Ruiru MCE & L No 58 of 2021 was *res judicata*. Until and unless the Court of Appeal determines the issue this Court would be usurping the powers of the Appellate Court. This Court is bound by the decision of the Court of Appeal and for good order, I decline to inquire of the issue. The Respondent ought to pursue his appeal to its logical conclusion. The act of filing the suit while another cause of action is pending is an act of second guessing the Court process so as to reap the most from it.

23. In the end I find the suit is an abuse of the process of the Court. It is struck out

24. The costs shall be in favour of the Applicant.

25. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 28TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of:-

Plaintiff – Absent

Wanjohi for 1st Defendant



1st and 2nd Defendant - Absent

Court Assistants – Phyllis/Oliver

