



Ndurere & another (Suing as administrators and personal representatives of the Estate of the Late Ndurere Gathii – Deceased) & another v Gethi & another (Environment & Land Case 16 of 2023) [2024] KEELC 1043 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1043 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 16 OF 2023
YM ANGIMA, J
FEBRUARY 22, 2024

BETWEEN

JOHN NGOTHO NDURERE & JAMES MUTHAMI NDURERE (SUING AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE NDURERE GATHII – DECEASED) 1ST PLAINTIFF

DAVID KIMENGERE WAITITU & DAVID GITONGA (SUING AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE BENJAMIN ITHINYAI M'NERANGUI – DECEASED) 2ND PLAINTIFF

AND

ANGELA WAIRFIMU GETHI 1ST DEFENDANT

MURUA LIMITED 2ND DEFENDANT

RULING

A. Introduction and Background

1. By a plaint dated 30.08.2023 the Plaintiffs sued the Defendants seeking the following reliefs:
 - a. A declaration that the Plaintiffs are the true, legitimate and legal owners of the suit premises.
 - b. Rectification of the register with regard to property known as Title No LR No 7381 (IR 6404) by reinstating the Plaintiffs' names on the title.
 - c. Cancellation of any title being held by the Defendants or any other person on their behalf in relation to the suit premises.



- d. An order of eviction of the 1st and 2nd Defendants and demolition of any illegal structures in the suit property placed by them.
 - e. An order barring, restraining and prohibiting the Defendants from trespassing and/or interfering with the Plaintiffs' quiet and peaceful enjoyment of the suit premises.
 - f. Damages for trespass.
 - g. Mesne profits.
 - h. Costs of the suit plus interest at court rates.
 - i. Any other relief that this honourable court may deem just and fair to grant.
2. The Plaintiffs pleaded that at all material times, the late Ndurere Muhunya and the late Benjamin Ithinyai were the legitimate owners of LR No 7381 (IR. 644) (the suit property) which was gifted to them by the original owner one Fabian Harry Wallis (Wallis) in 1964. They pleaded that the purported gifting of the same property to Benjamin Meja Gethi (Gethi) several years later was fraudulent and that Gethi had employed fraudulent means including forgery to obtain title documents thereto. The Plaintiffs pleaded several particulars of fraud in that regard.
 3. It was the Plaintiffs' further pleading that the Defendants' counterclaim in previous proceedings being Nyahururu ELC No 50 of 2018 was allowed because they relied upon fraudulent documents to mislead the trial court that Gethi had been gifted the suit property by Wallis. As a consequence, the Plaintiffs contended that the Defendants' judgment on their counterclaim was obtained fraudulently as well. In particular, the Plaintiffs contended that the lease document tendered by the documents and which was relied upon by the trial court was a forgery and that the same was the subject of a pending criminal investigation.

B. Plaintiffs' Application

4. Simultaneously with the filing of the suit, the Plaintiffs filed a notice of motion dated 30.08.2023 under certificate of urgency seeking interim orders of injunction. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by John Ngotho Ndurere on 30.08.2023 and the exhibits thereto. The Plaintiffs contended that they were the legitimate owners of the suit property and that the Defendants had obtained title documents thereto through forgery and concealment of material facts. It was their contention that there was a pending criminal investigation on how the Defendants obtained their title documents. There was, however, no allegation that the Plaintiffs were threatened with imminent eviction from the suit property or that they stood to suffer any irreparable loss or injury in the absence of an interim injunction pending the hearing and determination of the suit.

C. Defendants' Response

5. The Defendants responded by filing a notice of preliminary objection dated 01.12.2023 and a replying affidavit sworn on 01.12.2023 in opposition to the suit and application for interim orders. In their replying affidavit and notice of preliminary objection dated 01.12.2023 the Defendants contended that the suit was *res judicata* on account of the existence of a previous suit i.e. Nyahururu ELC No 50 of 2018 (the previous suit) between the same parties and over the same subject matter. It was contended that judgment in the previous suit was delivered on 12.11.2019 hence instant proceedings were an abuse of the court process.



D. Directions on Submissions

6. When the Plaintiffs' application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Defendants' submissions were filed on or about 07.02.2024 but the Plaintiffs' submissions were not on record by the time of preparation of the ruling.

E. Issues for Determination

7. The court has perused the Plaintiffs' notice of motion dated 30.08.2023, the Defendants' replying affidavit and notice of preliminary objection as well as the material on record. The court is of the view that the following issues arise for determination herein:
 - a. Whether the Plaintiffs' suit is *res judicata*.
 - b. Whether the suit is an abuse of the court process.
 - c. Whether the Plaintiffs have made out a case for the grant of an interim injunction.
 - d. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the Plaintiffs' suit is *res judicata*

8. The court has considered the material and submissions on record on this issue. The Defendants submitted that the instant suit is caught by Section 7 of the [Civil Procedure Act](#) (Cap.21) in that there existed a previous suit between the same parties over the same issues and over the same subject matter. It was submitted that the previous suit was heard and determined on merit vide a judgment dated 12.11.2019. The Defendants relied upon the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR on the issue of *res judicata* and urged the court to strike out the Plaintiffs' suit costs in order to bring the litigation to an end. The court was similarly urged to strike out the application for interim orders with costs.
9. Although the Plaintiffs obtained leave of court to file a further or supplementary affidavit they did not file any by the time of preparation of the ruling. It is apparent from the Plaintiffs' suit and notice of motion that they acknowledged the existence of the previous suit. They acknowledged that it was heard and determined on merit but they contended that the Defendants had presented and relied upon forged documents in order to win the suit and counterclaim.
10. The court has noted from the judgment dated 12.11.2019 in the previous suit that the Plaintiffs had sued the Defendants seeking the following reliefs:
 - a. A declaration that LR No 7381 (IR.6406), Laikipia is a property of the estates of the deceased joint owners Benjamin Ithinyai M'narangui and Ndurere Muhunyo Gathii.
 - b. A declaration that the registration of LR No 7381 (IR 6406) Laikipia in the names of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof are unlawful and illegal.
 - c. An order for cancellation of the registration of LR No 7381 (IR 6406) Laikipia in the name of Benjamin Menja Gathii and the subsequent registration of his successor in the title thereof.



- d. A permanent injunction restraining the Defendants their servants, workmen and agents from entering into the said Plot, or from in any way interfering with the Plaintiffs' use and enjoyment of LR No 7381 (IR 6406) Laikipia.
 - e. Costs of this suit and interest at court rates.
 - f. Any other relief the court deems fit to grant.
11. The Plaintiffs' claim in the previous suit was substantially the same as their claim in the instant suit. Their claim was based essentially on the same facts and circumstances. The Plaintiffs pleaded that the suit property belonged to their deceased parents who had obtained it from Wallis by way of gift. It was their case that Gethi had obtained title documents for the suit property fraudulently and had them evicted therefrom in 1971 or thereabouts. In fact, the Plaintiffs had testified in the previous suit that there was a pending investigation on the alleged fraudulent transaction on the part of Gethi.
 12. By its judgment dated 12.11.2019 the trial court (Hon. Justice M.C. Oundo) held that there was no evidence of fraud on the part of the Defendants as the Plaintiffs had failed to prove their allegations of fraud to the required standard. The court also found and held that the Plaintiffs' claim was time-barred under Section 7 of the Limitation of Actions Act (Cap. 22) hence the court had no jurisdiction to entertain the suit. As a result, the court dismissed the Plaintiffs' claim and proceeded to allow the Defendants' counter-claim.
 13. There is no indication on record to show that the judgment in the previous suit was ever set aside, varied or overturned either on review or appeal. The only material on record shows that the Plaintiffs made some attempts to appeal out of time and to obtain a stay of execution before the Court of Appeal without any measure of success.
 14. The test for *res judicata* was considered in the case of *Kamunye and others v The Pioneer General Assurance Society Ltd* [1971] EA.263 at page 265 as follows:

“The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time. *Green-halgh v Mallard*, [1947] 2 All E.R 255. The subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply *Jadva Karsan v Harnam Singh Bhogal* (1953), 20 E.A.C.A 74,”
 15. The court is of the opinion that the Plaintiffs in this suit are essentially trying to re-litigate in another way a dispute or transaction which was heard and adjudicated upon by a court of competent jurisdiction in the previous suit. It is evident from the material on record that the parties in both suits are the same and litigating in the same capacity. The subject matter is the same. The matters directly and substantially in issue in both suits remain the same. The previous suit was undoubtedly heard on merit and the Plaintiffs were unable to prove their allegations of fraud against Gethi and the Defendants.
 16. The court is satisfied that the Plaintiffs are simply trying to have a second bite at the cherry before a different court. They had every opportunity to prove their allegations of fraud, forgery and pending criminal investigations in the previous suit. Having lost in the previous suit, they cannot legitimately try to resurrect and re-invent their cause of action by merely making cosmetic changes to their plaint



to make it appear as though it has never been heard and determined before. The court fully agrees with the Defendants' submissions that the instant suit is *res judicata* and otherwise an abuse of the court process. The only legitimate option the Plaintiffs had upon losing the previous suit was to appeal to a higher court.

b. Whether the suit is an abuse of the court process

17. The court has already found that the instant suit is *res judicata* by reason of the adjudication and determination in the previous suit. The dispute presented before this court has already been decided in the previous suit hence seeking to revive the matter in the instant suit is plainly a gross abuse of the court process and a wastage of judicial resources. The court has neither the time nor the resources to repeat itself over the same matters, among the same parties and over the same subject matter. If that were to be allowed, then there would be no end to litigation.

c. Whether the Plaintiff has made out a case for the grant of an interim injunction

18. The court has already found and held that the Plaintiffs' suit is *res judicata*. The court has also found and held that the instant suit is an abuse of the court process. It would, therefore, follow that the Plaintiffs are not entitled to any interim orders in proceedings which are *res judicata* and an abuse of the court process.

d. Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no justification to deprive the successful parties of the costs of the action. As a result, the Defendants shall be awarded costs of the suit and application.

G. Conclusion and Disposal Order

20. The upshot of the foregoing is that the court finds that the Plaintiffs' suit is *res judicata* and otherwise an abuse of the court process. As a consequence, the court makes the following orders for disposal of the matter:

- a. The Defendants' preliminary objection 01.12.2023 is hereby upheld.
- b. The Plaintiffs' suit is hereby declared *res judicata* and otherwise an abuse of the court process.
- c. The Plaintiffs' suit and notice of motion dated 30.08.2023 are hereby struck out.
- d. The Defendants are hereby awarded costs of the suit and application dated 30.08.2023.

21 It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 22ND DAY OF FEBRUARY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Omondi holding brief for Mr. Were for the Plaintiffs



Ms. Kethi Kilonzo for the Defendants

C/A - Carol

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