



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 423 OF 2014

LOISE NJERI & 9 OTHERS PLAINTIFFS (RESPONDENTS)

-VERSUS-

KAMAU NGURE DEFENDANT

JOSEPH MAINA KAMAU..... SUBSTITUTED DEFENDANT (APPLICANT)

RULING

1. On **13th July, 2015** Joseph Maina Kamau (hereinafter referred to as the applicant) filed the notice of motion of even date seeking to strike out the suit herein on that ground that it is *res judicata*.
2. The application is premised on the grounds on the face of the application and the affidavit of the applicant sworn on **13th July, 2013**. In those grounds and the affidavit, it is pointed out that the issues raised in this suit were subject of determination in previous suits by the respondents and/or their predecessors in claim or entitlement and contended that the suit was filed to circumvent the orders issued in those suits.
3. To prove existence of previous suits between the parties herein and/or their predecessors in claim or entitlement to the subject matter of the suit, the applicant has annexed various documents to the affidavit he swore in support of the application. These include pleadings filed in HCCC NO. 283 of 1983; the Orders obtained in that suit; the ruling in Thika CMCCC No.476 of 2002; ruling in Nyeri Court of Appeal Civil Application No.230 of 2011 and a letter from the Commissioner of Lands to the Land Registrar Maragua District dated 10th August, 2011.
4. The application is opposed through the replying affidavit of **Mwangi Gathaiyu** (5th Plaintiff/respondent) sworn on **9th September, 2015** in which it is contended that the suit is not *res judicata*.

The following reasons are given for the said contention:-

- a. The subject matter in the two suits is different. In this regard it is pointed out that the subject matter is Maragua/Ridge 264-269, while that in 282 of 1983 is Loc.7/Maragua/Ridge 50.
- b. The deponent has deposed that he is not aware of the orders issued in 282 of 1983 nullifying LR No. Loc.7/Maragua Ridge/39 'A' from which Plots No. Maragua Ridge 264-269 were created;

- c. That he is also aware of the eviction orders issued on 11th May, 2011 in 252 of 1983 ;
- d. There is no evidence that they were served with the eviction orders issued in 282 of 1983;
- e. There is no evidence that they were involved in Thika CMCCC No.476 of 2002.

5. The respondents have denied the allegation that the current suit was filed to circumvent the execution orders issued against them in 282 of 1983 and explained that the suit is meant to safe guard their interest in the suit property (Plots No. Maragua Ridge 264-269).

Analysis and determination

6. This Court through its ruling delivered on **22nd day of June, 2015** had an opportunity to consider the issue raised in the current. In so doing it observed:-

“19. From the documents annexed to the respondent’s replying affidavit and the uncontroverted averments therein to the effect that the issues raised in the current application were subject of consideration in Nyeri HCCC NO. 252 OF 1983, the following facts are discernable:-

1. That there exist a prior suit in respect of the suit property;

2. That some of the parties to the current suit were parties to the previous suit;

3. That the rights of some of the applicants vis-à-vis those of the Respondent to the suit property were determined by a court of competent jurisdiction to hear and determine the dispute;

4. That no appeal was preferred against the decision of the court referred in 4 above;

5. That attempts to stay and/or review the decree issued in favour of the respondent were in vain.

6. That an order was issued in the previous suit for eviction of some of the Applicants’ and any other persons in occupation of the suit property.

20. Apparently, after some of the applicants were unable to overturn the decree obtained in HCCC NO. 252 of 1983, they decided to try their luck through the current suit, previously Nyeri HCCC No. 222 of 2012; Loise Njeri & 9 others v. Joseph Maina.

21. From the two suits herein (that is Nyeri HCCC No. 252 OF 1983 and Nyeri HCCC No.222 of 2012), it is clear that applicants No.5 and 9 (Mwangi Ngatheyu and Mbuthia Kahiga respectively) were parties to Nyeri HCCC No. 252 of 1983 wherein orders for their eviction were issued in favour of the Respondent.

22. There is evidence that their application (application by 5th and 9th Applicant and their colleague Muiruri Njoroge) for stay of the decree issued against them was dismissed by the Court of Appeal on 5th July, 2012.

23. Barely three months after issuance of the orders issued against them; the Applicants, alongside the other applicants in this application, filed Nyeri HCCC NO. 222 of 2012 contending that the decision in Nyeri HCCC 252 of 1983 did not extend to the parcel of land they are claiming.

24. Having taken liberty to check the proceedings in HCCC No. 252 of 1983 and the orders issued therein, I can confirm that the questions raised in HCCC NO. Nyeri HCCC NO. 222 OF 2012 were substantially in issue in Nyeri HCCC 252 of 1983. By bringing the same

matters by way of a fresh suit as opposed to an appeal, the Applicant's clearly engaged in abuse of the court process. In this regard see the ruling the Court of Appeal in Nyeri court of Appeal Civil Application No.230 of 2011 where it was observed:-

“...The intended appeal, if any, will not serve any usefull purpose, because the judgment complained about was issued in the year 1989; the said judgment ordered eviction of the Applicants and they were duly evicted on 29th December, 1999 but they came back to the land; they thereafter filed an application for review in the year 2000, which they failed to prosecute forcing the respondent to steer its prosecution resulting in its dismissal....the intended appeal is not arguable.” (Emphasis supplied).

25. The court record reveals that on 11th July 2014 the court dismissed the 5th, 8th and 9th Applicants application for stay of execution of the order dated 18th February, 2013. The order of 18th February, 2013 sought to be stayed allowed the eviction of the Applicants from the suit property.

26. In view of the foregoing can the Applicants, some of whom have clearly engaged in abuse of the process of the court be said to have proved their case against the Respondent.

27. Being of the view that the current suit was filed to circumvent the orders issued in the earlier suit and there being evidence that the Application by the lead players in the current suit to stay execution of the orders of eviction issued against them was refused, I find the Applicants' application and the suit on which it is premised to be bad in law and decline to issue the orders sought.” (Emphasis supplied).

7. Apparently it is the above determination of this court that prompted the defendant/applicant to file the current application for dismissal of the suit.

8. Even though not all the plaintiffs were parties to Nyeri HCCC No. 282 of 1983, it is clear from the pleadings filed in the two suits, HCC 282 of 1983 and HCC 222 of 2012 (the current suit) that the issues raised in the two suits is the same to wit, whether L.R NO. LOC7/Ridge Block 39 A from which the suit properties in the current suit (plot Nos. 264-269) exist.

9. Whereas the said property (L.R NO. LOC7/Ridge Block 39 A) was found to be none existent through the proceedings conducted in 252 of 1983 and which is acknowledged by the plaintiffs/respondents and their counsel, it is submitted that available evidence show that the said parcel of land exists. That contention by the plaintiffs/and their counsel is premised on a letter from the Ministry of Lands and Settlement, Department of Land Adjudication and settlement dated 23rd September, 2005. In that letter, addressed to the Defendant/applicant herein, it was the plaintiffs/respondents who were indicated as the allottees of plots No.259 to 269 Maragua Ridge Settlement Scheme (Formerly Plot No. 39'A'.

10. It is indicated in that letter, that Plot No.39A was excised from plot No. 50 for purposes of settling the above named allottees whose main plots were water lodged.

11. It is noteworthy that plot No.50 from which the above plots are said to have been curved is the plot which was claimed by the defendant/applicant in Nyeri HCC No.282 of 1983. In that suit the defendant/applicant sought to, *inter alia*, have the persons he had sued (some of whom are the plaintiffs/respondents) in the current suit evicted from plot No. 50.

12. In that case, the Defendant was declared to be the exclusive owner of Loc.17 Maragwa Ridge/50 from which the plaintiffs/respondents hinge their claim. There is evidence that the court issued eviction orders against the people the defendant/applicant had sued together with their families, servants or agents.

13. There is evidence that Section 39'A' on which the plaintiffs/respondents claim is hinged was nullified. In this regard, see the letter from the Ministry of Lands, Department of Lands dated 10th

August, 2011 annexed to the defendant/applicant's supporting affidavit.

14. In my view, the question of ownership of the parcel of land claimed by the defendant/applicant and of existence of plot No. 39A on which the plaintiffs/respondents claim is hinged has already been heard and determined by a court of competent jurisdiction. The argument by the plaintiffs and their counsel that there is evidence that Plot No.39'A' on which the plaintiffs claim is hinged does not give them a right to re-litigate the matter. The only recognised avenue for challenging an order of court where new evidence is unearthed, and which evidence the parties could not avail during hearing despite exercise of due diligence, is by way of review. In this regard see **Section 7** as read with **Section 100** of the Civil Procedure Act, Cap 2 Laws of Kenya.

15. Having determined that the issue(s) raised in this suit were heard and determined by a court with competent jurisdiction to hear and determine them, I find and hold that the current suit is res judicata Nyeri HCC No.282 of 1983. Consequently, I find the application herein to be merited and allow it as prayed.

Dated, signed and delivered at Nyeri this 26th day of May, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Wachira for the defendant

M/S Wakili holding brief for Mr. Musyoki for the plaintiff

Court assistant - Lydia