



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 66 OF 2014 (O.S)

MARY IGANDU KIGOTHO.....PLAINTIFF

-VERSUS-

MICHAEL WANG'OMBE GITITU.....DEFENDANT

RULING

Background

1. On **31st March, 2014** the plaintiff instituted the current suit for determination of the following questions:-

- a) **Whether the defendant's title to land parcel No. Magutu/Gatei/875 (hereinafter referred to as the suit property) has been extinguished by her adverse possession thereof in terms of Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya?**
- b) **Whether she has acquired title to Land Parcel No. Magutu/Gatei/875 by adverse possession?**
- c) **Whether she ought to be registered as the absolute proprietor of Land Parcel No. Magutu/Gatei/875?**
- d) **Whether the Land Registrar Nyeri, should be ordered to register the said land (land parcel No. Magutu/Gatei/875) in her name as absolute proprietor?**
- e) **Whether the defendant should be condemned to pay the costs of the suit.**
- f) **In all the circumstances of the case, which orders are just and expedient to make?**

2. Simultaneously with the originating summons instituting the suit, the plaintiff brought the notice of motion dated **3rd July, 2014** seeking to temporarily restrain the defendant by himself, his agents, servants or anybody else claiming the suit property through or under him from entering, performing acts of waste, evicting and/or otherwise interfering with her occupation, quiet possession and use of the land parcel No. Magutu/Gatei/875 (hereinafter referred to as the suit property).

3. The application is premised on the grounds that the applicant is in occupation of the suit property and that the defendant recently illegally entered into the suit property and performed acts of waste by damaging the applicant's crops and desecrating the graves of the plaintiff's deceased relatives. The

applicant contends that she was in possession and occupation of the suit property even before it was registered in the defendant's name.

4. In the affidavit that the plaintiff swore in support of the application, the plaintiff has reiterated her contention that she has been in occupation of the suit property since 1974, way before it was subdivided and a title in respect thereof issued in favour of the defendant. She contends that from the time the defendant was registered as the proprietor of the suit property in 1993, he has never taken possession.

5. The Plaintiff alleges that on 17th June, 2014 the defendant unlawfully and violently descended on the suit property and destroyed the crops she had planted thereon (maize and cabbages) and that on 30th June, 2014 the defendant yet again unlawfully and violently descended on the suit property, erected a structure thereon and desecrated her late husband's and son's graves.

6. In view of the foregoing, the plaintiff has deposed that unless the defendant is restrained by the order herein sought, she may be evicted from the suit property before her suit is heard and determined.

7. In reply and opposition to the suit and the application, the defendant filed the replying affidavit he swore on **15th July, 2014** wherein he has deposed that the suit by the plaintiff is an abuse of the court process because he had been involved in litigation over the property with the plaintiff's deceased husband, Kigotho Kariithi, who equally claimed that he was entitled to the property.

8. He points out that through Nyeri Chief Magistrate's Award Case No.65 of 1999 in which the plaintiff's husband was the defendant, he obtained a decree allowing him to evict the plaintiff's husband from the suit property. He points out that the plaintiff's husband applied for review of the award and the decree but his application was dismissed and orders of eviction against the plaintiff's husband issued on 12th August, 2011. It is the defendant's case that the plaintiff and her deceased husband's structures standing on the suit property were demolished and removed from the parcel of land by M/s Green Bells Auctioneers.

9. The plaintiff is faulted by feigning ignorance of the suit between the defendant and her deceased husband in bringing the suit herein.

10. The defendant has pointed out that the plaintiff does not live on the suit property. It is contended that following the determination of the High Court in the case filed by her deceased husband, the plaintiff's tricks must be stopped.

11. Annexed to the defendant's affidavit are:-

- a) Notice to show cause issued in Nyeri CM Award No.65 of 1999; marked as **MW-1**;
- b) Order issued on 6th september, 2012 in Nyeri CM Award No.65 of 1999; marked **MW-2**;
- c) Notice of motion dated 13th September, 2012 seeking an order for removal of the respondent by m/s green bells auctioneers of Nyeri.

12. The application was disposed of by way of written submissions.

On behalf of the plaintiff/applicant, it is submitted that from the evidence on record, there is no doubt that the plaintiff applicant is in occupation of the suit property. On the authority of the case of **Daniel Mutisya & Another v. Katelembu, Athiani, Muputi Farmers and Ranching Cooperative Society Ltd**, Nairobi Civil Appeal No. 104 of 1998, it is submitted that in land matters, the court should strive to maintain the status quo.

13. Concerning the contention by the defendant/respondent that the application and the suit are *res judicata* Nyeri CMCCC No.65 of 1999, which was between the defendant and the plaintiff's husband, it is submitted that the plaintiff was not a party to the suit. it is contended that the plaintiff has not brought

the current suit as the legal representative of her deceased husband.

14. It is admitted that an order of eviction was issued against the plaintiff's deceased husband but contended that the order of eviction was against the plaintiff's deceased husband alone.

15. The plaintiff has also faulted the procedure used to raise the issue of *res judicata*. In this regard, on the authority of **Henry Wanyama Khaemba v. Standard Chartered Bank (K) Ltd & Another (2014) eKLR** where **Gikonyo J.**, declined to determine the preliminary issues raised before them and directed that the issues should be raised in a more broad-based approach like a formal application under the relevant law and procedure, or in the trial of the suit, it is submitted that an issue of *res judicata* should be raised by way of a formal application.

16. On behalf of the defendant/respondent, it is reiterated that the application and the suit is *res judicata* Nyeri CM Award Case No.65 of 1999. The case cited by the plaintiff's advocate on how a question of *res judicata* should be raised is said to be inapplicable. It is submitted that where an issue of *res judicata* has been raised, a court should interrogate it. It is further submitted that the plaintiff and her deceased husband were evicted from the suit property. It is pointed out that the plaintiff/applicant does not deny knowledge of the existence of the previous suit and that Kigotho Kariithi is her late husband.

17. On whether the application for injunction should be allowed, it is submitted that the application was based on material non disclosure of the previous suits and orders, hence is tainted with unclean hands.

18. The plaintiff is said to have failed to meet the legal threshold for granting a temporary injunction.

Analysis and determination:

19. It is not in dispute that the suit property was subject of arbitration between the defendant/respondent and the plaintiff/applicant's deceased's husband. An order for eviction of the plaintiff/applicant's deceased husband was issued on 6th September, 2012.

20. The question that arises is whether there being evidence that the suit property was subject of arbitration between the defendant/respondent and the plaintiff/applicant, the plaintiff/applicant can be allowed to circumvent the doctrine of *res judicata* simply because she has not brought the suit as a legal representative of her deceased husband.

21. In determining this question, I adopt the decision in the case of **Samuel Njau Wainaina v Commissioner of Lands & 6 others [2012] eKLR** where **D.S Majanja J.** stated:-

“In this respect, I would do no better than quote the case of Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported) where the court stated, “ [57] The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata* I am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, “Guard against attempts to evade the doctrine [of *res-judicata*]” where he states that, “One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more Once a man has had his say, has taken his case as far as the law permits him, and has failed,

he must be stopped from re-litigating the same matter.”

22. Similar sentiments were expressed in the case of **Madede & Another vs Fita & 2 Others (1988) KLR 211** where it was stated:-

“The appellants were sons of the 2nd respondent. They had sued their father and the 1st and 3rd respondents to claim land that was registered in the names of the 1st and 3rd respondents. There had been a suit over the same land between the 1st and 2nd respondents which had been decided. The 2nd respondent lost the suit. The sons of the 2nd respondent now sued to recover the land from the 1st respondent alleging a trust. It was held that the suit was res judicata. This was despite the position that the parties in the second suit were not the same parties in the first suit, the court reasoning that the subject matter, being an issue of ownership, had already been decided in the previous suit. (Emphasis supplied).

23. In applying the above legal principles to this case, I find and hold that the plaintiff cannot be allowed to re-litigate the suit herein because she was ably represented by her deceased husband in the previously instituted suits.

24. The upshot of the foregoing, is that the application herein and the originating motion on which it is based are an abuse of the process of the court. Consequently, I dismiss both the notice of motion and the originating summons with costs to the defendant/respondent.

Dated, signed and delivered at Nyeri this 24th day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Macharia h/b for Mr. Kiminda for the respondent

Mr. Kiugeni h/b for Mr. Kahiga for the applicant

Court assistant - Lydia