



Muriuki & 2 others v Njagi (Being sued as the legal representative of Jeremiah Njagi Samson Murenga Alias Njagi Samson (Deceased) (Environment & Land Case 31 of 2023) [2024] KEELC 647 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 31 OF 2023
JM MUTUNGI, J
FEBRUARY 15, 2024**

BETWEEN

**JANE WANGARI MURIUKI 1ST APPLICANT
DOROTHY WAWIRA MURIUKI 2ND APPLICANT
MERCY NJERI MURIUKI 3RD APPLICANT**

AND

**MERCY NJERI NJAGI (BEING SUED AS THE LEGAL REPRESENTATIVE
OF JEREMIAH NJAGI SAMSON MURENGA ALIAS NJAGI SAMSON
(DECEASED) RESPONDENT**

RULING

1. The plaintiff commenced this suit by way of an Originating Summons dated 4th May 2023, seeking the following orders:
 1. Spent
 2. That there be issued an order of prohibition over land parcel No. Ngariama /Rungeto/76 and all the subdivision thereon being land parcel Nos. Ngariama/Rungeto/2442-2449 preventing the respondent and her agents from selling, alienating or in any other dealing with the said land parcels pending the hearing and determination of this matter.
 3. That there be a stay of proceedings in Kerugoya Chief Magistrate ELC Case No. 41 of 2020 involving one of the resultant subdivisions of land parcel No. Ngariama/Rungeto/76 being land parcel No. Ngariama/Rungeto/2443 involving the 1st Applicant and one Lawrence Mugwimi Njagi and which is scheduled for mention on 11th May 2023.



4. That the Respondent be by a temporary injunction be prevented from evicting the Applicants from any of the resultant subdivisions above pending the hearing and determination of this matter.
 5. That the Respondent be declared to be holding in constructive trust in favour of the Applicants in respect of half share of land parcel No. Ngariama/Rungeto/76 measuring 8.4 acres and the Applicants occupying 4.2 acres thereof and having been born and raised there and developed the same extensively by planting cash crop and constructed permanent buildings and lived thereon for over fifty years without any interruption whatsoever.
 6. That the Applicants be declared to have become entitled by way of adverse possession of over 12 years to half portion of parcel of land and comprised in the title number Ngariama/Rungeto/76 now subdivided into land parcels No. Ngariama/Rungeto/2442-2449 within Kirinyaga County in the Republic of Kenya.
 7. That the Applicants be registered as joint proprietors over 4.2 acres being half portion over land parcel No. Ngariama/Rungeto/76.
 8. That the land registrar Kirinyaga central do cancel the title deeds in respect to the subdivision therein being land parcel No. Ngariama/Rungeto/76 and the half portion of 4.2 acres be registered in the joint names of the Applicants.
 9. That the Respondent be ordered to pay the cost of this suit.
2. The Originating Summons was predicated upon the annexed affidavit of Jane Wangare Muriuki in which she averred that the Respondent was the Applicants step mother and pleaded adverse possession over half of what used to be Ngariama/Rungeto/76. She reiterated that Ngariama/Rungeto/76 was subdivided into Ngariama/Rungeto/2442-2449 following the determination of Kerugoya High Court Succession No. HCP&A No. 2/2020 in which her application for revocation of the grant was dismissed. She stated that the land belonged to her mother Gladys Wandia, who had it registered in the name of the deceased during the land consolidation period as her husband had died and the law at the time did not allow women to be registered as proprietors of land. She further averred that one of the beneficiaries of the estate had filed Kerugoya CM ELC Case No. 41 of 2020 to have them evicted despite their living in open uninterrupted and exclusive possession of the land for a period exceeding 30 years.
 3. The Respondent filed her Replying Affidavit dated 6th July 2023 in opposition and a Notice of Preliminary Objection of even date and sought to have the Applicants' Originating Summons dismissed and struck out with costs on inter alia the grounds; that this suit is *Res Judicata* by dint of Section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya as the issues herein were directly in issue in High Court Appeal Number 29 of 1987, Court of Appeal Judgment in 117 of 1991, High Court Miscellaneous Application No. 9 of 2007 which were heard and finally decided by the High Court and upheld by Court of Appeal, as per Rulings and Judgments attached to the Replying Affidavit.
 4. The Respondent in her Replying Affidavit averred that the subject matter has been subject to many cases to wit, Magistrate's Court Civil Case Number 68 of 1982, High Court Appeal Number 29 of 1987, and High Court Civil Case Number 233 of 1994 instituted by the Applicants' mother and High Court Embu Miscellaneous Application No. 9 of 2007 where the Applicants were parties. She averred that these cases were dismissed for being *Res Judicata* and prayed that the Originating Summons be dismissed for being *Res Judicata* as it raised the same issues that were raised and adjudicated in the previous suits.



5. The Court on 11th July 2023 gave directions that the Preliminary Objection should be disposed of first and that it should be canvassed by way of written submissions. The Respondent filed his written submissions on 2nd August 2023 and the Applicants filed their submissions on 15th August 2023.
6. The issues that arise for determination in regard to the Respondent's Notice of Preliminary Objection is Whether the Court lacks jurisdiction to entertain the matter on the basis that there have been previous proceedings in Magistrate's Court Civil Case Number 68 of 1982, High Court Appeal Number 29 of 1987, High Court Civil Case Number 233 of 1994 and High Court Embu Miscellaneous Application No. 9 of 2007 between the same parties where similar issues arose and were determined which renders the instant suit *Res Judicata*.
7. The Court of Appeal in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the *Mukisa Biscuit Case* (supra) Law, JA stated as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to the arbitration.”
8. In the present matter the Respondent has hinged her Preliminary Objection on the fact that the Applicants' cause of action has been heard and determined in other suits involving the same subject matter and the same parties and is thus *Res Judicata*. The question whether or not the Applicants' suit is *Res Judicata* goes to the jurisdiction of the court to entertain the suit. If the suit is *Res Judicata*, then the Court lacks the jurisdiction to entertain the same. If the Court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and void.
9. The substantive law on *Res Judicata* is codified in Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya which provides that:

“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”.

The [Black's law Dictionary 10th](#) edition defines “*Res Judicata*” as

“An issue that has been definitely settled by Judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”



Steve Ouma, in A Commentary on the Civil Procedure Act Cap 21, Second Edition at page 38 has explained Section 7 to mean:

“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 matter directly and substantially in issue in such suit.”

10. The doctrine of *Res Judicata* has two rationales. First, that hardship to the individual that should litigate twice for the same cause is distasteful. Second, that it is in the public interest that there should be an end to litigation. The underlying assumption of every suit is that a cause of action must predicate it, where a party files a suit hinged on the cause of action of a previous suit, the suit cannot stand.

11. In the Case of *Kennedy Mokua Ongiri v John Nyasende Mosloma & Florence Nyamoita Nyasende* [2022] eKLR, the Court held that:-

“...in order therefore to decide as to whether an issue in a subsequent Application is *Res Judicata*, a Court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant application to ascertain;

- a. what issues were really determined in the previous application;
- b. whether they are the same in the subsequent application and were covered by the decision.
- c. whether the parties are the same or are litigating under the same title and that the previous application was determined by a Court of competent jurisdiction.

12. In the Case of *Njangu v Wambugu and another* Nairobi HCCC No. 2340 of 1991 (Unreported), Kuloba J, as he then was, stated that:

‘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*.....’

13. These principles were restated by Hon. Justice Odunga in *Republic v Attorney General and Another Exparte James Alfred Koroso* [2013] eKLR, where he expressed himself thus on the issue of access to Justice: -

“Access to Justice cannot be said to have been ensured when persons in whose favour Judgments have been decreed by Courts or Tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

14. The Learned Judge in the Case of *Kennedy Mokua Ongiri* (*Supra*) further held that

“...Article 159 (2) (b) of the *Constitution* mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity.”



15. I have considered the Originating Summons, the Replying Affidavit, the Supplementary Affidavit and rival submissions by Counsel for both parties. It is not in dispute, that there exist Decrees and Orders in Civil Appeal No. 29 of 1987 at the High Court at Nyeri; Civil Appeal No. 117 of 1991 at the Court of Appeal at Nyeri; Civil Case No. 233 of 1994 at the High Court in Nyeri; Civil Appeal No. 87 of 2001 at the Court of Appeal at Nyeri and Republic v Dorothy Wawira Muriuki & 5 Others; and P & A Case No. E002 of 2020 between Gladys Wandia v Njagi Samson and their respective Legal Representatives. In all these cases, the issue of legal ownership of the subject matter Ngariama/Rungeto/76 has been at the core of the dispute and the various Courts have dismissed the claim as being *Res Judicata*, for the reason that the matter was heard and determined in Nyeri Resident Magistrate's Court Civil Case Number 1065 of 1963.
16. The genesis of these cases was Nyeri Resident Magistrate's Court Civil Case Number 1065 of 1963, which though not exhibited by the Respondent, Tunoi, J (as he then was) relied on the same in HCC Appeal No. 29 of 1987 (Nyeri) to uphold the Appeal by Njagi Samson against Gladys Wandia on the basis that Embu RMCC No. 62 of 1982 was *Res Judicata* on account Nyeri RMCC No. 1065 of 1963. In deciding the Appeal, the Learned Judge stated that judgment involving the suit land and the same parties had been pronounced in Nyeri RMCC 1065/63. He consequently, set aside the entire proceedings in Embu RMCC 62/82 together with all consequential orders for being *Res Judicata*. Aggrieved by the decision, Gladys Wandia, the Appellant, filed a second appeal at the Court of Appeal in Nyeri in Civil Appeal No. 117 of 1991 which was dismissed as the Court of Appeal Judges unanimously held that the Learned Judge rightly allowed the Appeal as at the time when the Appellant filed a matter in the Resident Magistrate's Court at Embu, the matter was already *Res Judicata*. Gladys Wandia filed Civil Case No. 233 of 1994 seeking to have the matter referred to arbitration and again Njagi Samson filed a Preliminary Objection on the basis of *Res Judicata*. Justice J.V.O Juma dismissed the suit on the basis of *Res Judicata*. Aggrieved by the decision, Gladys Wandia through her son Jack Mathagu Muriuki, appealed to the Court of Appeal vide Civil Appeal No. 87 of 2001. The Court of Appeal again dismissed her appeal on the basis of being *Res Judicata*. The Appellant and his siblings then filed a complaint in the Gichugu Land Dispute Tribunal and it is at this juncture that Njagi Samson instituted Judicial Review to have the decision of the land dispute tribunal set aside. The award of the land dispute tribunal was quashed due to the fact that the matter was *Res Judicata*.
17. The Applicants in the instant suit have now regrouped and filed the instant suit on the basis that they do so in their own capacity and for a claim of adverse possession against their step mother. In their Supplementary Affidavit, the 1st Applicant admits that the doctrine of *Res Judicata* was raised in respect to matters that involved Njagi Samson (deceased) and Gladys Wandia their mother who is also deceased and denies having been parties thereto. She submits that the doctrine of *Res Judicata* was extinguished after the lapse of twelve years after Embu High Court Misc. Application (JR) No. 9 of 2007 was dismissed on 9th June 2010.
18. The Court appreciates that the suit land has been subject of a litany of cases where the Courts have come in unison to maintain that every suit filed subsequent to Nyeri Resident Magistrate's Court Civil Case Number 1065 of 1963, claiming legal ownership of the suit land was *Res Judicata* and have gone ahead to dismiss the suits with costs. In the Resident Magistrate's Court in Nyeri, the Learned Magistrate dismissed the suit between the parties due to the fact that the Court could not order rectification of the register of the suit land. It is after this matter that Gladys Wandia, the mother to the Applicants filed Civil Appeal No. 29 of 1987 at the High Court at Nyeri; Civil Appeal No. 117 of 1991 at the Court of Appeal at Nyeri; Civil Case No. 233 of 1994; Civil Appeal No. 87 of 2001 which were all dismissed for being *Res Judicata*.



19. The various suits before the Courts were between the same parties and involved the same subject matter being the suit property. What is different from the instant matter is that both Gladys Wandia and Njagi Samson have since died and their Legal Representatives so to speak taken over from the deceased to continue with the litigation on behalf of the deceased.
20. In these proceedings there is clear and uncontested evidence that Gladys Wandia (deceased) mother of the Applicants has had long running dispute regarding land parcel Ngariama/Rungeto/76 with Njagi Samson and various courts have made decisions in regard to the dispute. The very initial decision was made in Nyeri RMCC No. 1065 of 1963. In rendering judgment in the appeal before him in Nyeri HCCA No. 29 of 1987 arising out of Nyeri RMCC No. 68 of 1982 Tunoi, J (as he then was) stated as follows:-

“Nyeri RMCC 1065/63 whose proceedings have been attached to this appeal shows that Judgment had been pronounced in the same suit land as in the case before this Court. On 12/6/73 the Senior Resident Magistrate, Nyeri, in RMCC 1065/63 ruled that this suit between the parties herein be dismissed in that the Court could not order rectification of the register of the suit land and therefore dismissed the suit.

About 10 years afterwards the Appellant instituted this suit. The matter directly and substantially in issue in the former case was also directly and substantially in issue in the latter case. The parties were the same and the subject matter was the same suit land. The case was heard and finally decided. The Appellant was duly represented by a Learned Counsel.

In my view the Learned Trial Magistrate erred in law in that he ought to have held that the suit before him was *Res Judicata* this having been revealed in the written statement of defence.

Perhaps the Appellant should have preferred an Appeal against that ruling if she so wished. She did not do so. She could not re-open the case 10 years afterwards.”

21. The Court of Appeal has expressed itself on two separate occasions respecting the appeals that ended before the Court at the instance of Gladys Wandia (deceased). The Court of Appeal in Civil Appeal No. 87 of 2001 (Nyeri) in a precise and succinct Judgment rendered themselves thus:-

“As far back as 25th April, 1991, Tunoi, J as he then was, told this Appellant or those through whom she claimed that the suit which was repeatedly being brought in various counts was re judicata. There was an appeal to this Court and in confirming the decision of Tunoi, J this Court stated as follows:-

“It is clear that when the Appellant filed her suit at Embu in 1982, 10 years after the dismissal of her suit on same issue filed at Nyeri in 1973, the matter was already re judicata. The Learned Judge rightly allowed the Respondent’s appeal. There is no merit in this appeal and we, therefore dismiss it with costs to the Respondent against the Appellant.”

After this it appears that the Appellant again went back to the High Court over the same matter. Juma, J, told her the matter was re judicata. She now comes to this Court over the same matter. We must again tell the Appellant as we told her in 1994, that the matter is *Res Judicata*. Even if the Magistrates who dealt with the matter had no jurisdiction, the proper place to have raised those issues was before Tunoi, J and this Court when it gave its Judgment in 1994. We must once again tell the Appellant that this matter is *Res Judicata* and irrespective of the number



of times it is brought to Court it will be dismissed on the same ground. We order that this appeal be and is hereby dismissed with costs to the Respondent.”

22. The Applicants in the instant suit in a bid to distance themselves from their deceased mother have endeavored to configure their own cause of action. They have sought to hinge the claim on the doctrine of adverse possession. They argue they have adversely possessed and occupied the subject land for a period in excess of 12 years and should therefore be declared as owners of the portion they occupy. In my view, this new approach cannot disguise the fact that it is a claim regarding the ownership of the suit land which issue has been litigated between the Applicants and the Respondents parents since the 1960’s. The 1st Applicant, Jane Wangari Muriuki no doubt representing her other siblings filed objection proceedings to issuance of grant in Nyeri HC Succession Cause No. 761 of 2011 (estate of Jeremiah Njagi Samson Murenga alias Njagi Samson). The grant was however issued and confirmed on 20th February 2014 and the estate distributed. The Applicants claim could only arise through their mother and I do not agree their claim would be independent from the claim by their mother, Gladys Wandia (deceased) and hence the doctrine of adverse possession would be inapplicable.
23. Litigation cannot be on the basis of trial and error and that other than a party who dies when there is ongoing litigation being substituted and/or a person being appointed a personal legal representative of a deceased person for purposes of instituting a suit on behalf of the deceased estate, litigation cannot be inherited such that the children of the deceased person revives and starts a fresh litigation that had been finally concluded. The *Res Judicata* doctrine come in handy to forestall such occurrences.
24. The issue of *Res Judicata* goes to the jurisdiction of the Court to sustain a suit and may be raised by a party at any stage and/or Suo moto by the Court itself. In the present matter, various suits as has been demonstrated by the Respondent concerning the same subject matter and the same parties have been heard and determined. The Applicant has approached this Court in the guise of adverse possession and claims that they are litigating on their behalf and not as their mother’s Legal Representative to give this suit a facelift. The Applicants cannot be allowed to abuse the Court process since it is a certainty that their claim is the same claim their deceased mother had put forth or should have raised in the previous suits which were heard and determined by Courts of competent jurisdiction.
25. In the circumstances, I uphold the Preliminary Objection in its entirety. Costs will be borne by the Applicants.
26. In the premises I hold the present suit is unsustainable and is hereby struck out. I award the costs of the suit to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK THIS 15TH DAY OF FEBRUARY 2024.

J. M. MUTUNGI

ELC - JUDGE

