



Nthurima & 2 others v Mwangi & another (Environment and Land Appeal E024 of 2023) [2024] KEELC 1738 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E024 OF 2023
CK NZILI, J
MARCH 20, 2024**

BETWEEN

**KENNETH KIMATHI NTHURIMA 1ST APPELLANT
DENNIS MUTUMA NTHURIMA 2ND APPELLANT
SHARON MWENDWA 3RD APPELLANT**

AND

**JAMES NJUGUNA MWANGI 1ST RESPONDENT
JENARO NTHURIMA MBWIRIA 2ND RESPONDENT**

(Being an appeal from the ruling of Hon. E.W Ndegwa - SRM delivered in Githongo ELC No. E023 of 2023 on 1.3.2022)

JUDGMENT

1. The appellants, as plaintiffs at the lower court, sued their father, the 2nd respondent, for secretly subdividing LR No. Abothuguchi/Gaitu/302, an ancestral or trust land, into LR No's Abothuguchi/Gaitu/1306 and 1305, and later on subdividing LR No. 1306 into LR No. 1494 – 1502, LR No. 1502 into LR No's 1772 – 1781 and further LR No's. 1781 into LR No's 3621 – 3633 and selling LR No. 3623 to the 1st respondent in 2016, contrary to and in breach of the customary trust.
2. They prayed for the cancellation of the sale and transfer to the 1st respondent and a permanent injunction. Alongside the plaint dated 7.11.2022, the appellant filed a notice of motion dated 9.11.2022 seeking inhibition and temporary orders of injunctions, pending the hearing and determination of the suit.
3. The 2nd respondent opposed the suit by a statement of defense dated 30.11.2022. He admitted that the initial LR No. Abothuguchi/Gaitu/302 was inherited land transferred to and held by him and his



brother in equal shares. He denied that they secretly closed for and subdivided into two portions and later other portions. Additionally, he denied the alleged occupation of the land by the appellants or breach of any alleged customary trust.

4. The 1st respondent entered an appearance on 30.11.2022 and filed a replying affidavit to the notice of motion dated 15.12.2022 saying that he bought the suit land for Kshs.700,000/= in 2016 and the 2nd respondent refused to vacate it, leading to an eviction order, proceedings and orders pursuant to a judgment in Githongo CM ELC no. E9 of 2020 issued on 26.9.2022 hence termed the instant suit as *res judicata*, an abuse of the court process and filed in collusion with the 2nd respondent to defeat the earlier decree. He attached it as annexure J.N. "1".
5. In a further affidavit sworn on 31.1.2023, Kenneth Kimathi Nthurima, the 1st appellant on behalf of the appellants, averred the 1st respondent knew or was aware of their occupation of the suit land, which land is ancestral. The appellants said that they were not parties to the former suit whose issues were different in the instant suit; hence, *res judicata* was inapplicable and was only being introduced to lock them out of the seat of justice before they could be heard and to evict them from the ancestral land, sold and transferred to the 1st respondent in breach of their ancestral rights.
6. By a ruling dated 1.3.2023, the trial court struck out the suit on account of *res judicata*. The appellants fault the decision as premature since there was no preliminary objection filed or failed by the respondents; the suit was not *res judicata*; a preliminary objection of *res judicata* may not be raised at the preliminary stage; they were not given an opportunity to be heard; the court considered extraneous matters and when the application they had filed had merits.
7. With leave of court, parties were directed to canvass the appeal by written submissions to be filed by 16.1.2024. none were received from the appellants.
8. The respondents relied on written submissions dated 22.12.2023. It was submitted that the 1st respondent had filed the former suit after the 2nd respondent had failed to grant him vacant possession, which the appellants did not oppose. Therefore, the issue of ownership having been determined in the former suit, the appellant could not introduce a new cause of action over the same remedy before this court; otherwise, they would be attempting to re-open in another way the same cause of action over the same parcel of land.
9. The respondent submitted that the appellants could not hide behind the issue of occupation and trust when ownership was determined in the former suit and to vex the 2nd respondent by a multiplicity of suits. Reliance was placed on *Gladys Nduku Nthuki vs Letsbego (K) Ltd Mueni Charles Mainigi (IP)* (2022) eKLR citing *IEBC & others vs Maina Kiai & others* (2017) eKLR.
10. Regarding fair hearing and the power to determine the doctrine of *res judicata*, the 1st respondent submitted that the appellants were granted an adequate chance to file written submissions to the application and the response; otherwise, the suit was filed solely to defeat the execution of the former decree. Regarding costs, the 1st respondent submitted costs are discretionary by the court for the successful party unless with good reasons. Reliance was placed on *Southern Star Sacco Ltd vs Vanancio Ntwiga* (2021) eKLR.
11. An appellate court of the first instance has the mandate to rehearse, re-appraise, and re-look at the lower court record with an open mind and come up with independent findings on facts and the law. See *Sele vs. Associated Motor Boat & Co. Ltd, Gitobu Imanyara & others vs Attorney General* (2013) eKLR.
12. In this appeal, other than the replying affidavit dated 15.12.2021, the 1st respondent did not file any pleadings such as a statement of defense or preliminary objection against the issues raised in the plaint



dated 7.11.2022. Similarly, the 2nd respondent, in his statement of defense dated 30.11.2022, did not plead the existence of a previous suit or decree. Moreover, other than the judgment in Githongo CMCC ELC No. E9 of 2020 attached to the replying affidavit of the 1st respondent as annexure J.N. “1” in the pleadings in the former suit was not shared with the trial court.

13. A preliminary objection was described in *Mukbisa Biscuit Manufacturing Co. Ltd vs West End Distributors* (1969) EA 696. It is a point of law that has been pleaded or arising by clear implication out of pleadings and which, if argued, may dispose of the suit. In *IEBC vs Jane Cheperenger and 2 others* (2015) eKLR, the court said that a preliminary objection should be founded upon a settled and crisp point of law. In *Oraro vs. Mbaja* (2005), 1KLR the court said a preliminary objection requiring the adduction of evidence based on disputed facts or deriving its foundation from factual information that stands to be tested by rules of evidence was not a pure point of law.
14. In *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & another* (2014) eKLR, the court said the issues of *res judicata*, the duplicity of suits and such having been spent would require probing of evidence and therefore were incapable of being handled as a preliminary objection. In *George Kamau Kimani & others vs County Government of Transzoia & another* (2014) eKLR, the court said the best way to raise a plea of *res judicata* was by way of a notice of motion where pleadings in the previous suit are annexed to enable the court to determine whether the current suit was *res judicata* for it would require evidence to ascertain the facts as *res judicata*.
15. In this appeal, the suit before the trial court was based on ancestral or customary trust. It was alleged that the 1st respondent’s title, as acquired from the land from the 2nd respondent in 2016, was subject to occupation and alleged accrued customary rights of the appellants. In the further affidavit dated 31.1.2023, the appellants had deposed that they were not privy to the previous suit or decree and that the issues raised in their current suit had not been heard and determined to finality by a court of competent jurisdiction.
16. A cause of action refers to a set of facts that grants the claimant a cause to complain against the opposite party. A glance at the judgment dated 26.9.2022 shows the previous suit was for an order of eviction between the respondent herein. The 2nd respondent had testified that it was his second wife who had refused to vacate the land under her occupation and ought to have been sued instead of him.
17. The issues of ancestral or customary trust, and its breach thereof by the respondents were not heard and determined in the former suit. The appellants were not parties to the suit. The pleadings before the former court were not availed to the trial court. Evidence was required to probe the issues. Therefore, my finding is that the appellants were denied a chance to ventilate their defense to the plea of *res judicata* by demonstrating that the two suits were not similar and raised different issues.
18. I find the grounds of appeal with merits. The appeal is allowed with costs. The application dated 7.11.2022 at the lower is as a result of this allowed. The orders shall last for one year only.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH DAY OF MARCH, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu



No appearance

