



Ndumia (Suing as the legal representative of the Late Simon Ndumia Kimenju – Deceased) v Wambugu (Environment & Land Case 17 of 2023) [2024] KEELC 1431 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 17 OF 2023
YM ANGIMA, J
MARCH 14, 2024
(FORMERLY NYAHURURU ELC E003 OF 2023)**

BETWEEN

AMOS MATHENGE NDUMIA (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE SIMON NDUMIA KIMENJU – DECEASED) PLAINTIFF

AND

JOHN KIBOI WAMBUGU DEFENDANT

RULING

A. Introduction

1. By a plaint dated 23.08.2023 the Plaintiff sued the Defendant as the legal representative of the estate of the late Simon Ndumia Kimenju (deceased) seeking the following reliefs:
 - a. An order declaring the Plaintiff as the legal owner of all that parcel of land known as Nyandarua/Mbuyu/323 measuring approximately 3.22 Ha.
 - b. An order declaring that the boundary separating Nyandarua/Mbuyu/323 from Nyandarua/Mbuyu/967 is as per the Registry Index Map.
 - c. An order of permanent injunction restraining the Defendant, his employees, servants and or agents from further trespassing, constructing structures, cultivating, fencing, cutting down trees or destroying the fence on the parcel of land known as Nyandarua/Mbuyu/323 measuring approximately 3.22 Ha.
 - d. General damages for trespass.



- e. An order of permanent injunction restraining Tango Auctioneers, their employees, servants and or agents from threatening, harassing and collecting the sum of Kshs.202,495/= from the Plaintiff.
 - f. An order do issue directing the Defendant to immediately vacate all that parcel of land known as Nyandarua/Mbuyu/323 measuring approximately 3.22 Ha and in default an order of eviction do issue.
 - g. Costs and interest of the suit.
 - h. Any other order that this honourable court may deem fit and just to grant.
2. The Plaintiff pleaded that at all material times, he was the proprietor of Title No. Nyandarua/Mbuyu/323 (Parcel 323) whereas the Defendant was the proprietor of an adjacent Title No. Nyandarua/Mbuyu/967 (Parcel 967). He pleaded that the Defendant had previously filed Nyahururu CM ELC No. 27 of 2018 (the previous suit) seeking, *inter alia*, an order of a mandatory injunction to compel him to vacate a portion of Parcel 967 which it was claimed the Plaintiff had encroached upon.
 3. It was further pleaded that upon a full hearing of the previous suit the trial court found for the Defendant and granted the mandatory injunction sought as well as an eviction order. The Plaintiff further contended that after delivery of judgment the County Surveyor – Nyandarua County visited the parcels in dispute to ascertain the position of the access road between them whereupon he discovered that it was the Defendant who had actually encroached on the Plaintiff's land and not vice versa.
 4. The Plaintiff pleaded that despite the surveyor's findings the Defendant had on 02.10.2020 through court bailiffs known as Tango Auctioneers demolished his houses on Parcel 323 and proclaimed certain assets in purported execution of the decree in the previous suit. It was further contended that the Defendant had thereafter occupied the entire Plaintiff's land in violation of his proprietary rights. It was the Plaintiff's case that despite issuance of a demand and notice of intention to sue the Defendant had failed to make good his claim hence the suit.

B. Plaintiff's Instant Application

5. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion under certificate of urgency dated 23.08.2023 seeking some interim orders. The motion was filed pursuant to Order 40 rules 1, 2, 4 & 8 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, (Cap.21) and all other enabling provisions of the law seeking the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of temporary injunction restraining the Defendant/respondent, his employees, servants and or agents from further trespassing, constructing structures, cultivating, fencing, cutting down trees or destroying the fence on the parcel of land known as Nyandarua/Mbuyu/323 measuring approximately 3.22 Ha.
 - d. Spent;
 - e. That in the alternative this honourable court be pleased to issue an order of status quo preserving of the suit land pending the hearing and determination of this suit.



- f. Spent;
 - g. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of temporary injunction restraining Tango Auctioneers, their employees, servants and or agents from threatening, intimidating, harassing and collecting the sum of Kshs.202,495/= from the Plaintiff/applicant.
 - h. That the costs of this application be provided for.
6. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Amos Mathenge Ndumia on 23.08.2023 and the annexures thereto. The application was based on essentially the same matters as pleaded in the plaint. The Plaintiff contended that the true factual position was that it was the Defendant who had trespassed on his Parcel 323 and not as held by the trial court in the previous suit. He also considered the auctioneer's demand for costs of Kshs.202,495/= to be illegal and a form of harassment.

C. Defendant's Response

7. The Defendant filed a replying affidavit sworn on 08.11.2023 in opposition to the application for interim orders. He stated that the land dispute between the parties touching on Parcels 323 and 967 was heard and determined in the previous suit whereby a judgment dated 29.04.2020 was delivered in his favour. He stated that the Plaintiff had filed an appeal against the judgment but subsequently withdrew the same.
8. The Defendant contended that when the Plaintiff failed to vacate Parcel 967 as required by the decree M/S Tango Auctioneers were appointed to execute the eviction order which they duly executed on 02.10.2020 by evicting the Plaintiff from the disputed land. It was his case that the portion of land the Plaintiff had encroached upon was restored to him through a process of execution of the decree in the previous suit hence the Plaintiff had no legitimate complaint in that regard.
9. It was also the Defendant's further response that the Plaintiff had filed an application dated 19.10.2020 before the trial court for review of the judgment based on his surveyor's report obtained after judgment but the same was dismissed. The Defendant further stated that the Plaintiff was yet to settle the costs he was awarded in the previous suit and there were pending execution proceedings in that regard for his arrest and committal to civil jail.
10. The Defendant thus contended that the Plaintiff's suit was *res judicata*, an abuse of the court process, and an attempt to appeal against the decree passed in the previous suit through the back door. The court was consequently urged to dismiss the application with costs.

D. Plaintiff's Rejoinder

11. The Plaintiff filed a supplementary affidavit sworn on 15.12.2023 in reply to the Defendant's replying affidavit of 08.11.2023. He denied that his suit was *res judicata* or incompetent and contended that the matters in dispute in the instant suit were different from the issues in the previous suit. The Plaintiff contended that the instant suit was based on wrongful execution and attachment of his property.
12. It was the Plaintiff's case that the Plaintiff had wrongfully attached his livestock and had them sold by auctioneers for a sum of Kshs.160,000/= which amount should have been sufficient to cover the costs awarded in the previous suit hence the additional claim of Kshs.233,219/= was unjustified and the same was an attempt by the Defendant to unjustly enrich himself.



E. Directions on Submissions

13. When the 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 Plaintiff's submissions were filed on or about 16.12.2023 whereas the Defendant's submissions were filed on 20.01.2024.

F. Issues for Determination

14. The court has perused the Plaintiff's notice of motion dated 23.08.2023, the replying affidavit and notice of preliminary objection in opposition thereto, as well as the material on record. The court is of the view that the following key issues arise for determination herein:
 - a. Whether the Plaintiff's suit is res judicata and otherwise an abuse of the court process.
 - b. Whether the Plaintiff is entitled to the interim injunction sought.
 - c. Whether the Plaintiff is entitled to the status quo order sought.
 - d. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether the Plaintiff's suit is res judicata and otherwise an abuse of the court process

15. The court has considered the material and submissions on record on this issue. The court has noted that the dispute between the parties is essentially about who has encroached on the other's parcel of land. There is no doubt from the material on record that the Plaintiff acknowledges that the Defendant is the proprietor of Parcel 967 and the Defendant acknowledges the Plaintiff's ownership of Parcel 323. In the previous suit, the Defendant has sued the Plaintiff alleging that he had encroached upon his Parcel No. 967. The Plaintiff, of course, denied the allegation. In the instant suit, the Plaintiff is alleging that it is the Defendant who has encroached on his Parcel 323. Thus, the nature of the dispute between the parties appears to be a boundary dispute.
16. The material on record shows that the boundary dispute was adjudicated upon and determined in the previous suit by a court of competent jurisdiction. In its judgment dated 20.04.2020 the trial court held, inter alia, that:

“On the issue whether the Plaintiff has proved his claim or not the Plaintiff testified that two Land Registrars visited the suit land and prepared reports and one such report was produced as exhibit 3 by the Plaintiff. The report indicated that the Defendant had encroached on part of the Plaintiff's land. Even the first report that was set aside by High Court in 2005 had indicated the same (Plaintiff and Defendant produced the report). From evidence of both parties the two land parcels for the Plaintiff and the Defendant are supposed to be separated by a road but on the ground the road is missing. Even DW1 did not know where the road is supposed to be. In view of the report by the Land Registrar, I am satisfied that the Defendant encroached on the Plaintiff's land as indicated in the report. I therefore find that the Plaintiff has proved his claim in prayer (a) of the plaint. It is my finding that the Plaintiff is entitled to Land Parcel No. Nyandarua/Mbuyu/967, which the Defendant encroached.”
17. The material on record further shows that vide a notice of motion dated 19.10.2020 the Plaintiff sought a review and setting aside of the judgment of the trial court on the basis of his surveyor's report dated



29.06.2020 which indicated that the Defendant was the one who had encroached upon the Plaintiff's Parcel 323. In dismissing the Plaintiff's said application, the trial court held as follows:

“...this case started in the year 2009. The case was heard and concluded in the year 2020. Judgment was delivered on 29.04.2020 after the parties were allowed to testify and adduce all the evidence that they had for proper adjudication of the case. The applicant had all the time to adduce evidence that would support her case. To wait until judgment has been delivered and a decree issued and executed to go look for a surveyor to survey the land does not in my opinion amount to discovery of a new or important matter that with exercise of due diligence could not be discovered. The surveyor's report is not a new discovery because there was another surveyor's report and land registrar's ruling produced in court before judgment was made. The surveyor's report marked LWN.2 does not seem to be complete since it states that the report was forwarded to the land registrar for further recommendation and a ruling. There was no ruling made by the land registrar after this new survey. The report itself indicates that the owner of land Parcel No. Nya/Mbuyu/967 (the respondent) was dissatisfied with the new survey and provided that there was an ongoing court case in court.”

18. 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.”

19. It is evident from the material on record that the Plaintiff had every opportunity of canvassing all his grievances on the boundary dispute with the Defendant in the previous suit. He had every opportunity to engage a surveyor or land registrar to verify who had encroached upon who's land. It is strange that the Plaintiff waited until judgment in order to start fishing for additional evidence to defeat the decree which had already been passed against him. He sought a review of the judgment before the trial court on the basis of his report of 29.06.2020 and lost in 2021.
20. The court is of the view that a party who has lost a suit and an application for review before a court of competent jurisdiction is not at liberty to canvass the same or substantially the same matters through a new suit. The Plaintiff is simply seeking to relitigate the boundary dispute which was heard and determined on merit by a court of competent jurisdiction. The court agrees with the Defendant's submission that the Plaintiff has simply given his suit a cosmetic face lift to make it appear as if it is an entirely new cause of action which is unrelated to the previous suit.
21. If the Plaintiff was aggrieved by the decision of the trial court dismissing his application for review, then he ought to have redressed his grievances through an appeal but not by filing a fresh suit for re-litigation of a dispute which had already been heard and determined by a court of competent jurisdiction. The court is thus satisfied that the instant suit is res judicata and otherwise an abuse of the court process.



b. Whether the Plaintiff is entitled to the interim injunction sought

22. In view of the court’s finding on the first issue the court is of the opinion that the Plaintiff is not entitled to the interim injunction sought. A party cannot be entitled to an interim injunction which is predicated on a suit which is res judicata and abuse of the court process.

c. Whether the Plaintiff is entitled to the status quo order sought

23. The court takes the same view as it has taken on the second issue. The court is of the opinion that the Plaintiff cannot be entitled to a status quo order based on a suit which is res judicata and an abuse of the court process. As such, the court is not inclined to grant the order.

d. Who shall bear costs of the application

24. 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 –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs. Accordingly, the Defendant shall be awarded costs of the suit and the application to be borne by the Plaintiff.

H. Conclusion and Disposal Order

25. The upshot of the foregoing is that the court finds and holds that the Plaintiff’s suit is res judicata and otherwise an abuse of the court process. The court further finds and holds that the Plaintiff is not entitled to the interim orders predicated upon such a suit. As a result, the court makes the following orders for disposal of the suit and application:
- a. The Plaintiff’s suit be and is hereby struck out for being res judicata and otherwise an abuse of the court process.
 - b. The Plaintiff’s notice of motion dated 23.08.2023 for interim orders is hereby struck out in its entirety.
 - c. The Defendant is hereby awarded costs of the suit and the application dated 23.08.2023.
 - d. For the avoidance of doubt, the interim orders in force are hereby vacated forthwith.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 14TH DAY OF MARCH, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Oseko holding brief for Mr. Karanja for the Plaintiff

Mr. Gicheru holding brief for Mr. Waichungo for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

