



**Ogutu & 59 others v Teresia Wairimu Kirima & Anne Wangari Kirima (As the Administrators of the Estate of the Late Gerishon Kirima) & another (Environmental and Land Originating Summons 4 of 2023) [2024] KEELC 3385 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3385 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 4 OF 2023**

**LN MBUGUA, J**

**APRIL 18, 2024**

**(FORMERLY ELC PETITION NO. E003 OF 2023)**

**BETWEEN**

**BERNARD OWITI OGUTU & 59 OTHERS ..... APPLICANT**

**AND**

**TERESIA WAIRIMU KIRIMA & ANNE WANGARI KIRIMA (AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE GERISHON KIRIMA) ..... 1<sup>ST</sup> RESPONDENT**

**JOHN GERISHON KIRIMA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants' Notice of Motion application dated 3.11.2023 is for determination. They seek an injunction restraining the Respondents from interfering with their quiet possession of 3 acres within parcel LR 6825/2 pending hearing of the suit.
2. The application is premised on grounds on its face and on the 1<sup>st</sup> Applicant's supporting affidavit sworn on 3.11. 2023. He avers that vide a judgment delivered in Nairobi ELC No. 1257 of 2014, the court ordered eviction of squatters occupying 80 acres on the Respondent's land known as LR No. 6825/2 and by extent any person occupying parcel LR 6825/2.
3. That LR No. 6825/2 is 472 acres and the Applicants occupy 3 acres of it and have made enormous developments thereon by erecting residential and /or commercial buildings and are now facing imminent threat of eviction.



4. He avers that they are apprehensive that they may be evicted and they do not have alternative means of settlement and housing and if the evictions are carried out, they should be in line with Section 152B, 152C and 152D of the Land Act, 2012.
5. The Applicants also filed a further affidavit sworn on 19.1.2024 by Seth Ojienda, Advocate with conduct of the matter for them. He avers that there is a stay of judgement granted in ELC 1257 OF 2014 John Otieno Obade & 299 others v Teresia Wairimu & 6 others which is the main suit giving rise to this matter.
6. On 25.1.2024, the Applicants withdrew their case against the 2<sup>nd</sup> Respondent (John Gerishon).
7. The application is opposed by the 1<sup>st</sup> Respondents vide their preliminary objection dated 15.12.2023, where they aver that the application and the entire suit are incurably defective for violation of the mandatory requirements of Order 37 Rule 7 of the Civil Procedure Rules.
8. That this court lacks jurisdiction to set aside/vary any portion of the judgment delivered on 23.10.2023 in Nairobi ELC 1257 /2014 consolidated with ELC 850/14, 509/14, 1496/13, 1318/13 and 252/11 John Otieno Obade and 299 others v Teresia Wairimu Kirima and another, which made a determination that all illegal occupants on parcel LR No. 6825/2 should vacate that land.
9. It is also contended that the issues herein are res judicata having been determined in the aforementioned judgment, and that the issues herein are also subjudice as there are similar applications before the Court of Appeal in Nairobi Civil Application No. E552 of 2023 – Nardai Muoroto Self Group v James Gatundu & 49 others and Civil Application No. E560 of 2023 Dennis Otieno Ounda & 4 others v Teresiab Wairimu Kirima & 28 others seeking orders of stay against the judgement delivered on 23.10.2023 by Hon. Justice S. Okong'o.
10. The application is also opposed by the 1<sup>st</sup> Respondent vide the Replying Affidavit sworn on 18.1.2023 by Teresia Wairimu Kirima, an administrator of the estate of Gerishon Kamau Kirima. She avers that parcel LR No. 6825/2 has at all times belonged to the late Gerishon Kamau Kirima and that the Applicants are among hordes of grabbers who invaded the property upon his demise in year 2011.
11. She avers that despite lawful orders prohibiting interference with the suit parcel, the Applicants have by their continued occupation remained in contempt until the court pronounced itself in ELC No. 1257 of 2014 evicting all invaders, thus the court would be legalizing trespass upon the 1<sup>st</sup> Respondents property if it grants the orders sought in view of the finding of the court that parcel LR 6825/2 forms part of the estate of Gerishon Kirima.
12. She also contends that the Originating Summons is void ab initio since the Applicants failed to attach an abstract of the title they seek, and that they have exhibited indolence since ELC No. 1257 of 2014 was in court for a period of over 10 years and it was in the public domain, yet they purport to bring a similar suit.
13. The issues raised were canvassed by way of written submissions. The Applicant's submissions are dated 17.1.2024. It is argued that since equity looks at intent rather than form, the court should not strike out the Originating Summons for violation of order 37 Rule 7 of the Civil Procedure Rules but rather invoke Order 37 Rule 19 (1) of the Civil Procedure Rules and continue the suit as if it was instituted by a plaint.
14. The Court is also urged to uphold Article 159 of the Constitution and consider the omission to annex a copy of the title to the Originating summons dated 3.11.2023 as a mere technicality which should



- not be a ground for subverting the rule of law. To this end, the case of *Kibutiri v Kibutiri* (1983) KLR 62 is cited.
15. It is argued that this court has the right jurisdiction to hear this matter and that the Originating Summons dated 3.11.2023 bears different parties save for the Respondents and concerns a different piece of land thus it is not res judicata to ELC No. 1257 of 2014. The case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR is relied upon.
  16. It is also submitted that the suit is not subjudice, thus it does not offend Section 6 of the *Civil Procedure Act* and that the Applicants' right to housing under Article 43 (1) (b) of the *Constitution* will be infringed by evicting them without an alternative resettlement plan.
  17. The 1<sup>st</sup> Respondent's submissions are dated 5.2.2024 and 2.2.2024. It is argued that failure to annex a certified copy or extract of the title to the suit property renders the summons incurably defective for violation of Order 37 Rule 7 of the *Civil Procedure Rules*. To this end, the case of *Railway Housing Co-operative Society v Balu Munga & 10 others* [2019] eKLR as well as the case of *Joseph Dennis Odondo v Mesback Juma Omollo & another* [2019] eKLR are cited.
  18. It is argued that the pleadings herein clearly highlight that the substratum of the suit is occupation of the suit property which in effect seeks to vary Hon. Justice Okongo's judgement delivered on 23.10.2023 and since a court cannot sit on appeal of its decision or that of a court of a concurrent jurisdiction, the suit should be dismissed. The case of *Daniel Otieno Oracha v Republic* [2019] eKLR is relied upon.
  19. It is submitted that the orders emanating from the judgement of 23.10.2023 by Justice S. Okong'o were issued in rem as against all illegal occupants on the suit property thus the suit offends section 7 of the *Civil Procedure Act*. To this end, the 1<sup>st</sup> Respondent relies on the cases of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, *Abukar G Mohamed v Independent Electoral and Boundaries Commission* [2017] eKLR as well as the case of *Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Ltd* [2008] eKLR.
  20. The 1<sup>st</sup> Respondent also argues that the Applicants have not met the threshold for grant of orders of injunction as set out in the case of *Giella v Cassmann Brown & Company Limited* [1973] EA. It is pointed out that the Applicants failed to establish a prima facie case since in the substantive summons, they make no prayer for a declaration of ownership and have no evidence alluding to ownership of the suit property.
  21. It is argued that the Applicants did not lay a basis in support of their allegation that they would suffer harm and in any case, their apprehension of loss is monetary and can be compensated by way of damages, of which there is no evidence that the Respondents would not be in a financial position to pay damages that may be awarded if the application and suit were to succeed. To this end, the case of *Mureithi v City Council of Nairobi* [1979] eKLR is cited.
  22. I have considered the pleadings, the application, the responses thereof and the rival submissions. I frame the issues falling for determination as follows;
    - a. Whether the 1<sup>st</sup> Respondents' Preliminary Objection dated 15.12.2023 is merited.
    - b. Have the Applicants established grounds for an injunction restraining the Respondents from interfering with their quiet possession of 3 acres within parcel LR 6825/2
  23. The 1<sup>st</sup> Respondents' Preliminary Objection is based on 4 grounds. The 1<sup>st</sup> one is that the Originating Summons dated 3.11.2023 violates Order 37 Rule 7 of the *Civil Procedure Rules*.



24. The procedure for asserting an adverse possession claim is by way of Originating Summons as provided for under order 37 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act. Order 37 Rule 7(2) provides;

“....The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

25. A cursory perusal of the pleadings herein reveal that the Applicants did not annex a certified extract of title to the suit parcel in their affidavit in support of the summons. Further, in their Originating Summons, their main prayer is an injunction restraining the Respondents from interfering with their quiet enjoyment of 3 acres within LR 6825/1. This prayer does not fall under Section 38 of the Limitations of actions Act as it is not a prayer for registration as an adverse possessor. Therefore, commencing the suit by a plaint would suffice.

26. Under Order 37 Rule 19 of the Civil Procedure Rules, 2010 an Originating summons duly filed may be converted into a plaint. That being the case, this court cannot penalize the applicants on account of failing to institute the matter by way of a plaint.

27. The 2<sup>nd</sup> ground of the Preliminary Objection is that the court lacks the jurisdiction to set aside judge Okongo’s orders issued on 23.10.2023 in Obade & 299 others & 10 others v Kirima & 60 others (Environment and Land Case Civil Suit 1257 of 2014 & 252 of 2011 & Environment & Land Case 509 & 850 of 2014 & 1496 & 1318 of 2013 (Consolidated)) [2023] KEELC 20868 (KLR) (23 October 2023) (Judgment).

28. The court has considered the said judgment which was a consolidated one. The Hon judge ordered the Plaintiffs in ELC 1257 of 2014 John Otieno Obade & 299 others v Teresia Wairimu & 6 others to vacate parcel LR 6825/2. A portion of the same parcel is in contention herein. The Plaintiffs in ELC 1257 of 2014 were about 300 and they had claimed about 80 acres.

29. It is not clear whether the 60 Applicants in the instant suit were amongst the 300 claimants in the former suit and whether they have now metamorphosed as Applicants. What is clear is that the orders of the court in ELC 1257 of 2014 contained at paragraph 294 (a) of the judgment of Hon Justice Okong’o issued on 23.10.2023 declared that the Plaintiffs in the said matter had no claim over the suit parcel.

30. In the circumstances, I opine that the court considered the issue of occupation thus this court is mute on that issue.

31. It is also contended that the suit is re judicata and violates Section 7 of the Civil Procedure Act, having been determined by Justice Okong’o in ELC 1257 of 2014.

32. Section 7 of the Civil Procedure Act provides for the doctrine of res judicata which bars a party from litigation on issues which have been determined in a former suit. The same is expounded by the court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR the Court as follows:

“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the



same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally”.

33. As earlier stated, the court already made a decision that persons claiming entitlement of 80 acres hived from the suit parcel have no case.
34. It would be absolute chaos and an abuse of the court process if every person residing in the parcel 6825/2 was allowed to file fresh claims as and when they deem fit!. In *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] eKLR, the Court of Appeal quoted the following passage from the case of *Yat Tung Investment Co Ltd vs Dao Heng Bank Ltd and Another* [1975] AC 581;

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
35. In the case of *ET vs Attorney General & another* (2012) eKLR, cited in *Daniel Mesiri Kasoo & 7 others v Fredrick Nkonge Mutwiri & another* [2020] eKLR, the court stated thus;

“The courts must always be vigilant to guard 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 in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction”.
36. To this end, I find that the issues raised herein are resjudicata to the issues raised in the former suit. Not to mention that issuance of the order sought herein would also have the effect of varying the judgment in the other suit, taking into account that the 80 acres mentioned in the other suit were not ascertained.
37. At this juncture, I pose the questions; Where were the applicants all this time that the issue of occupation of Kirima’s land was going on in the consolidated suits?, How comes that this suit was only filed after the delivery of the judgment in the other suit.? What will stop other claimants from coming up now and then to claim various portion/acres out of parcel 6825/2, if the court allows this suit to see the light of the day? “Both justice and equity abhor a claimant’s indolence or sloth and stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice; See *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR (Mbugua J).
38. The Respondents have also argued that the suit is subjudice as there are other pending matters before the Court of Appeal. To determine whether this suit is subjudice, this court would be required to comb through pleadings relating to the other suits which would be outside the ambit of what a Preliminary Objection is. What more, such evidence was not proffered.
39. In the end, I find that the Respondents’ Preliminary Objection succeeds on ground 2 and 4. It follows that the Notice of Motion dated 3.11.2023 and the Originating Summons herein are not merited.
40. Before I pen off, I must state that even without the application, this suit would still have landed in the judicial graveyard, taking into account that the prayer sought in the main pleading is an injunction order. I pose the question; Injunction pending what? An order of injunction cannot be issued in a vacuum.
41. In light of the foregoing analysis, the application and the suit are hereby struck out with costs to the respondents.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Ojienda for Plaintiff

Onduso and Mwenesi for 1<sup>st</sup> Respondent

Rao holding brief for Dr. Ojiambo for Ann Wangari Kirima

Court assistant: Eddel

