



Thuo & another (Suing as the Legal Representatives of the Estate of Charles Thuo Kibatha - Deceased) v Kihara & 3 others (Sued as the Legal Representatives of the Estate of Francis Kihara Muiruri - Deceased) (Environment & Land Case 182 of 2019) [2024] KEELC 4395 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 182 OF 2019**

JG KEMEI, J

MAY 28, 2024

BETWEEN

WASHINGTON KIBATHA THUO 1ST PLAINTIFF

HENRY GATEI HIUHU 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES THUO KIBATHA - DECEASED

AND

DANIEL MUIRURI KIHARA 1ST DEFENDANT

PETER NJUGUNA KIHARA 2ND DEFENDANT

SAMUEL NDEGWA KIHARA 3RD DEFENDANT

LUCY NYANDIGI KIHARA 4TH DEFENDANT

SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FRANCIS KIHARA MUIRURI - DECEASED

JUDGMENT

Introduction

1. The Plaintiffs vide their Complaint dated 2/12/2019 claim that they are the legal administrators of the estate of the late Charles Thuo Kibatha (late Charles). That the late Charles was the registered owner of the parcel of land known as LR 10874/58 (hereinafter the suit land) and upon his demise, succession proceedings were initiated and the suit land devolved to all the beneficiaries. That when the Plaintiffs went to execute the succession orders on the suit land, they found that the Defendants had encroached



on the suit land by digging quarries thereon. That despite demand and notice of intention to sue, the Defendants have refused to vacate the suit land hence the suit.

2. The Plaintiffs sought Judgement against the Defendants for;
 - a. An order directing the Defendants to vacate and stop any further dealings or encroachment either by themselves, their agents, servants, subtenants or any other person over this suit property known as LR 10874/58.
 - b. A permanent injunction restraining the Defendants their servants, agents or any other person claiming under them from entering, trespassing, building, occupying or in any other way dealing with parcel known as LR 10874/58.
 - c. Costs of this suit.
 - d. Any other relief as the Court may deem fit to grant.
3. The 1st and 2nd Defendants filed a joint defence dated 17/2/2020. They denied the Plaintiffs' averments in toto and put them to strict proof. On without prejudice basis, they stated that on 2/11/1993, the late Charles sued their late father Francis Kihara Muiruri (late Francis) in Kiambu SRMCC Civil Suit No. 1312 of 1993. In his defence therein the late Francis contended that the parcel of land the subject of the action measuring seven acres had been lawfully sold to him by Gakoi Kingeti way back in 1976. That any claim of ownership thereat by any person was extinguished under Section 37 (a) and 38 (1) of the *Limitation of Actions Act* by way of adverse possession. Accordingly, therefore the late Charles had no legal claim over the suit land. That if he was ever registered as the owner, the same was unlawful. That at the time of the sale agreement between Gakoi Kingeti and late Francis the parcel of land LR No. 10874/11 had not been subdivided and no title deed had been issued to the late Francis in respect of the 7 acres and as such the late Charles had no cause of action against the late Francis.
4. Further it was averred that the Plaintiffs' suit is res judicata in light of the dismissal of their case with costs in the Kiambu case on 17/7/2005. That upon the demise of Charles on 7/3/2008 the matter appeared to have rested until 5/2/2019 when the 2nd Plaintiff herein vide a Notice of Motion application dated 24/10/2018 attempted to substitute himself as the Plaintiff in Kiambu Civil Suit No. 1312 of 1993. The application was opposed and subsequently withdrawn on 19/7/2019. They urged the Court to strike out the suit with for being res judicata.
5. The 2nd and 3rd Defendants did not file any defence.

The evidence

6. Washington Kibatha Thuo the 1st Plaintiff testified as PW1. He adopted his witness statement dated 2/12/2019 as his evidence in chief. He testified that the suit land is registered in his father's name, the late Charles Thuo Kibatha. He accused the Defendants of trespassing on the suit land and carrying out quarrying activities and constructing a building thereon.
7. In cross, PW1 said his father acquired the suit land in 1990's but never took possession nor utilized it. PW1 admitted to knowing Francis Kihara Muiruri adding that Francis did not live on the suit land but opposite the suit land, across the road. He also conceded to knowing the Defendants and their occupation on the suit land. PW1 further said he was aware of the Kiambu case between Charles and Francis and that it was concluded. On further questioning, the witness denied knowing that his father had a case against the Defendant's father in Kiambu.
8. The second Plaintiff Henry Gatei Hiuhu took the stand as PW2. He also adopted his witness statement dated 2/12/2019 as his evidence in chief. It was his evidence that he is a son in law and co-administrator



- in the estate of the late Charles. That after his father in-law's demise, they went to the suit land and found people digging quarries thereon. That those people entered the suit land while his father in law was still alive. PW2 said the family of the late Francis had possession of the land. He added that he was aware of the case between Charles and Francis but did not know whether it was concluded. PW2 produced the documents listed in the List of Documents dated 2/12/2019 as P.Ex 1- 3 namely copy of Grant of Letters of Administration dated 16/12/2014 for the estate of the late Charles, Copy of the Grant of Letters of Administration dated 6/2/2018 for the estate of the late Francis and copy of certificate of title for the suit land. PW2 also produced copy of map at page 18 of his bundle as P.EX 4.
9. In cross, PW2 stated that his father in law died in 2008 and he was appointed as co -administrator in 2014 after the previous administrator passed on. PW2 reneged his earlier testimony about knowledge of the case by his father in-law against the late Francis. He told the Court that his father in-law left a will though no evidence to that end was adduced in Court.
 10. The 1st Defendant Daniel Muiruri Kihara testified as DW1 on his behalf and that of the 2nd Defendant. He relied on his statement dated 17/2/20202 as his evidence in chief. Further he told the Court that they have lived on the suit land since 1976 and are cultivating and quarrying on it. That the suit land dispute was determined during the lifetime of the late Francis and late Charles. DW1 produced the documents contained at page 8 – 65 of their Trial Bundle as DEX 1-18.
 11. On behalf of the 3rd and 4th Defendants, the 3rd Defendant Samwel Ndegwa Kihara testified as DW2. He relied on his witness statement dated 12/9/2023 and reiterated the evidence of DW1.

Written submissions

12. The Plaintiff through the firm of Kimani Charagu & Co. Advocates filed submissions dated 4/12/2023. Rehashing the facts of the case, the Plaintiffs submitted that they have proven that the suit land belonged to the late Charles whilst the Defendants have failed to prove that the award that determined the suit land in their favor. That the Defendants have failed to prove the purchase by way of sale agreement that Gakoi sold the land to the late Francis. Reliance was placed on Article 40 of the [Constitution of Kenya](#) and Sections 24, 25 and 26 of the [Land Registration Act](#) in urging the Court to allow their suit with costs.
13. In rebuttal the firms of TT Maswani Advocate and Muturi Njoroge & Co. Advocates filed joint submissions for the Defendants dated 4/12/2023. Rehashing the background of the case, the Defendants pointed out that since the Charles' suit had been dismissed on 17/7/2005 and his legal administrators failed to substitute him, that suit abated by operation of law. That having withdrawn the Application for substitution in Kiambu CMCC 1312 of 1993, the instant suit is defective and bad in law. Further that this suit is res judicata as espoused under Section 7 of the [Civil Procedure Act](#). That they have led evidence to show that the suit by late Charles against the late Francis was dismissed on 17/7/2005. That the dismissal orders remain unchallenged. That the prayers sought herein regarding the same subject matter with similar parties and /or litigating under the same titles offend the doctrine of res judicata as held in the Court of Appeal case of [Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others](#) [2017] eKLR. It was submitted that the issue herein was directly in issue in Kiambu CC 1312 of 1993; it was between same parties – Charles Thuo Kibatha and Francis Kihara Muiruri; the claim by Charles against Francis was dismissed with costs by a Court though subordinate to this Court, competent to try the suit and therefore the current Plaintiffs are estopped from resuscitating the claim. In the end, it was argued that the Plaintiffs' suit fails for abatement, *res judicata* and adverse possession and as such it ought to be dismissed with costs.



Analysis & determination

14. Having considered the rival pleadings, evidence and submissions before Court, the issues for determination are;
 - a. Whether the Plaintiffs' case is *res judicata*;
 - b. If the answer to the above is in the negative, whether the Plaintiffs have proven their case?
 - c. What orders should the Court grant?
15. The facts of this case are largely undisputed. The Plaintiffs aver that their late father was the registered owner of the suit land. That upon his demise and conclusion of the succession proceedings, the Plaintiffs who are also co- administrators of the estate of the late Charles found that the Defendants had trespassed on their land carrying out quarrying activities thereon.
16. The Defendants on their part, deny the Plaintiffs' claim of ownership of the land by the late Charles. They aver that the suit land belonged to their late father Francis who bought it from Gakoi Kingeti way back in 1976. That at the time of the purchase the land had not yet been subdivided. That in 1993 the late Charles sued the late Francis vide Kiambu civil suit no. 1312 of 1993 over ownership of the suit land and according to them the suit was dismissed on 17/7/2005. That later the 2nd Plaintiff's attempt to revive the suit by substituting the late Charles was through an Application dated 24/10/2018. That the Defendants opposed the motion and the 2nd Plaintiff withdrew it on 19/7/2019 and subsequently filed the instant suit.
17. The Defendants raise the plea of *res judicata* in objection. Before the matter was set down for hearing, the 1st and 2nd Defendant raised a Preliminary Objection dated 29/6/2021 assailing the Plaintiffs' suit for being *Res judicata*. In dismissing the Preliminary Objection, this Court held that the plea of *res judicata* called for analysis of evidence which ousted the realms of a Preliminary Objection as held in the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696.
18. It is trite that he who alleges must prove. Sections 107 - 109 [Evidence Act](#) provide;
 - “ 107. Burden of proof
 - (1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. Incidence of burden
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



19. Have the Defendants proven their plea of *res judicata*? *res judicata* is anchored under Section 7 of the [Civil Procedure Act](#) as follows:-

“7. *res judicata*

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this Section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) 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 a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this Section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this Section, be deemed to claim under the persons so litigating.”

20. 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
...”

21. The essence of this doctrine is that judicial determinations must be final, binding and conclusive. There must be finality to litigation. This position was affirmed by the Supreme Court decision in [John Florence Maritime Services Limited & Another v. Cabinet Secretary, Transport and Infrastructure & 3 Others](#) [2021] eKLR and for the plea of *res judicata* to succeed, the following ingredients must be satisfied;

- “ a. There was a former Judgment or order which was final;



- b. The Judgment or order was on merit;
 - c. The Judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties; and
 - d. There had to be between the first and the second action identical parties, subject matter and cause of action.”
22. The above position is reflected in South Africa as well. In the case of *FirstRand Bank Limited v. Badenhorst NO & Others* [2023] ZAGPJHC 779 it was observed that the doctrine of *res judicata* is an implement of justice that seeks to protect litigants, and the Courts, from repetitive litigation. To determine whether a suit is *res judicata* Q Leech JA held as follows; -
- “In my view, the cause of action must be determined from an assessment of the whole of the case in which the final Judgment was delivered. The basic ingredients or the factual basis – the necessary, material, central basic facts - that emerge from such an assessment must be compared against the facts distilled from the subsequent case in which the defence of *res judicata* is raised. The defence will find application if those facts are the same, and the other requirements are satisfied.”
23. To support their plea of *res judicata*, the Defendant produced Dexb 1 being the plaint filed in Kiambu Civil Case No. 1312 of 1993 dated 27/10/1993. The plaint by Charles Thuo Kibatha against Francis Kihara Muiruri was in respect of parcel of land known as LR No. 10872/58. The late Charles claimed ownership of the said parcel of land and accused the late Francis for trespassing on it and carrying quarrying activities. Inter alia he prayed for eviction, damages for trespass and permanent injunction against the late Francis.
24. In the instant suit the Plaintiffs’ claim as already summarized in the preceding paragraphs, claim ownership of the same parcel of land LR No. 10872/58. The suit is brought by the children/legal administrators of the estate of the late Charles against the children/legal administrators of the estate of the late Francis.
25. From the forgoing, it emerges that the subject matter in Kiambu Civil Case No. 1312 of 1993 and herein is the same i.e. LR No. 10872/58. The parties in the respective suits are the same with the instant ones litigating under the titles of their deceased fathers as Plaintiff and Defendants respectively.
26. The next question whether the matter of trespass was determined by a competent Court and in finality? It is not in dispute that though the matter was filed in the Chief Magistrates Court at Kiambu – CMCC No 1312 of 1993 , the same was referred to the Land Dispute Tribunal by consent of the parties on the 8/8/2002.
27. Section 3 of the *Land Dispute Tribunal Act* provided;-
- “(3)
- (1) Subject to this Act all cases of a civil nature involving a dispute
'as to-
Cap. 21.
 - (a) the division of or the determination of boundaries
to land including land hold in common:



(b) a claim to occupy or work land; or

(c) trespass to land.

shall be heard and determined by a Tribunal established under Section 4.”

28. The claim of the Plaintiff at the trial Court and in the tribunal was that of trespass of the suit land by the Defendants father then. Upon hearing the dispute the Land Dispute Tribunal panel of elders made an award in the following terms;

“The tribunal views this is a straight forward case of trespass and in order to give meaning to land titles and government approved plans Mr Charles Thuo Kibatha is to fence his plot and seek the help of the Provincial administration and even the police to enforce his exclusive rights to his plot.

Mr Francis Kihara son was advised to follow up with the surveyor pay the surveyor’s dues and collect his title and restrict his quarrying activities to their plot as he would be trespassing on Charles Thuo’s shamba and liable to criminal prosecution.”

29. From the record it is not disputed that the parties were heard at the tribunal. The late Francis Kihara Muiruri was represented by his wife and son while Charles Thuo Kibatha was in person. Going by the award referred to in the preceding paras, it is clear that the Judgement was in favour of the Plaintiff then (Charles Thuo Kibatha).

30. The Court finds that the dispute was heard by a competent Court (herein the Land Dispute Tribunal) which gave a final award dated the 8/1/2002

31. Section 7 of the *Land Dispute Tribunal Act* states as follows;

“7.

(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The Court shall enter Judgement in accordance with the decision of the Tribunal and upon Judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”

32. It is the role of the Chairman of the Tribunal to transmit the decision of the Tribunal for filing in the Court together with any dispositions thereof. Upon receipt the law mandated the Court to enter Judgement in accordance with the decision of the tribunal and a decree is issued for purposes of execution under the *Civil Procedure Rules*. It is clear that the process between the Tribunal and the Court did not require any intervention of the parties. The Plaintiffs have not explained why they chose to file a fresh suit on the same issues while the same were settled by the Tribunal in finality.

33. Section 3(9) of the said *Act* provided that notwithstanding any other written law no magistrate’s Court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of subsection (1). What this means is that the award of the tribunal subject to adoption by the Hon



Magistrate was the final Judgement. The role of the Magistrate was only to adopt the award as an order of the Court for purposes of drawing the decree therein to aid execution.

34. Section 8 of the *Land Dispute Tribunal* provides that any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.
35. Further a party that is aggrieved with the decision of the Provincial Appeals Board has a right to appeal to the High Court under Section 8 (9) of the *Act* that states as follows;

“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

(10) A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”
36. There is no evidence that the said award was appealed either to the Provincial Appeals Board or to the High Court.
37. For purposes of answering the first issue the Court finds that there was an award emanating from a Tribunal properly constituted with legal power to determine the dispute of the parties. And further that the dispute was determined to finality. The question is therefore answered in the positive.
38. Having arrived at the above conclusion I find no necessity to determine the second issue. For the reasons given above, the Court finds that the suit is res judicata.
39. It is hereby dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MAY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:-

Plaintiff – Absent

Aswani for 1st and 2nd Defendants

3rd and 4th Defendants - Absent

Court Assistant – Phyllis

