



Gatiba & 2 others v Kimani (Suing as the administrator of the Estate of Pius Kimani Mutua - Deceased) (Environment & Land Case 119 of 2020) [2024] KEELC 4999 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 119 OF 2020**

JG KEMEI, J

JUNE 24, 2024

BETWEEN

SIMON KIARIE GATIBA 1ST PLAINTIFF

JAMES M KARIUKI 2ND PLAINTIFF

SAMUEL KULOBA KIARIE 3RD PLAINTIFF

AND

JANE WATIRI KIMANI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PIUS KIMANI MUTUA - DECEASED) DEFENDANT

RULING

1. Coming up for determination is the Defendant’s Notice of Preliminary Objection dated 28/6/2022 in opposition to the Plaintiff’s Originating Summons dated 27/11/2020 premised on grounds That;
 - a. The claim as contained in the Originating Summons aforesaid ought to be struck out on grounds *Res Judicata* with costs to the Defendant.
 - b. The Court lacks jurisdiction to deal with the matter since it has already been decided by a Court of competent jurisdiction and no appeal lodged against the decision of Lady justice Hannah Okwengu in Nairobi High Court Civil Appeal No. 757 of 2002 – *Pius Kimani Mutua Vs. Gatiba Kiarie*.
 - c. The present suit is a classic case of abuse of the processes of this Honorable Court.
2. When the Court retired to write its Ruling that was scheduled for 13/4/2023, the Court noted that the pleadings being alluded to in the Preliminary Objection were illegible and directed parties to file a complete record of the following cases; SRM No. 131 of 2002 Pius Kimani Mutua vs Gatiba Kiarie and HCCA No. 75 of 2002 Pius Kimani Mutua vs Gatiba Kiarie.



3. The Preliminary Objection was canvassed by way of written submissions. The Defendant filed submissions dated 10/3/2023 through the firm of Mwendwa Mwinzi Advocates. The Plaintiffs did not file any submissions.
4. The Defendant drew three issues for determination; whether the suit ought to be struck out for being *Res Judicata*; whether the Court lacks jurisdiction to determine this suit and whether the suit is an abuse of Court process.
5. Citing Section 7 of the *Civil Procedure Act*, the Defendant submitted that the subject matter herein being ownership of land parcel No. Tigoni/Karamba-ini/168 is the same as the one in Nbi HC Appeal No. 757 of 2002 – Pius Kimani Mutua v Gatiba Kiarie (the Nairobi Appeal). That in that appeal the Court found that the Respondent therein was illegally occupying the suit land. As to the issue of similar parties, the pleadings herein show that the Defendant is sued in her capacity as the legal representative of the estate of Pius Kimani Mutua. That in the Defendant’s Replying Affidavit dated 24/2/2021, the Plaintiffs are the children of Gatiba Kiarie and Gatiba Kiarie and Pius Kimani Mutua were the parties in the Nairobi Appeal. That the instant claim by Gatiba’s children claiming adverse possession over the suit land cannot stand in light of the Nairobi Appeal finding that Gatiba’s occupation was illegal. That the Court in the Nairobi Appeal vested full ownership of the suit land to Pius Kimani Mutua. Accordingly, in view of the forgoing same subject matter, same parties and a decision of a Court of competent jurisdiction, there should be finality to litigation.
6. The Defendant further posited that in light of the Res Judicata bar, this Court lacks jurisdiction to entertain the present suit. Reliance was placed on the classical case of *The Owners of Motor Vessel “Lilian S” Vs. Caltex Oil Kenya Limited* (1989) KLR 1. In answering the last issue in the affirmative, the Defendant submitted that the Plaintiffs attempt to revive already determined issues amount to an abuse of Court process. To support that proposition the case of *Muchanga Investments Limited Vs. Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR was cited.
7. The singular issue for determination is whether the Preliminary Objection is merited. The plea of *Res Judicata* is anchored under Section 7 *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.”

8. 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...”
9. 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 Vs. 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.”
10. The above position is reflected in South Africa as well. In the case of *FirstRand Bank Limited Vs. 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.”
11. The Plaintiffs Originating Summons herein dated 27/11/2020 inter alia seeks orders that the Plaintiffs have acquired land parcel Tigoni/Karambaini/168 by way of adverse possession and that the Estate of the late Pius Kimani Mutua is holding the said parcel in trust for them. In the Supporting Affidavit it is deponed that the 1st Plaintiff started living on the suit land in the year 1976 while the 2nd, 3rd and 4th Plaintiffs were born, raised and even married while living on the suit land. That the suit land belonged to the late Pius Kimani Mutua and the Defendant is sued as his legal administrator. That some of the Plaintiffs’ kin are buried on the suit land and that the claim for adverse possession has thus crystalized.
12. Opposing the Originating Summons, the Defendant filed her Replying Affidavit sworn on 24/3/2021. She deponed that she is the sole administrator of her late husband Pius Kimani Mutua who was the registered owner of the suit land. That before his demise, Pius had sued the late Gatiba Kiarie in Limuru SRMCC 131 of 2001 in which the Court ordered that the suit land be shared equally between



the parties. Aggrieved with that Judgment, Pius Kimani Mutua lodged an appeal being Nbi HCCA 757 Of 2002 – Pius Kimani Mutua Vs. Gatiba Kiarie. The Appellate Court set aside the subordinate Court Judgment and vested ownership of the entire suit land in the Appellant, Pius Kimani Mutua. Accordingly, the claim of adverse possession cannot stand for want of fulfilling the ingredients of adverse possession.

13. I have considered the bundle of documents filed herein. It is not in doubt that Nbi HCCA 757 of 2002 was between Pius Kimani Mutua and Gatiba Kiarie. The appellate Court delivered Judgment on 27/6/2008 as follows;
 - a. That the appeal be and is hereby allowed.
 - b. That the Judgment of the lower Court be and is hereby set aside and substitute it thereof with a Judgment in favor of the Appellant on the main claim and dismissing the Respondent's counter claim.
 - c. That the respondent shall vacate the suit property within 90 days from the date hereof.
 - d. That in default the Appellant shall be at liberty to apply for execution in the lower Court.
14. It emerges that the issues before Court were ownership of the land; the appellant was the Plaintiff in Limuru SRMCC 131 of 2001 and had sought eviction of the Respondent from the suit land. The Trial Court ordered that the suit land be divided equally between the parties and it is this decision that provoked the Nairobi Appeal. The respondent had raised a counter claim for trust; that the appellant was holding the suit land in trust for him. The Appellate Court in its analysis found the claim of trust could not stand and that the suit land solely belonged to the Appellant who purchased it from Mbari ya Muna, a land buying company. It was the turn of the Respondent to be aggrieved and he filed a notice of appeal dated 23/12/2008. The current position of that appeal is not contained in the record before me.
15. Having said that I turn to the criteria of *Res Judicata* in Section 7 of the [Civil Procedure Act](#). Whereas the parties litigating here are the same or litigating under the same title as the parties in the Nairobi Appeal, I note that the issue of adverse possession was not raised in the previous suits. There is no final determination by a Court of competent jurisdiction on the claim of adverse possession. To that extent I hold that the plea of *Res Judicata* cannot succeed in the given set of facts.
16. The upshot of the foregoing is that the Preliminary Objection is unmerited and it fails.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st, 2nd, 3rd and 4th Plaintiffs – Absent but served

Mwinzi for Defendant

Court Assistants – Phyllis/Oliver

