



**Gachina v Njonge & another (Environment & Land Case  
E020 of 2022) [2024] KEELC 4581 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4581 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E020 OF 2022**

**BM EBOSO, J**

**JUNE 5, 2024**

**BETWEEN**

**EVANSON KURIA GACHINA ..... PLAINTIFF**

**AND**

**JAMES NGANGA NJONGE ..... 1<sup>ST</sup> DEFENDANT**

**LEGAL REPRESENTATIVE OF THE ESTATE OF DOUGLAS NGANGA**

**NJONGE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Falling for determination in this ruling is the notice of motion dated 15/9/2023 brought by James Nganga Njonge [referred to in this ruling as the “the 1st defendant”]. Through the application, the 1st defendant seeks an order dismissing the suit on the ground that the suit is res judicata. I will outline a brief background to the application before I analyse and dispose the key issue that falls for determination in the application. Part of the background was outlined in the preceding ruling rendered by this court on 14/6/2023. No prejudice will be suffered by replicating the same background in this ruling. For clear identification of parties, I will, in this ruling, refer to Evanson Kuria Gichina as “the plaintiff”. The estate of the late Douglas Nganga Njonge will be referred to as “the 2nd defendant”.
2. The suit was initiated through an originating summons dated 8/6/2022, which was taken out on 8/6/2022. Through the originating summons, the plaintiff seeks the following verbatim orders against the defendants:
  1. That a declaration that the title Douglas Nganga Njonge and James Nganga Njonge holding in trust for Michael Ndungu Njonge to the land parcel Karai/ Gikambura/1915 (suit land) has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act* [sic].



2. That the applicant has become entitled to adverse possession to the suit land Karai/ Gikambura/1915 and registered under the Land Act in the name of the Defendant [sic].
  3. That an order that the Land Registrar Kiambu register the applicant as absolute proprietor of land parcel number Karai/ Gikambura/1915 in place of the respondent [sic].
  4. That the Land Registrar Kiambu be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the respondent to the applicant.
  5. Costs of the suit.
3. The case of the plaintiff is that he entered into an agreement for purchase of land parcel number Karai/ Gikambura/1915 [referred to as “the suit property”] from one Michael Ndungu Njonge in January 1995. The said Michael Ndungu Njonge died in August 1995 and his wife, Grace Wanjiru Ndungu, agreed to proceed with the sale at a sale price of Kshs 260,000. He paid Kshs 45,000 and deposited the balance with his lawyer, pending completion. He then entered into possession of the suit property in 1996. However, Grace Wanjiru Ndungu died before completing the transfer. He has been in exclusive possession of the suit property since 1996, hence he has acquired title to it through adverse possession.
  4. Upon being served with the originating summons, the 1st defendant filed a notice of preliminary objection dated 19/7/2022, through which he invited this court to strike out the suit on the ground that the suit is res judicata because the dispute in the suit had been heard and determined by the Principal Magistrate Court at Kikuyu in Kikuyu PMCCC Case No 43 of 2012. On 21/1/2022, the court directed the 1st defendant to ventilate the issue of res judicata through a formal application that would enable him place before the court the pleadings and determination relating to the previous suit. The 1st defendant subsequently brought an application dated 9/5/2023.
  5. Upon considering the application dated 9/5/2023, this court rendered a ruling on it, dated 14/6/2023, in which it struck out the application on the ground that the 1st defendant had failed to exhibit relevant pleadings relating to the previous suit. The court rendered itself thus:
    - “ 10. What is logically discernible from the above legal framework and explanatory notes is that, a party seeking a finding to the effect that a suit is res judicata is expected to place before the court the relevant pleadings and determination relating to the previous suit, to enable the court discern what the precise issues were in the previous suit and relate those issues to the suit that is contended to be res judicata.
    11. The 1st defendant did not exhibit the relevant pleadings. This court does not have all the precise issues that arose out of the pleadings that were filed in Kikuyu SPMCC Case No 43 of 2012. This court cannot therefore make a conclusive or definitive finding on the question of res judicata without the said pleadings.
    12. In the circumstances, the court will strike out the notice of motion dated 9/1/2023 on the ground that the 1st defendant (applicant in the notice of motion) failed to place before the court the relevant pleadings. The 1st defendant will, however, be at liberty to bring a competent application and ventilate the issue of res judicata if he so desires. The 1st defendant will bear costs of the application.”



6. Subsequent to the ruling of 14/6/2023, the 1st defendant brought a notice of motion dated 15/9/2023 seeking an order dismissing the plaintiff's suit on the ground of res judicata. The application was supported with the 1st defendant's affidavit sworn on 15/9/2023. It was canvassed through written submissions dated 4/12/2023, filed by M/s Mbuthia Kinyanjui & Co Advocates.
7. The case of the 1st defendant is that this suit is res judicata and offends the provisions of Section 7 of the *Civil Procedure Act*. He contends that in 2012, the plaintiff [Evanson Kuria Gachina] filed Kikuyu SPMC Civil Case No 43 of 2012 against him and against Lucy Wambui Ndungu, seeking to be granted legal ownership of land parcel number Karai/Gikambura/1915 [the suit property]. He adds that the said suit was fully heard and determined on merits. It is his case that the Magistrate Court rendered a final Judgment in which it found the plaintiff's claim to be unmerited. It is the position of the 1st defendant that the subject matter in Kikuyu SPMC Civil Case No 43 of 2012 and the subject matter in the present suit is the same, to wit, land parcel number Karai/Gikambura/1915.
8. The plaintiff opposes the application through his replying affidavit sworn on 17/11/2023 and written submissions dated 5/12/2023, filed by M/s Muhuhu & Company Advocates. The case of the plaintiff is that the application is frivolous, and that this suit is not res judicata. He contends that in Kikuyu SPMC Civil Case No 43 of 2012, his claim was based on contract and he sought an order compelling the Executive Officer of the Court to endorse the transfer forms which the 1st defendant had refused to sign, adding that the present suit is based on adverse possession under the *Limitation of Actions Act*. He further contends that he has been in continuous uninterrupted possession of the suit land since 1995. He urges the court to reject the application.
9. The court has considered the parties' respective cases and rival submissions. The single issue to be determined in the application under consideration is whether this suit is res judicata.
10. The common law doctrine of res judicata has been legislated into statute law under Section 7 of the *Civil Procedure Act* which provides as follows:

“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.”
11. The Parliament of Kenya went a step further to enact the following explanatory notes as part of the statute:

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.

12. The rationale of the doctrine of res judicata was outlined by the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR as follows:

“The rule or doctrine of res judicata serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

13. The Court of Appeal in *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR reiterated that the elements of res judicata are conjunctive rather than disjunctive. This means that for a suit to be deemed as res judicata on account of a former suit, the following five elements must be established:

- a. The suit or issue was directly or substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.

14. It is this suit res judicata? The 1st defendant exhibited the pleadings, proceedings and judgment relating to Kikuyu SPMC Civil Case No. 43 of 2012. The Court has read them. The Court has also read the pleadings in the present suit. There is no doubt that the subject matter in the two suits is land parcel number Karai/ Gikambura/ 1915. In Kikuyu SPMC Civil Case No. 43 of 2012, the plaintiff sought to be registered as proprietor of the said land, contending that he had purchased the land and he had been in possession of it. The court considered his claim and rendered a Judgment in which it found the plaintiff's claim unmerited and dismissed it. Eight years after the dismissal, the plaintiff brought the present claim, anchoring it on the doctrine of adverse possession.

15. It is clear from the pleadings, evidence and judgment in Kikuyu SPMC Civil Case No. 43 of 2012 that the 1st defendant resisted the plaintiff's claim over the suit land. The 1st defendant's resistance led to dismissal of the plaintiff's claim in 2014.

13. The plaintiff had the opportunity to mount a claim of adverse possession in 2012. He did not do so. He elected to pursue a claim of specific performance of a sale of land contract. Eight years after he lost the claim, he decided to have a second bite at the cherry by mounting a claim of adverse possession. Clearly, the 12 year statutory threshold for the crystallization of title under the doctrine of adverse possession



cannot be said to have been met given that the 1st defendant's defence against the plaintiff's claim of ownership of the suit land was upheld through the Judgment rendered in 2014.

14. The totality of the foregoing is that the court is satisfied that the present suit has all the essential elements of *res judicata*. Clearly, the suit offends the provisions of Section 7 of the [Civil Procedure Act](#).
15. Consequently, this suit is hereby rejected for being *res judicata*. The suit is hereby struck out. The plaintiff shall bear costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Ms Ngigi for the Applicant

Ms Odhiambo for the 1st Defendant

Court Assistant: Hinga

