



**Mereu v Mwarangu (Environment & Land Case E002 of 2023)
[2024] KEELC 5544 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E002 OF 2023**

CG MBOGO, J

JULY 24, 2024

BETWEEN

PETER OLE MEREU PLAINTIFF

AND

CHARLES CHEGE MWARANGU DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 5th March, 2024 filed by the defendant/applicant, and it is expressed to be brought under Section 7 of the [Civil Procedure Act](#) seeking the following: -
 1. That the suit be struck out with costs as it is *res judicata*.
 2. That the costs of this application be borne by the defendant/applicant.
2. The application is premised on the grounds inter alia that the issue of ownership surrounding plot No Narok Cis/Mara-Oloroito/18 between the parties has already been decided in Narok CMCC No 34 of 2014.
3. The application is supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/ applicant deposed that he filed suit in regard to plot No Narok Cis/Mara-Oloroito/18 vide CMCC No 34 of 2014 which was defended by the plaintiff/respondent, and which suit included a counter claim. He deposed that the matter was heard and determined and the judgment was delivered on 29th August, 2023.
4. The defendant/applicant deposed that the judgment was in his favour, and being aggrieved, the plaintiff/respondent had a recourse which would be to appeal against the judgment. Further, he deposed that the plaintiff/respondent does not deny the existence of the judgment in the lower court, and in filing the current proceedings with full knowledge that a similar case was filed and determined,



- the plaintiff/respondent is leading the court in a scenario where there will be two decisions. He also deposed that it is in the interest of justice that the suit be struck out.
5. The plaintiff/ respondent filed his replying affidavit sworn on 28th May, 2024. The plaintiff/ respondent deposed that the issue before the magistrate's court is completely different from the present case. That in the previous suit, the defendant/ applicant was claiming proprietary rights as the registered owner where he sought an eviction. Further, he deposed that his defence and counterclaim was based on fraudulent acquisition of the title held by the defendant/ applicant, and adverse possession was not a claim before the magistrates' court.
 6. The plaintiff/respondent further deposed that the defendant/ applicant has no defence to his claim, and now wishes to invoke the doctrine of *res judicata*. Further, he deposed that there is no other forum mandated to deal with his plea except this court. He further deposed that in order for a case to be *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question, the entire pleadings of the previous case, and the instant case to ascertain the issues determined in the previous case whether they are the same in the subsequent case and whether they are covered by the decision of the earlier case.
 7. The application was canvassed by way of written submission. The plaintiff/ respondent filed his written submissions dated 10th June, 2024 where he raised one issue for determination which is whether the instant suit was directly and substantially in issue in the previous suit.
 8. On this issue, the plaintiff/ respondent while relying on the cases of *Christopher Kenyariri v Salama Beach* [2017] eKLR, *Njacami v Mue & 2 others* (E038 of 2022) eKLR, *Michael Chebii Toroitich v Peter Mogin Yatich Chebii* [2013] eKLR, and *Njoki Wainaina v Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties)* [2021] eKLR submitted that if indeed the issue of adverse possession had been raised, the court would have downed its tools for lack of jurisdiction on the matter.
 9. The plaintiff/ respondent further submitted that he has acquired the prescriptive right and that his possession of the suit land was as of right and in the manner inconsistent with the rights of the registered owner. Reliance was placed in the cases of *Derick Masini Onami v Josam Ibwana* [2021] eKLR and *Ramji Megji Gudka Limited v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR.
 10. The defendant/ applicant filed his written submissions dated 10th July, 2024 where he raised one issue for determination which is whether the issue surrounding ownership plot number Narok Cis/ Mara-Oloroito/ 18 between the parties herein has already been decided in Narok CMCC. No 34 of 2014.
 11. On this issue, the defendant/ applicant submitted that the suit was fully heard and determined vide the judgment delivered on 29th August, 2023 by the Magistrates' Court, and that it is clear that all the issues the plaintiff/ respondent may have intended to have the court decide on, he had a chance of including the counter claim. Further, he submitted that the plaintiff/ respondent cannot thus bring another suit as he is barred by law under Section 7 of the *Civil Procedure Act*.
 12. The defendant/ applicant further submitted that the plaintiff/ respondent wants this court to act in retrospect. He went on to submit that the plaintiff/respondent slept on his right and that this court will not wake him up. He also submitted that in determining the instant suit, the court will be put in an awkward position as it is being called upon to give another decision on a similar property.
 13. I have considered the application, the replying affidavit and the written submissions filed by the parties herein. In my view, the issue for determination is whether the instant matter is *res judicata*.



14. The principle of *res judicata* is provided 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.

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.”

15. From the above, it will be observed that for *res judicata* to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit, between the same parties, or between parties under whom they are litigating. The Court of Appeal in the case of [Uburu Highway Development Ltd v Central Bank & others](#), CA No 36 of 1996 held that: -

“In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

16. The plaintiff/respondent filed originating summons dated 18th October, 2023, seeking determination of the following issues: -

1. A declaration that the defendant's right to recover the suit property Cis-Mara Oloroito/18 is barred under [Limitations of Actions Act](#) Cap 22 of the Laws of Kenya, and his title over the suit property in occupation/use of the plaintiff thereto extinguished on grounds that the plaintiff herein has openly, peacefully, and continuously been in occupation/use and possession of the aforesaid suit property for uninterrupted period exceeding 12 years with effect from 1991.
2. That there be an order that the plaintiff be registered as the proprietor of parcel No Cis-Mara Oloroito/18 in place of the defendant and/or the Narok Land Registrar be directed to rectify the register thereof to reflect the plaintiff's ownership of the aforesaid parcel of land.
3. That the defendant herein be ordered to execute all the requisite transfer of land documents necessary to have the plaintiff be registered as the proprietor of the suit Cis-Mara Oloroito/



18 measuring 14 acres, decreed by the court, in default, the Deputy Registrar be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of this honourable court.

4. A declaration that the plaintiff has acquired the freehold interest of the suit land Cis-Mara/Oloroito/18 by his adverse possession thereof for a period exceeding more than 12 years i.e. from at least 1991 to date.
 5. The costs of this originating summons be borne by the defendant.
 6. Such further and/ or other orders be made as the court may deem fit and expedient in the circumstances of this case.
17. In the instant case, the plaintiff/ respondent is seeking ownership of the suit property by virtue of adverse possession. In contending with the ownership, the defendant/ applicant filed the instant application stating that the ownership of the suit property has already been determined in CMCC No 34 of 2014, and if the court proceeds to hear and determine the originating summons, there will be two decisions regarding the same property which will bring uncertainty in law.
18. Having fully considered the application, I note that the plaintiff/ respondent acknowledges the judgment delivered by the magistrates' court in CMCC No 34 of 2014. I have perused the said judgment and in applying the principles of *res judicata*, I find that the matter before the magistrates' court was between the same parties wherein the plaintiff/respondent was the defendant, and the defendant/ applicant was the plaintiff in the former suit. The issue before the court was ownership, where the defendant/applicant, as the registered owner of the suit property, sought for eviction against the plaintiff/ respondent.
19. The plaintiff/ respondent filed his defence and counter claim to the suit property, where he pleaded particulars of fraud, against the defendant/applicant as to the manner in which he obtained the title deed. The matter was heard and judgment was delivered on 29th August, 2023. Paragraph 25 of the said judgment recognizes ownership of the suit property by the defendant/ applicant. In conclusion, the court granted the orders of eviction against the plaintiff/ respondent amongst other orders.
20. As it stands, the judgment of the magistrates' court remains in force as there is no indication of any appeal against the said decision.
21. The plaintiff/ respondent now argues that the claim of adverse possession was not an issue before the magistrates' court and therefore the instant suit is not *res judicata*. As I have understood him, the plaintiff/ respondent wants this court to ignore the decision arrived at by the magistrates' court and assume that he can claim ownership, which he was not able to prove in the former suit, before this court which is vested with jurisdiction to hear and determine a claim of adverse possession.
22. In the case *Nancy Mwangi t/a Wortblin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* (2014) eKLR Gikonyo, J while dealing with the issue of *res judicata* stated that: -
- “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 court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* (2001) EA 177, the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J.. in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991



(unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.”

23. From my analysis, this court finds that the instant suit is *res judicata*. The attempt by the plaintiff/respondent herein, is trying to introduce a different claim over the same subject matter, whereas there is a decision concerning the same property. The common denominator in the former suit and the instant suit is a claim of ownership, although with a different approach. I find this to be gross abuse of the court process to say the least. In allowing the plaintiff/ respondent to proceed with this matter, that would be causing confusion as there is likelihood of two conflicting decisions. This court will not be caught in disrepute over such unprocedural acts.
24. Arising from the above, I find merit in the Notice of Motion dated 5th March, 2024. The originating summons dated 18th October, 2023 is hereby struck out with costs to the defendant/ applicant. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

24/07/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

