



**Mahinda v Mahinda (Environment & Land Case 65 of 2016)  
[2024] KEELC 6006 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 65 OF 2016  
JO OLOLA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**ELIZABETH WANGECHI MAHINDA ..... PLAINTIFF**

**AND**

**MAURICE MUREITHI MAHINDA ..... DEFENDANT**

**RULING**

1. By a Plaint dated 8<sup>th</sup> April 2016, Elizabeth Wangechi Mahinda (the Plaintiff) sought for an eviction order to issue against the Defendant removing him from the parcel of land known as Ruguru/Chieni/277. In addition, the Plaintiff sought for what was described as loss and damages as well as mesne profits.
2. The basis of those prayers were the Plaintiff's contention that she is the registered proprietor of the suit land having lawfully inherited the same following the death of her husband Eustace Wamuria Mahinda on 1<sup>st</sup> July 2013. She accused the Defendant of being in forceful occupation thereof and of refusing to vacate the same despite several requests.
3. Morris Mureithi Mahinda (the Defendant) was opposed to the grant of the orders sought in the Plaint. In his Statement of Defence and Counterclaim dated 11<sup>th</sup> May 2016, the Defendant asserted that the suit property was given to him by his deceased brother who was the Plaintiff's husband in 1996 and that he had since occupied the same without any interruption.
4. The Defendant accuses the Plaintiff of taking out Letters of Administration in Nairobi following the death of her husband and intentionally concealing the succession cause from himself.
5. By way of his counterclaim, the Defendant prays for Judgment against the Plaintiff and urges the court to grant orders as follows:-
  1. The Plaintiff's suit be dismissed;



2. The Defendant's counterclaim be awarded as prayed;
  3. An order for the Land Register for land parcel No. Ruguru/Chieni/277 be rectified and the Defendant be registered as the sole proprietor;
  4. Costs to be awarded in favour of the Defendant; and
  5. Any other relief that this court may deem fit.
6. Subsequently the Plaintiff withdrew her suit and by a Notice of Preliminary Objection dated 7<sup>th</sup> November 2023, the Plaintiff objects to the Defendant's Counterclaim on the grounds:-
1. That the issues raised in the Counterclaim Paragraphs 9, 10, 11, 12, 13, 14, 15 and 16 together with the prayers/reliefs sought in the Counterclaim are *res judicata* as they were the same/similar (sic) issues that had been raised in two(2) other matters between the same parties over the same subject matter i.e Title No. Ruguru/Chieni/277 that have already been determined namely:-
    - a. Nairobi Succession Cause No. 308 of 2014; In the matter of the Estate of Eustace Wamuria (Deceased);
    - b. Nyeri ELC No. 26 of 2019 (OS); Maurice Mureithi Mahinda & 2 Others –v- Elizabeth Wangechi Mahinda & 2 Others.
  2. That the Counterclaim has been overtaken by events as the Defendant is not in occupation of the subject matter Title No. Ruguru/Chieni/277.
7. In support of the Preliminary Objection, the Plaintiff has filed an Affidavit sworn on 7<sup>th</sup> November 2023 wherein she annexes two decisions arising from the two cited cases in support of her position that the issues raised in the Counterclaim are *res judicata*.
8. I have carefully perused the Notice of Preliminary Objection vis-à-vis the pleadings and the material placed before the court. As was stated in *Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Ltd* [1969] EA 696:
- “ .....a Preliminary Objection consists of a pure point of law which has been pleaded or which arises by a clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....
- A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. By her Notice of Preliminary Objection, the Plaintiff asserts that the issues raised by the Defendant in his Counterclaim as filed herein are *res judicata* as the same have been the subject of two judicial determinations. By her Plaint as filed herein dated 8<sup>th</sup> April 2016, the Plaintiff had sought for an eviction order removing the Defendant from the suit property on the ground that the Plaintiff is the registered proprietor thereof.
10. In his Statement of Defence and Counterclaim dated 11<sup>th</sup> May 2016, the Defendant asserted that the suit property was given to him by his brother who was the Plaintiff's husband as a gift in 1996 and that



- he had hence occupied the same without interruption. He accused the Plaintiff of taking out Letters of Administration in Nairobi High Court Succession Cause No. 308 of 2014; In the matter of the Estate of Eustace Wamuria (Deceased) secretly and without his knowledge.
11. By his Counterclaim as filed herein, the Defendant sought to have the Plaintiff's title canceled and that the same be registered in his favour as the sole proprietor thereof.
  12. As it turned out, the Defendant filed objection proceedings in the said Succession Cause in which he similarly accused the Plaintiff who was the Petitioner therein of obtaining Letters of Administration of the estate of his brother by concealment of relevant facts. It was his case that the suit property had been given to him by his deceased brother as a gift in the year 1996 and that he was the rightful owner thereof.
  13. In a Ruling delivered on 7<sup>th</sup> June 2019, the Honourable Lady Justice Asenath Ongeru ordered the Defendant to vacate the suit property within 60 days after finding as follows at Paragraphs 20 to 22 of the Ruling:
    20. I find that the grant was properly issued to the Petitioner/Respondent as she is the rightful heir of the deceased's estate in accordance with the law governing Intestate Succession;
    21. On the issue as to whether the Petitioner/Respondent concealed material facts in order to obtain the grant, I find that the answer is No; and
    22. There is no evidence that the deceased had gifted the Objector/Applicant with the suit property. The Objector/Applicant has no colour of right to be in occupation of the suit property. He is an intermeddler in the estate of the deceased and should vacate forthwith."
  14. Some three (3) months after he was ordered to vacate the suit land, the Defendant instituted Nyeri ELC No. 26 of 2019 by way of an Originating Summons in which he together with two others asserted that they had acquired the suit property by way of adverse possession.
  15. In response to that claim, the Plaintiff herein again filed another Notice of Preliminary Objection wherein they stated that the issues raised in the new case had been substantially and directly in issue in Nairobi High Court Succession Cause No. 308 of 2014 aforesaid.
  16. Having considered the Objection and in a Ruling delivered in the said matter by this court on 28<sup>th</sup> July 2022, the court came to the conclusion that Nyeri ELC No. 26 of 2019 (OS) was filed in abuse of the court process as it was clear that the same dealt with the very same matters and were indeed between the same parties in the Succession Cause.
  17. Having achieved their aim of evicting the Defendant from the suit property, the Plaintiff came to court and sought to withdraw the suit. While the Plaintiff's suit was marked as withdrawn on 9<sup>th</sup> November 2023, the Defendant insisted on proceeding with their claim as raised in the counterclaim.
  18. Having considered the material placed before me, it was evident that the issues raised by the Defendant as the Objector in the said Nairobi High Court Succession Cause No. 308 of 2014 are the very same issues being raised by the Defendant in his Counterclaim herein. The dispute was determined finally and conclusively by the High Court in the Ruling delivered on 7<sup>th</sup> June 2019 which required the Defendant to vacate the suit property within 60 days.



19. That being the case, it was evident that the issues raised in the Defendant’s Counterclaim herein are now res judicata. In regard to the doctrine of res judicata, Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, commands as follows:-

“No court shall try any suit or issues 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 issues had been subsequently raised, and has been heard and finally decided by such court.”

20. Commenting on the role the doctrine plays in Nicholas Njeru –v- Attorney General & 8 Others [2013] eKLR, the Court of Appeal observed as follows:-

“The doctrine of res judicata is founded on Public Policy and is aimed at achieving two objectives, namely; that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation....”

21. It follows that in the circumstances herein, I am persuaded that the Defendant’s Counterclaim is res judicata and that the Plaintiff’s Notice of Preliminary Objection dated November 7, 2023 has merit. I allow the objection and hereby strike out the Counterclaim dated 11<sup>th</sup> May 2016 with costs to the Plaintiff.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AND IN OPEN COURT AT NYERI THIS FRIDAY 20TH DAY OF SEPTEMBER, 2024.**

In the presence of:

Mr. Kanyi holding brief for Ndurumo for the Plaintiff.

No appearance for the Respondent.

Court Assistant: Michael

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**J. O. OLOLA**  
**JUDGE**

