



Kyallo v Mutuku (Sued as the Administrator of the Estate of Samson Mutuku Mbithi) (Environment and Land Appeal E034 of 2023) [2024] KEELC 7018 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E034 OF 2023
A NYUKURI, J
OCTOBER 23, 2024**

BETWEEN

JOSHUA WELLINGTON KYALLO APPELLANT

AND

DANIEL KINGI MUTUKU RESPONDENT

SUED AS THE ADMINISTRATOR OF THE ESTATE OF SAMSON MUTUKU MBITHI

(Being an Appeal from the Ruling of Honourable V. Ochanda, SRM, in Machakos CMC ELC Case No. 114 of 2022 (OS) delivered on 18th October 2023)

JUDGMENT

Introduction

1. This appeal was instituted by Joshua Wellington Kyallo challenging the ruling of Honourable V. Ochanda SRM, delivered on 18th October 2023 in Machakos MCELC No. 114 of 2022(OS). In the impugned ruling, the learned trial magistrate dismissed the appellant’s application dated 28th April 2023 seeking leave to amend originating summons; orders of temporary injunction to restrain the respondent (defendant) from interfering with Parcel No. LR. Masii/Embui/94 (suit property) pending hearing and determination of the suit, and or orders of status quo.

Background

2. In a notice of motion dated 28th April 2023, the appellant (the applicant/plaintiff in the lower court) sought the following orders;
 - a. Spent.



- b. That the applicant be granted leave to amend the originating summons to include a prayer for injunctive orders in order to meet the ends of justice in this case.
 - c. That the attached draft copy of the amended originating summons upon leave to be deemed filed, filing fees having been paid for at the time of filing.
 - d. Spent.
 - e. That pending the hearing and determination of the main suit, the Honourable Court do issue an interlocutory injunctive order restraining the respondent and or his agents or assigns, representatives or any other person claiming under him whomsoever from interfering whether by trespass, sale, transfer or in any other manner alienating or disposing off land parcel number L.R. No. Masii/Embui/94 to the detriment of the applicant's ownership interests through adverse possession.
 - f. That in the alternative and given the nature of this matter, the urgency in preserving the subject matter of the suit and again given the time involved in determining the interlocutory proceedings, the court be pleased to issue an order that the status quo in regard to the property L.R. No. Masii/Embui/94 by ensuring that the respondent does not change the current registration of ownership from the late Mutuku Mbithi to the respondent's name Daniel Kingi Mutuku or any other person claiming from the estate.
 - g. That the orders issued by the court be served upon the County Land Registrar for his/her record and action as is appropriate.
 - h. That the costs of this application be provided by the respondent.
3. The application was supported by the applicant's affidavit dated 28th April 2023. The applicant's case was that the respondent was confirmed as the administrator of the Estate of Samson Mutuku Mbithi and that the suit property is for transfer to one Peter Mulei as per the confirmed grant. He stated that the applicant had been on the suit property for 25 years and had acquired ownership thereof by adverse possession. He expressed apprehension that since the letters of administration had been confirmed, the respondent could dispose off the property and thereby prejudice the applicant's claim and his claim will be rendered nugatory.
 4. He stated that although there was a case being Machakos CMCC No. 1061 of 2006 where the respondent had obtained judgment against persons who sold land to the applicant, his claim based on adverse possession was a different cause of action. He also averred that his application to have the suit property removed from the distribution schedule of the deceased's assets, was dismissed by the court.
 5. He added that he had developed the suit property by planting citrus fruits. He stated that he entered the suit property by purchase, where he made a final instalment payment on 2nd May 2003 and having failed to obtain consent, time began running for purposes of adverse possession on 2nd November 2023.
 6. The application was opposed. Daniel Kingi Mbithi filed a replying affidavit sworn on 12th May 2023. He stated that he was the administrator of the estate of the late Samson Mutuku Mbithi. He stated that the application could not be granted as there was no prayer for permanent injunction in the originating summons. He confirmed issuance of a confirmed grant and stated that the applicant's protest regarding the suit property was dismissed and that this application is an appeal against the decision of the High Court, which is improper.
 7. Regarding Machakos CMCC No. 1061 of 2006, he stated that on 20th June 2014, in an amended claim, the applicant sued Peter Mulinge Mutuku and Abednego Mweu Mutuku in Machakos CMCC No.



- 1061 of 2006 for refund of purchase price and on 18th August 2022, the court delivered a judgment declaring the sale void and ordered refund of the purchase price of Kshs. 960,000/- plus interest and costs. That the two defendants paid the applicant by banker's cheque the sum of Kshs. 960,000/- on 9th January 2023, and that what remains are costs and interest.
8. The respondent further stated that therefore the issue of sale of the suit property to the applicant by Peter Mulinge Mutuku and Abednego Mweu Mutuku was determined by court. He denied the allegation that the applicant had been on the suit property for over 25 years and had grown citrus fruits thereon; and averred that the applicant trespassed on the suit property on 18th March 2023, prompting him to report to the area chief. He stated that the applicant had not demonstrated a prima facie case. In a rejoinder, the applicant filed a supplementary affidavit dated 18th May 2023 stating that he filed the suit in the lower court because the High Court advised him to file such suit and that the payment for Kshs. 960,000/- was returned to the respondent on 24th January 2022.
 9. Upon hearing both parties, the trial court delivered a ruling on 18th October 2023 dismissing the applicant's application dated 28th April 2023, for reasons that the trial court had no jurisdiction to determine the prayer for injunction as the court could not issue an injunction against the judgment of the High Court. The court further stated that it was apparent that the prayer for injunction was anchored on the succession cause and on Machakos CMCC No. 1061 of 2006, both decisions of courts of competent jurisdiction, and therefore the prayer for injunction must fail.
 10. Regarding the prayer for amendment, the trial court stated that as the amendment is anchored on issues already litigated upon and determined by courts of competent jurisdiction, that prayer must fail. Ultimately the trial court dismissed the application.
 11. Aggrieved with the trial court's findings and decision, the appellant filed this instant appeal by way of Memorandum of Appeal dated 14th November 2023, citing the following six grounds;
 - a. That the learned magistrate erred in law and fact in holding and finding that the court did not have jurisdiction to determine the issue of grant of injunction as the court allowed itself to misunderstand the law relating to a claim founded under the doctrine of adverse possession and as against the law of succession.
 - b. That the learned magistrate erred both in law and fact in failing to appreciate the facts of the case presented before it and consequently failed to appreciate the issues for determination and therefore wrongly held that the matter should have litigated in higher court than the High Court when the court was fully seized and clothed with all the jurisdiction to determine the issues.
 - c. That the learned magistrate erred both in law and fact in failing to appreciate the facts of the case before it and held that there was no enough evidence presented before the court to grant an injunction and hence the principles for the grant of injunctive orders had not been satisfied.
 - d. That the learned magistrate erred both in law and fact in holding and finding that the injunction order was based on the succession cause and that the Chief Magistrates Court and the High Court had already determined it against all the weight of the evidence presented to it against the facts presented and the evidence before it.
 - e. The learned magistrate erred both in law and fact when the court failed to allow the amendment of the originating summons by failing to appreciate the facts of the case and thus came to the wrong conclusion.



- f. The learned magistrate erred both in law and fact when the court failed to grant the order of status quo as sought by the appellant in order to preserve the property pending the hearing of the claim under adverse possession.
12. Subsequently, the appellant sought from this court, orders that the appeal be allowed, the lower court's orders be set aside and the appellant's prayer before the lower court be granted. He also sought costs of the appeal.
13. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated 14th February 2024 and the respondent's submissions dated 24th April 2024.

Appellant's submissions

14. Counsel for the appellant submitted that the trial court was wrong to make a finding that it had no jurisdiction to determine the application, when it had jurisdiction donated by Sections 25 and 26 of the *Environment and Land Court Act* as well as Section 9 of the Magistrates Courts Act. They cited the case of *Elindah Njambi Maina v. Stephen Muriithi & Another* [2020] eKLR to buttress their argument.
15. It was submitted for the appellant that the trial magistrate erred in law and in fact by failing to appreciate the facts of the case before her. Counsel argued that it was not disputed that the suit property was subject to succession proceedings but that the High Court in its ruling had advised the appellant to follow up the beneficiaries when succession was complete. Counsel argued that the appellant filed the claim for adverse possession because there was no wisdom in appealing the lower court decision. Counsel maintained that the claim for adverse possession was a distinct claim and had nothing to do with succession. Counsel referred to the case of *Wambugu v. Njuguna* [1983] KLR 172 on the doctrine of adverse possession.
16. Regarding the prayer for amendment, reliance was placed on the case of *Ochieng & 2 Others v. First National Bank of Chicago* [1995] eKLR in restating the principles for amendment. Counsel argued that the appellant was entitled to orders of amendment of the suit having complied with legal conditions. On the prayer for status quo, counsel submitted that if the suit property is transferred to a third party, the same will not be preserved. Reliance was placed on several cases including *TSS Spinning & Weaving Company Ltd v. NIC Bank Ltd & Another* [2020] eKLR and *Kenya Airline Pilots Association (KALPA) v. Cooperative Bank of Kenya Ltd & Another* [2020] eKLR, to argue that status quo orders are meant to maintain the subject matter pending determination of the dispute. Counsel also referred to the case of *Texaco Ltd v. Mulberry Ltd* [1972] WLR 814 and submitted that status quo orders were a case management strategy different from injunctions and therefore the conditions for injunction were unnecessary.

Respondent's submissions

17. Counsel for the respondent relied on provisions of Order 42 Rule 2 of the Civil Procedure Rules and submitted that the appeal was incompetent as the appellant had failed to file and serve a record of appeal having the order appealed against. Counsel submitted that this court therefore has no jurisdiction to determine the appeal, citing the case of *Lucas Otieno Masaye v. Lucia Olewe Kidi* [2022] eKLR.
18. On grounds 1 and 2 of the appeal, counsel submitted that the trial court was not wrong in finding that the court had no jurisdiction in granting the prayer for injunction. Counsel also argued that the prayer for injunction was based on an originating summons that did not have a prayer for permanent injunction. The court was referred to the case of *Ngati & 4 Others v. Mutie & 7 Others* [2022] KEELC



13486 KLR (6 October 2022 (Ruling) Neutral Citations [2022] KEELC 13486 KLR among other authorities.

19. Counsel maintained that the trial court was right in declining to grant an injunction as the suit property was subject of confirmed grant from the High Court. Further, counsel pointed out that the appellant filed Machakos CMCC No. 1061 of 2006 seeking refund of purchase price against persons who sold him the suit property and judgment was delivered to the effect that the sale agreements were void, and the court ordered refund of the purchase price of Kshs. 960,000/- to the appellant, which amount was paid by way of banker's cheque. Counsel submitted that therefore the question of sale of the suit property was settled by the court.
20. On whether there was proof of adverse possession, counsel submitted that the appellant failed to provide evidence and that there is no evidence that the appellant had developed the land. Counsel referred the court to the case of Gabriel Mbui v. Mukindia Maranya [1993] eKLR to submit that failure to obtain consents for controlled transactions rendered the agreement void. Counsel further submitted that having entered the suit property after 2nd November 2023, the appellant could not prove adverse possession.

Analysis and determination

21. The court has carefully considered the appeal, rival submissions and the entire record before the trial court. The only issue that arise for determination is whether the trial court was right in dismissing the appellant's application dated 28th April 2023 that sought orders of amendment of the originating summons; injunction and orders of status quo; on the basis that the courts had determined the issues in the succession cause before the High Court and the magistrates court vide Machakos CMCC No. 1061 of 2006.
22. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of res judicata and bars a court from trying a 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 their privies, and determined in a competent court to try the subsequent suit, where the matter has been heard and finally determined by such competent court. Section 7 of [Civil Procedure Act](#) 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.

23. Therefore, elements to be proved for res judicata are;
- a. The issue directly and substantially in issue in the previous suit is the same as that in the current suit.
 - b. The parties in the previous suit are the same or their privies as those in the current suit.
 - c. The issue was determined with finality by a court competent to hear and determine the current suit.
24. In its ruling, the trial court made a finding that the issue in the originating summons was heard and determined by the High Court in the succession court and by the magistrate in Machakos CMCC No. 1061 of 2006. This court has considered the ruling by the High Court in Machakos P& A Cause No. 608 of 2006, In the Estate of the late Samson Mutuku Mbithi delivered on 5th November 2019. In that ruling, the appellant herein had filed an affidavit of protest against the distribution of the estate of the deceased on the basis that he was a purchaser for value of 6.7 acres in respect of Parcel Masii/Embui/94 from Peter Mulinge Mutuku, one of the administrators of the deceased's estate. In the ruling, the High Court dismissed the protest and found that the appellant having not purchased land from the deceased, was not a creditor to the deceased's estate, but had the option of waiting until the vendors' interest in the estates crystalize before laying his claim against the person who sold him land and that the court's decision did not bar him from seeking refund of his money from the seller. The High Court also found that it had no jurisdiction to determine a claim for adverse possession.
25. It therefore follows that the issue in the High Court was whether the appellant's claim to the suit property on account of having purchased the same from the beneficiaries of the estate was valid as against the deceased's estate. In my view, as the trial court found that the appellant's claim was not supposed to be against the estate but those who sold him the land, and that he was free to seek refund, or claim for adverse possession, which claim the court had no jurisdiction to determine; that was not a determination of the issues with finality as the door to make his claim against the legitimate defendants was open and the issues are different from the issues before the trial court herein. There being no merit based determination with finality on the question of adverse possession, I find and hold that as far as Machakos HCC P & A No. 608 of 2006 is concerned, the suit before the trial court herein was not res judicata having raised the question of ownership by adverse possession.
26. On whether the suit herein was res judicata in view of the decision in Machakos CMCCC 1061 of 2006, I note that from the judgment provided by the respondent in the former suit, it is the appellant who sued Peter Mulinge Mutuku and Abednego Mweu Mutuku claiming in his amended plaint dated 18th June 2014 for;
- a. The purchase price of Kshs. 960,000/-.
 - b. Damages for breach of contract.
 - c. Special damages.
 - d. Interest at 35% per annum from 22nd December 2002 till payment in full, and
 - e. Costs of the suit.



27. In that suit, the plaintiff (appellant herein) stated that the defendants were at all material times the beneficial and equitable owners of a portion of land measuring 6.7 acres part of the suit property, which land belonged to the vendor's late father. He stated that he entered into different land sale agreements with beneficiaries of the deceased estate on 20th September 1998; 6th April 1999 and 6th January 2003 respectively, buying a total of 6.7 acres at a total cost of Kshs. 960,000/-. He stated that he was not given vacant possession, and that they agreed that in the event of breach, he would be refunded the consideration and interest at 35% per annum.
28. In an amended defence and counterclaim dated 25th June 2014, the defendants denied being beneficial or equitable owners of the suit property and maintained that it belonged to the late Mutuku Mbithi whose estate was yet to be administered since he died in 1992. They stated that the sale agreements were null and void for being contrary to the Law of Succession Act and the Land Control Act. They argued that the plaintiff was not entitled to interest which they argued was unconscionable. They counter claimed for the following orders;
- a. The suit by the plaintiff be dismissed with costs.
 - b. An order that any sale of LR. Masii/Embui/94 including sale agreements between the plaintiff and the defendants in regard to the estate of the deceased without being administrators of the deceased is null and void and the plaintiff has no right to occupy or enter into part of the deceased's estate by virtue of the purported unlawful agreements and that the plaintiff should vacate the suit property.
 - c. General damages for false arrest and imprisonment.
 - d. Costs of the counterclaim with interest.
29. Upon hearing the suit, the learned Chief Magistrate on 18th August 2022 entered judgment for the plaintiff and found that defendants lacked proprietary rights over the suit property and that they lacked contractual capacity. Ultimately, the court entered judgment for the plaintiff for refund the purchase price of Kshs. 960,000/- plus interest at court rates and costs of the suit.
30. Therefore, the issue before the former suit (Machakos ELC No. 1061 of 2006) was whether the plaintiff (appellant herein) was entitled for refund of the purchase price, and damages arising from the aborted sale agreements between the plaintiff and the defendants. The parties in that case were Joshua Wellington Kyallo and Peter Mulinge Mutuku and Abednego Mweu Mutuku. The subject matter was 6.7 acres parcel Masii/Embui/94. The determination was made by a Principal Magistrate who had jurisdiction to hear and determine that suit and the jurisdiction to hear and determine the trial court's case and her decision was final.
31. On the other hand, before the trial court herein, the plaintiff is Joshua Wellington Kyalo (the appellant herein) while Daniel Kingi Mutuku is the respondent being sued as administrator of the estate of Samson Mutuku Mbithi. The claim is a claim of the suit property on the basis of adverse possession.
32. Confronted with the question of res judicata, the appellant argued that the claim of adverse possession is distinct and not like his claims in Machakos HCC P & A 608 of 2006 or Machakos CMCC No. 1061 of 2006. Having observed as above, it is clear that the parties in Machakos CMCC No. 1061 of 2006 and in this case are similar save that now the appellant has changed the defendants and sued not the sellers of the suit property, but the administrator of the estate of Samson Mutuku Mbithi claiming the suit property yet he concedes that he is not a creditor to the estate of Samson Mutuku Mbithi and the finding by the High Court to that effect still stands to date. The issue herein is ownership of 6.7 acres part of Masii/Embui/94 which is the same issue as that in Machakos CMCC No. 1061 of 2006;



the court that determined the former suit being a magistrate court had jurisdiction to determine the suit before the trial court and the decision in the former suit was given on merit determination of the dispute and is a final determination.

33. That being the case, it is clear that the issues and parties, in the previous suit are similar to those in the current suit before the magistrate in Machakos CMCELC No. 114 of 2022 (OS) and the fact that the appellant changed the claim from refund to adverse possession and changed the defendant from sellers of the suit property to the deceased's administrator, does not negate the fact that the subsequent suit was res judicata. There is nothing that stopped the appellant from seeking ownership of the suit property on adverse possession in Machakos CMCC No. 1061 of 2006 and therefore, the appellant having obtained judgment for refund of Kshs. 960,000/- cannot return to court over the same facts now demanding for adverse possession. That would be an abuse of the court process and a waste of precious judicial time. The changes made on the suit before the trial court are cosmetic but based on the same transaction and facts and he cannot use them to circumvent the doctrine of adverse possession. A party having a claim in regard to one subject matter, ought to raise all the causes of actions arising therefrom but cannot in law be allowed to litigate in instalments as that would violate the doctrine of res judicata.
34. If the appellant herein were to be allowed to proceed to have the trial court try Machakos MCELC No. 114 of 2022 (OS), and if he were to lose, what will stop him from filing a fresh suit seeking the suit property on another legal principal, say constructive trust?
35. In the premises, I find and hold that the trial court was right in finding that the court in Machakos CMCC 1061 of 2006 had already made a decision on the matter. Where a suit is found to be res judicata, the court has no jurisdiction to determine anything in regard thereof and must down its tools. Therefore, the trial court was right in dismissing the appellant's application dated 28th April 2023.
36. In the premises, this court finds that the appeal herein lacks merit and the same is hereby dismissed with costs to the respondent.
37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kimeu for respondent

Mr. Mbullo for appellant

Court assistant – Abdisalam

