



Mathenge & 3 others v King’ori & 6 others (Environment & Land Case 719 of 2014) [2024] KEELC 6809 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 719 OF 2014
JO OLOLA, J
OCTOBER 17, 2024**

BETWEEN

**NANCY WANGARE MATHENGE 1ST PLAINTIFF
WAMBUI MATHENGE 2ND PLAINTIFF
DANIEL GICHUKI 3RD PLAINTIFF
PURITY MUTHONI MWANGI 4TH PLAINTIFF**

AND

**RACHEL KARUNGARI KING’ORI 1ST DEFENDANT
JOHN MWANIKI KING’ORI 2ND DEFENDANT
CHARLES MWANGI KING’ORI 3RD DEFENDANT
GERALD MAINA KING’ORI 4TH DEFENDANT
PATRICK NJURU KING’ORI 5TH DEFENDANT
JAMES NGATIA 6TH DEFENDANT
WILLIAM WAWERU KING’ORI 7TH DEFENDANT**

RULING

1. By the Notice of Motion dated 9th October 2023 as filed herein on 1st November 2023, the seven (7) Defendants pray for orders:-
 1. Spent;
 2. That a permanent injunction order be issued restraining the Plaintiffs/Respondents whether by themselves, their agents, servants, and/or employees from continuing with



the illegal occupation of the suit properties known as Thegenge/Karia/3596, Thegenge/Karia/3597, Thegenge/Karia/3598, Thegenge/Karia/3599, Thegenge/Karia/3600, Thegenge/Karia/3601, Thegenge/Karia/3602;

3. That the Honourable Court (do) issue an order directing the Officer Commanding Nyeri Police Station (OCS) to provide security and to oversee the eviction of the Plaintiffs/ Respondents from the suit plots Nos. Thegenge/Karia/3596, Thegenge/Karia/3597, Thegenge/Karia/3598, Thegenge/Karia/3599, Thegenge/Karia/3600, Thegenge/Karia/3601 and Thegenge/Karia/3602; and
 4. The costs of this application be in the cause.
2. The application is supported by an Affidavit sworn by Rachel Karungari King'ori (the 1st Defendant) and is premised on the grounds inter alia, that:
- a). The Honourable Court issued an order on 28th February 2014 agreeing that the said properties situated in Nyeri County belong absolutely to the Defendants who are the registered owners thereof;
 - b). The Plaintiffs suit was dismissed on the said 28th day of February 2014 but they continue to illegally occupy the said properties and have refused to vacate therefrom;
 - c). The Plaintiffs' continued occupation of the suit lands is a gross violation of the Defendants' rights to property as enshrined under Article 40 of *the Constitution* of Kenya 2010 and is highly prejudicial to the Defendants;
 - d). It is only fair and just that the orders sought be granted.
3. The application is opposed. In a Replying Affidavit sworn on their behalf by Daniel Gichuki Mathenge (the 3rd Plaintiff), the Plaintiffs aver that the application is misconceived, vexatious and frivolous and they urge the court to dismiss the same on account that it amounts to an abuse of the court process.
4. The Plaintiffs aver that the issues raised in the application herein have been raised in earlier suits and applications and that this court has found the issues to be res judicata. It is the Plaintiffs' case that litigation must come to an end.
5. I have carefully perused and considered the Defendants' application as well as the response thereto by the Plaintiffs. I have similarly perused and considered the vival submissions and authorities placed before me by the Learned Advocates representing the parties.
6. By their application herein, the Defendants urge the court to issue a permanent injunction restraining the Plaintiffs from continuing with what the Defendants term as their illegal occupation of the suit properties being LR. Nos. Thegenge/Karia/3596 to 3602. The Defendants also urge the court to direct the OCS, Nyeri Police Station to provide security and oversee the eviction of the Plaintiffs from the said properties.
7. The basis for those prayers is the Defendants' contention that on 28th February 2014, this court rendered a Ruling wherein it agreed that the suit properties belong absolutely to the Defendants who are the registered proprietors thereof. It is the Defendants' case that in spite of the fact that the Plaintiffs' suit was dismissed, they continue to illegally occupy the said properties and have refused to vacate therefrom.



8. The Defendants aver that the Plaintiffs' continued occupation of the suit properties is a gross violation of the Defendants' rights to own and enjoy property as enshrined under Article 40 of the Constitution and it is their case that it is only fair and just that the orders sought in their application be granted.
9. The Plaintiffs do not deny being in occupation of the suit properties. It is however their case that the application herein is misconceived and an abuse of the court process. The Plaintiffs urge the court to dismiss the application on account that the issues raised therein have been raised by the Defendants previously in other matter where the court has pronounced itself and it is accordingly their case that this application is res judicata.
10. The doctrine of res judicata is captured in our laws under the provisions of Section 7 of the Civil Procedure Act 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. Considering the provisions of the said Section 7 of the Civil Procedure Act in Independent Electoral and Boundaries Commission –vs- Maina Kiai & 5 Others [2017] eKLR, the Supreme Court of Kenya observed that for one to invoke the doctrine of res judicata, all the elements outlined thereunder must be satisfied conjunctively. That is:
 - a). The suit or issue was directly and substantially in issue in the former suit;
 - b). That the 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; and
 - e). The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issues was raised.”
12. Applying the law and the principles set out hereinabove, to the facts of this case, it was clear to me that the parties herein were the same parties in Nyeri HCCC No. 122 of 2010 and Nyeri HCCC No. 136 of 2011 which suits were consolidated on 21st March 2013. From the material placed before the court, it was also evident that the parties herein were the representatives and/or descendants of two families that had been feuding over the suit properties since the early 1970s.
13. From the material placed before the court, it was evident that the properties now known as LR. Nos. Thegenge/Karia/3596 – 3602 were but sub-divisions of a parcel of land formely known as Thegenge/Karia/38. It was apparent that way back in the 1960s, the Plaintiffs predecessor in title one Paul Mathenge Muchemi had entered into the suit premises pursuant to a Sale Agreement he had apparently entered into with the Defendants predecessor in tile one King'ori Wahogo.
14. Sometime in the year 1973, the Plaintiffs predecessor sued the said King'ori Wahogo for failing to transfer the land to himself but the defence contented that no Land Control Board Consent had been obtained to sanction the sale transaction. That suit was dismissed after the Court declared the suit was



based on a contract and that the same had been brought outside the six (6) year period of limitation for actions based on contract.

15. Subsequently the said King'ori Wahogo instituted Nyeri HCCC No. 3 of 1973 against Paul Mathenge Muchemi accusing him of trespass to the suit property and seeking his eviction therefrom. That suit was dismissed in 1983 and none of the parties took any action for some time.
16. Some five (5) years down the line, the said Paul Mathenge Muchemi instituted Nyeri HCCC No. 165 of 1988 against the 1st Defendant herein Rachel Karungari King'ori, the administratrix of the Estate of King'ori Wahogo who was by then deceased. In that suit, the Plaintiffs' predecessor sought to be decreed the suit property on account of adverse possession, stating that he had entered the same and had been in occupation since 1961. Taking account of the previous proceedings commenced in the 1970s, that suit was dismissed on the basis that it was res judicata.
17. After some 20 years during which the parties tried all sorts of suits and applications, the 1st Defendant herein moved back to the same Nyeri HCCC No. 165 of 1988 and filed a Notice of Motion application dated 25th January 2008 wherein she applied to have one Joseph Mwangi Mathenge to be ordered to vacate the parcel of land then still known as Thegenge/Karia/38. The said Joseph Mwangi Mathenge had been substituted on 14th March 1991 for the Original Plaintiff Paul Mathenge Muchemi who had also since passed away.
18. In a Ruling rendered on the said application by the Honourable Justice Serگون on 26th February 2010, the Learned Judge observed as follows:-

“..... The Plaintiff is aware that the defendant is in possession of the title to the land in dispute. I have been urged to issue an order to direct the Plaintiff to vacate the suit land. It is admitted by both parties that litigation came to an end upon the dismissal of the Plaintiffs' suit. Upon making the dismissal order this court became functus officio. This suit was dismissed (and) hence finalized.”
19. The Learned Judge went on to advise the parties in the penultimate Paragraphs of that Ruling as follows:-

“It is obvious that the defendant is the registered proprietor of the parcel of land known as Thegenge/Karia/38. Her rights are protected under Sections 27 and 28 of the Registered Land Act. If well advised, it is obvious that there are many avenues in which the defendant can seek redress but I must state that one of those avenues is not through this suit. I have already stated that this suit is already spent and the court is rendered functus officio. I find the Motion incompetent. The same is ordered struck out with costs to the Plaintiff.”
20. In the premises herein, it was self-evident that even though the parties had increased in number, they remained the same parties litigating under the same title and over the same subject matter. As we have seen from the history of this matter, the issue of eviction of the Plaintiffs from the suit property was the crux of the claim in Nyeri HCCC No. 3 of 1973. That suit was dismissed in 1983 and the Defendants have never made any proper steps to resuscitate the same.
21. Their attempt to raise the same issues in Nyeri HCCC No. 165 of 1988 was properly rebuffed by the court in the Ruling delivered on 26th February 2010. Their filing of the present application in October 2023 seeking to have the Plaintiffs evicted in similar fashion is a clear indication that they either did not heed the advise given to them some 13 years earlier or that they are just bent on abusing the court process.



22. Given the dismissal of their suit for eviction of the Plaintiffs, it was evident to me that the application before the court is res judicata as asserted by the Plaintiffs.
23. As the Court of Appeal held in *The Independent Electoral and Boundaries Commission case (supra)*:
- “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 commonsensical 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 or calumny. The foundations of res judicata thus rest in public interest for swift, sure and certain justice.”
24. In the matter herein, it was evident that none of the parties are interested in bringing the litigation herein to an end. The application by the Defendants seeks to re-canvass a matter that they started litigating on in the year 1973. A decision on that matter was made in year 1983 and they neither appealed nor sought to have the same reviewed.
25. It follows that I am persuaded that the Motion dated 9th October 2023 is res judicata. I dismiss the same with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17TH DAY OF OCTOBER, 2024.

J. O. OLOLA

JUDGE

In the presence of:

Mr. Wanda holding brief for Juma for the Defendant/Applicant.

Mr. Ng'ang'a holding brief for Gori for the Plaintiff/Respondent.

Court Assistant: Kendi

