



**Muinamia v Wainaina (Environment & Land Case E010 of 2023)
[2024] KEELC 13709 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E010 OF 2023**

JG KEMEI, J

DECEMBER 9, 2024

BETWEEN

JOHN NDUNGU MUINAMIA PLAINTIFF

AND

DOMINIC MBUGUA WAINAINA DEFENDANT

RULING

1. The Plaintiff filed his claim vide an Originating Summons dated the 19/10/2023 seeking in the main orders of title by way of adverse possession against the Defendant.
2. Simultaneously he filed a Notice of Motion of even date seeking among others restraining orders against the Respondent from trespassing, demolishing his house and in any other way interfering with the Applicants peaceful and quiet enjoyment of possession of the suit property pending the hearing and determination of the suit. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on 19/10/2023. He deposed that he was allocated the suit land in 1992 by the defunct Kiambu County Council and has been in continuous occupation of the suit land peacefully and without any interruptions. That the Respondent claims to have obtained a title in 1992 and further that he has unsuccessfully tried to evict him and his family from the land he has called home for decades. That unless the orders sought herein are granted he stands to suffer irreparable loss and damage and urged the Court to grant the orders.
3. The application was resisted by the Respondent through his Replying Affidavit deponed on the 11/1/24 where he stated that the suit is resjudicata in light of Kikuyu SPMCC No 45 of 2015 – Dominic Mbugua Wainaina Vs. Ndungu Kiuna & John Ndungu Muinamia where the Court rendered judgment on the 18/8/2023; the issue before the Court was ownership of the suit land; the issue was heard and determined; The Plaintiff filed a defense and omitted to raise a counter claim. Further it was posited that the suit was subjudice in light of MCECL No 27 of 2023 John Ndungu Muinamia



Vs. Dominic Mbugua Wainaina & 3 Others where the Plaintiff claims cancellation of title issued with regards to Karai/Lusingiti/1158. Lastly that the issue of grant of injunctive orders.

4. The copies of Plaintiff and Verifying Affidavit in Kikuyu SPMCC 45 of 2015 are annexed as DMW1 in the Respondent's Further Affidavit dated 27/3/2024. Similarly the pleadings in Kikuyu SPMCC 27 of 2023 are annexed as DMW2 in the Replying Affidavit sworn on 11/1/2024. No. copies of Judgment in either of the suits is attached.
5. Parties filed written submissions which I have read and considered.
6. The key issue is whether the suit is res judicata/sub judice and or an abuse of the Court process.
7. On the question is res judicata, Section 7 of the *Civil Procedure Act* provides as follows;

“7. Res judicata

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.”

8. The rationale for the doctrine of Resjudicata is expounded in the case of John Florence Maritime Services Limited & Another Vs. Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR where the Supreme Court held as follows;

“81. We reaffirm our position as in the Muiro Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...”



9. It is not in dispute that there are three cases filed by the parties in respect to the same property. In SPMCC No 45 of 2015, the cause of action was trespass. This matter was filed by the Respondent and was heard and determined. In SPMCC 27 of 2023 Kikuyu, the cause of action is fraud against the Defendant and the County Government of Kiambu. This suit is filed by the Plaintiff and from the scanty affidavit evidence on record, it is pending hearing and determination. Admittedly the current suit filed by the Plaintiff is based on adverse possession. It is correct to state that the issue of adverse possession was not raised in Kikuyu SPMCC No 45 of 2015. Even if it had been raised, the Magistrate Court would not have had jurisdiction to determine the cause of action. On that score therefore I am hesitant to hold this suit is resjudicata as far as Kikuyu SPMCC No 45 of 2015 is concerned.
10. That said, I have reflected on the Kikuyu SPMCC No 27 of 2023 where the Plaintiff has sought orders of cancellation of title in the name of the Respondent on grounds of fraud. It is instructive to note that this suit was filed on the 9/5/2023 while the current one was filed on the 19/10/2023, about 5 months apart. Granted that though the causes of actions are different the prayers sought are geared to obtain title of the suit land; one on fraud and cancellation of title and the second route is through adverse possession. The Plaintiff has not explained the essence of the two suits, one in the lower Court and the other in this Court. The only inference is that the Plaintiff is employing a scorched earth policy on the Courts by trying his luck in both Courts so that one may give in to his plea.
11. The actions of the Plaintiff above are actions described by the Court in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR when the Court stated as follows;

“.... The situations that would give rise to an abuse of Court process were in-exhaustive. It involved situations where the process of Court had not been or resorted to fairly, properly, honestly to the detriment of the other party. Abuse of Court process also arose in the following situations:

1. instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there existed a right to begin the action;
2. instituting different actions between the same parties simultaneously in different Courts even though on different grounds;
3. where two similar processes were used in respect of the exercise of the same right;
4. where an application for adjournment was sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below;
5. where there was no iota of law supporting a Court process or where it was premised on recklessness. The abuse such an instance lay in the inconvenience and inequalities involved in the aims and purposes of the action;
6. where a party had adopted the system of forum-shopping in the enforcement of a conceived right;



7. where an appellant filed an application at the trial Court in respect of a matter which was already a subject of an earlier application by the Respondent at the Court of Appeal;
8. where two actions were commenced, the second asking for a relief which would have been obtained in the first.”
12. Guided by Section 3A of the *Civil Procedure Act* which states that the Court has inherent powers to make such orders as may be necessary for the ends of justice and to prevent abuse of Court process, this suit be and is hereby struck out in its entirety.
13. The costs of the application are in favour of the Respondent.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kihara HB Mwaniki for Plaintiff

Ochieng HB Kimathi for Defendant

Court Assistant – Phyllis

