



**Nzemi v Mukiti (Environment & Land Case E001 of 2022)
[2023] KEELC 15818 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E001 OF 2022
CA OCHIENG, J
FEBRUARY 27, 2023**

BETWEEN

JOSEPHINE NZEMBI PLAINTIFF

AND

RAPHAEL UKUNGI MUKITI DEFENDANT

RULING

1. What is before court for determination is the defendant's notice of preliminary objection dated the June 28, 2022 premised on the following points of law:-
 1. That the claim ought to be struck out for res judicata.
 2. That the court lacks jurisdiction to deal with the matter since it has already been decided by a court of competent jurisdiction and no appeal lodged.
 3. That the claim is an abuse of the processes of this honourable court.
 4. Other grounds and reasons may be adduced at the hearing.

The notice of preliminary objection was canvassed by way of written submissions.

Analysis and Determination

2. Upon consideration of the instant notice of preliminary objection including the rivalling submissions, the only issue for determination is whether this suit should be struck out for being res judicata.
3. The defendant in his submissions contends that this Claim is res judicata as the plaintiff had initially filed a suit being Kithimani SRMC ELC No 2 of 2018 *vide* a plaint dated the February 22, 2018 where she claimed to have acquired the suit land through adverse possession. Further, that the said suit was determined by G Shikwe SRM *vide* the judgment dated the July 10, 2019. He insists that the court lacks the jurisdiction to deal with the matter since it had already been decided by a court of competent



jurisdiction. He reiterates that this suit is an abuse of the court process. To support his arguments, he relied on the following decisions: *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR*; *Owner of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR*; *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No 25 of 2002 (2009) eKLR 229 and *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR*.

4. The plaintiff in her submissions insists the notice of preliminary objection is unmerited and an abuse of the court process. She contends that the issue before the Court which is adverse possession has not been adjudicated upon on merits in the lower court case being Kithimani SRMC ELC No 2 of 2018. To support her averments, she relied on the following decision: *Tee Gee Electrics & Plastics Company Ltd v Kenya Industrial Estates Limited (2005) KLR*.
5. Before I proceed to make a determination of the instant notice of preliminary objection, I wish to provide a background of the said objection by highlighting various excerpts from the plaint, defence and judgment from the Kithimani SRMC ELC No 2 of 2018 Raphael Ukungu Mukiti v Josephine Nzemi.

In the plaint dated the February 22, 2017, the plaintiff therein who is the defendant herein had sought for the following orders against the current plaintiff who was the defendant in the said Kithimani suit:

- a. An order of eviction against the defendant from all that parcel of land known as Kithimani/Kithimani 'A'/369.
 - b. A mandatory order of injunction to restrain the defendant her agents and or servants from constructing on, disposing off, demolishing or otherwise interfering with the plaintiff's ownership of the property Kithimani/Kithimani 'A'/369.
 - c. General damages for trespass.
 - d. Costs of this suit.
 - e. Any other relief that the court shall deem fit in the circumstances.
6. While the plaintiff herein filed her defence dated the April 27, 2018 where she prayed for the said suit against her to be dismissed with costs and for:
 - a. A declaration that the defendant has acquired title by adverse possession to the suit property known as land reference number Kithimani/Kithimani 'A' /369.
 - b. That the registration of plaintiff as proprietor of land reference number Kithimani/Kithimani 'A'/369 be cancelled and the Land Registrar Machakos do rectify the register to enter the name of the defendant as the registered proprietor thereof free of all encumbrances.
 - c. A permanent injunction restraining the plaintiff, her servants, agents and/or assigns from interfering with defendant's occupation of the property known as land reference number Kithimani/Kithimani 'A'/369.
 7. The matter proceeded for hearing where each party presented witnesses who testified. In its judgment, the lower court stated that:

I have looked at the evidence on record particularly the evidence of the defence, the claim relies solely on the fact that his brother was the original allottee. In this case I have to seek guidance on the plaintiff's quoted case *John Chelimo Seguton v Joseph Kitur Kiplangat (2018) eKLR* that the onus was on the defence to prove the allegations by even producing



the register of allottees herein. It is also noted that the late Joseph left behind a family who are not contesting this title. The defendant is not a legal representative to the estate of the late hence does not have locus to use the deceased as a basis of her claim. In the premises therefore I do find for the plaintiff herein that he is the duly registered owner of the suit land and should be recognized as such. I hereby grant prayer (a) and (b) of the plaint that there be an order of eviction against the defendant from the suit land and a permanent injunction against the defendant from interfering in any way with the plaintiff's possession and use of the suit land number Kithimani/ Kithimani 'A'/ 369.

8. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at section 7 which stipulates inter alia:

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 can 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.

9. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

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.”

10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited (1969) EA 696*; the court held that:-

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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.



11. While in the case of *Uburu Highway Development Ltd v Central Bank & Others, CA No 36 of 1996* the Court of Appeal stated 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.

12. Further in the case *Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR*, J Gikonyo states thus:

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 92001) 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*...

13. In this instance the plaintiff filed the originating summons dated the January 11, 2022 seeking to be declared owner of land parcel number Kithimani/Kithimani ‘A’/369 by way of adverse possession. From the excerpts I have cited above, I note the issue in dispute in both suits was the said land parcel number, Kithimani/Kithimani ‘A’/369. Further, the parties in both suits were the same. The plaintiff herein, in her defence therein also sought to be declared owner of Kithimani/Kithimani ‘A’/369 by way of adverse possession. The Kithimani Court which is a court of competent jurisdiction after considering the evidence of the parties therein, dismissed the defendant’s claim and entered judgment in favour of the plaintiff and granted orders of eviction. In applying the legal provisions quoted above including associating myself with the decisions cited, I find that the instant suit is indeed *res judicata* as the matter which is in issue had directly and substantially been in issue in the former suit between the same parties, same title, in a court competent to try it and it was heard and finally decided by said court. It is my considered view that if the plaintiff was aggrieved with the impugned decision from the Kithimani Court, she ought to have lodged an appeal instead of filing a fresh suit. I further find that the plaintiff’s action of filing a fresh suit, seeking similar order amounts to abuse of court process.
14. In the circumstance, I find the notice of preliminary objection dated the June 28, 2022 merited and will proceed to strike out this suit. The costs of the suit is awarded to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

