



REPUBLIC OF KENYA



**Mwaniki & another v Mwangi & 2 others (Environment & Land Case  
35 of 2018) [2023] KEELC 733 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 35 OF 2018  
JM MUTUNGI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**NDERI MWANIKI ..... 1<sup>ST</sup> APPLICANT**

**BERNARD KINYUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JANE GACHUI MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**TIMOTHY MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**HAROUN KARIUKI MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Plaintiffs filed the instant suit vide a Complaint dated 29<sup>th</sup> June, 2018. The Plaintiffs claimed they were the persons who were rightfully entitled to land parcel Inoi/Thaita/77 that belonged to their late father and subsequently subdivided to create land parcels Inoi/Thaita/1001, 1002 and 1003. The Plaintiffs averred the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were issued title to land parcels Inoi/Thaita/1001 and 1002 irregularly and prayed that the titles be revoked and the land be registered in the name of the Plaintiffs. The Plaintiffs further prayed for the eviction of the Defendants from the land.
2. The Defendants in their joint defence filed on 26<sup>th</sup> July, 2018 denied they had obtained the titles to the land irregularly asserting that the titles were obtained procedurally. The defendants further asserted the dispute has been adjudicated by the appropriate Land Disputes Tribunal and the decision of the Tribunal was adopted in Nyeri CMCC No. 169 of 1995. An Appeal before the High Court vide Nyeri HCCA No. 14 of 1999 was dismissed while a suit Kerugoya ELC No. 21 of 2012 filed by the Defendants on the same subject matter was struck out for being resjudicata. The Defendants prayed for dismissal of the Plaintiffs suit.



3. The Defendants vide a Notice of Motion application dated 16<sup>th</sup> February, 2022 expressed to be brought under Section 1A, B, 3A and 7 of the Civil Procedure Act and Article 159(d)(presumably 159(2)(d) of the Constitution prays for Orders:-
  1. That this matter be declared as Resjudicata and dismissed.\*\*
  2. Costs of the Application.\*\*
4. The Application is grounded on the grounds that:
  - a. That the issues herein have already been dealt with and decisions given in various cases which include Nyeri CMCC No. 169 of 1995, Nyeri HCCA No. 14 of 1999, Nyeri ELCA No. 9 of 2018 and Nyeri C.A. No. 36 of 2019.
  - b. The matter is an abuse of the Court process.
  - c. The Applicant has suffered materially, emotionally and financially and continues to suffer due to actions by the Respondents.
5. The application was further supported on the Supporting Affidavit sworn by Timothy Maina Mwangi who inter alia deponed that the Plaintiffs were evicted by a Court Broker from land parcel Inoi/Thaita/1001 and 1002 in execution of the Court Order issued on 22/8/2018 (“TMM3”). The Deponent further annexed the orders, Rulings and Judgment issued in the various suits (“TMMI”).
6. The 1<sup>st</sup> Plaintiff/Respondent Nderi Mwaniki swore a Replying Affidavit in opposition to the application dated 18<sup>th</sup> March, 2022. Inter alia he deponed that the Applicants could not raise the issue of Resjudicata since the orders were made on a matter that had already been dismissed. He deponed that CMCC No. 169 of 1995 was dismissed by Hon. M. R. Gitonga – Principal Magistrate as per annexure NM-A. The deponent averred that Hon. Justice Waithaka and Hon. Wekesa erred in making orders in a matter that had been dismissed and where stay had been granted by the High Court.

The Application was canvassed by the parties by way of written submissions. I have reviewed and considered the written submissions filed by the parties and the issue for determination is whether having regard to the previous suits between the parties the present suit is resjudicata. The doctrine of resjudicata is provided for under Section 7 of the Civil Procedure Act which provides as follows;-

- 7) 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 issues has been subsequently raised and has been heard and finally determined by such court.

The essential ingredients necessary for the resjudicata doctrine to be applicable are that:-

- i. There as to have been a previous suit between the same parties where the issues directly and substantially in issue were similar or the same as in the subsequent suit where the plea of resjudicata is raised.
- ii. The issues in the previous suit were finally determined and the Court ought had competence and jurisdiction to make the determination.
- iii. The parties in the former suit ought to have been the same as in the subsequent suit or any of them claiming or litigating under the same title.



7. It is not disputed by any of the parties that there was indeed a previous suit namely Nyeri CMCC No. 169 of 1995 where the current Plaintiffs in the present suit were the Defendants and the 1<sup>st</sup> Defendant in the instant suit was the Plaintiff. The record of the proceedings in that suit show that on 8/10/1996 Hon. J. S. Mishelle SRM referred the dispute to the Kirinyaga Land Disputes Tribunal for hearing since the court lacked jurisdiction to entertain the matter by virtue of the provisions of the Land Disputes Tribunal Act No. 18 of 1990. The matter was heard and determined by the Kerugoya Land Disputes Tribunal who awarded land parcel 1001 to Jane Gacui Mwangi and land parcel 1002 to the Children of the 2<sup>nd</sup> wife of the deceased (Mwangi Mwaniki). Land parcel 1003 was awarded to the Children of the 1<sup>st</sup> wife who are the present Plaintiffs. The Plaintiffs in the present suit appealed against the award to the Provincial Land Disputes Appeals Tribunal at Nyeri who upheld the decision by the District Land Disputes Tribunal vide an award given on 11<sup>th</sup> December, 1998.
8. The Plaintiffs being not satisfied with the decision of the Provincial Land Disputes Appeals Tribunal lodged an appeal before the High Court Nyeri vide Civil Appeal No. 14 of 1999. On 8<sup>th</sup> July, 2008 Hon. Justice Mary Kasango delivered a Judgment where she dismissed the Appeal against the decision of the Provincial Appeals Committee. Kasango, -J, agreed with the findings of the Tribunal that the deceased had before his death subdivided his land into 3 portions between his three houses of his wives. The parcels of land were consequently registered in the names of the parties in the three homes. It was as a consequence of that, the 1<sup>st</sup> Defendant being one of the wives, was registered as the owner of land parcel No. 1001. The Learned Judge further observed that as it was evident the Plaintiffs were from the first house they had no locus to question the awards made to the other two houses.
9. In the suit before the Chief Magistrates Court Nyeri CMCC No. 169 of 1995 which was referred to the Kirinyaga Land Disputes Tribunal for determination, and the resultant Appeal to the Provincial Land Disputes Appeals Committee and the High Court and eventually the Court of Appeal the parties were the same and the subject matter was land parcel Inoi/Thaita/77 subsequently subdivided into parcel No. Inoi/Thaita/1001, 1002 and 1003. The eventual distribution and occupation of the land originally registered in the name of the deceased was the predominant issue. The issue and question of the distribution of the land was before the Land Disputes Tribunal and a decision was rendered which was upheld in Appeal. The Land Disputes Tribunal without any doubt in my view, had jurisdiction to handle the dispute.
10. In the present matter the Plaintiffs who were active participants in Nyeri CMCC No. 169 of 1995, the consequent reference to the Land Disputes Tribunal Kirinyaga, the Provincial Land Dispute Appeals Tribunal and the Appeals before the High Court and Court of Appeal, seek orders that the Defendants are in occupation of land parcels Inoi/Thaita/1001 and 1002 unlawfully and are trespassers and also to have the titles held by the Defendants revoked and they be evicted from there.
11. Upon evaluation of the record, the various proceedings, Rulings and Judgments forming part of the record, I am persuaded the issues raised in this suit have been the subject of previous litigation and have been determined finally. This instant suit is no different from Kerugoya ELC No. 21 of 2012 in which the 1<sup>st</sup> Defendant in the present suit, had as Plaintiff sued the Plaintiffs inter alia seeking an order of perpetual injunction and general damages for trespass. The Defendants (Plaintiffs in the present suit) in their defence pleaded the previous suit Nyeri CMCC No. 169 of 1995 and Nyeri HCCA No. 14 of 1999 had, dealt with the issues in the suit (Kerugoya ELC NO. 21 of 2012). Olao, J in his Judgment delivered on 3<sup>rd</sup> June, 2016 held that the suit was resjudicata as the matters in dispute were heard and finally determined in accordance with the provisions of the then Land Disputes Tribunal Act. I am persuaded the present suit by the Plaintiffs has to suffer the same fate.



12. The Plaintiffs in their response and submissions have argued that the suit had been dismissed by Hon. M. R. Gitonga –PM and hence the subsequent orders granted by Hon. Wekesa and Hon. Justice Waithaka for the eviction of the Plaintiffs were given in a non-existent suit. I have carefully perused the record and noted that on 19/1/2006, there was a purported order for the dismissal of the suit for want of Prosecution. This clearly was an order made in error as there was no suit pending before the court then. The suit having been referred to the Land Disputes Tribunal and the Tribunal having made an award and returned to court, the suit had been determined and all that remained was adoption and enforcement of the award as an order/deed of the Court. The Plaintiffs in fact appealed against the award by the District Land Disputes Tribunal to the Provincial Land Disputes Tribunal who dismissed the Appeal. The Plaintiff's yet again being dissatisfied by the decision of the Provincial Land Disputes Appeals Committee, appealed to the High Court vide HCCA No. 14 of 1999 which appeal was dismissed by Mary Kasango, J on 8<sup>th</sup> July 2008. There was therefore no suit that was pending before the Chief Magistrate's Court on 19/1/2006 that could be dismissed for want of Prosecution. If anything, what was pending was the Appeal before the High Court that arose following the Order of reference by the Court of Dispute to the Kirinyaga District Land Disputes Tribunal for hearing and determination. The Principal Magistrate's Court on 15<sup>th</sup> June 1999 adopted the decision/awards emanating from the Kirinyaga District Lands Disputes Tribunal and the Provincial Land Disputes Appeals Tribunal. The subsequent stay orders pending the Appeal before the High Court were automatically discharged upon the determination of the Appeal.
13. In view of all that I have discussed herein above, I am satisfied the present suit is res judicata and is unsustainable. I direct that the suit be and is hereby ordered struck out. Each party to bear their own costs of the application and the suit.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KERUGOYA COURT THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**JOHN. M. MUTUNGI**

**ELC - JUDGE**

