



REPUBLIC OF KENYA



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Njogu (Suing as the administrator of the Estate of the Late Reuben Gakuya Mbuthi (Deceased) v Gakuya & another (Environment & Land Case E3 of 2020) [2023] KEELC 17185 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17185 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E3 OF 2020

JM MUTUNGI, J

APRIL 20, 2023

BETWEEN

WAIRIMU NJOGU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE REUBEN GAKUYA MBUTHI (DECEASED)) PLAINTIFF

AND

JOHNSON MWANGI GAKUYA 1ST DEFENDANT

DAVID MWAI GAKUYA 2ND DEFENDANT

RULING

1. The Plaintiff instituted the present suit *vide* a Plaint dated 30th September, 2020 seeking the following orders:-
 - a. A declaration that the sub-division of title Number Mutira/Kaguyu/124 on 2nd October, 1995 was fraudulent and unlawful abinito.
 - b. A declaration that the subsequent transfer/s of title Numbers 2120-2122 was fraudulent and lawful.
 - c. An order ordering the cancellation of title Numbers Mutira/Kaguyu/2120 – 2122 and consolidation of the same into former title Number Mutira/Kaguyu/124 into the names of Reuben Gakuya Mbuthi.
 - d. Costs of this suit and interest.
 - e. Any other or further relief the Honourable Court may deem fit to grant.
2. The Defendants filed a defence dated 6th November, 2020 where they denied the averments and allegations contained in the Plaint. The Defendants contended that the late Reuben Gakuya Mbuthi



(deceased) was the owner of land parcel Kaguyu/124 measuring approximately 3:9 Acres and that he had in 1993 or thereabouts caused the land to be sub-divided into 3 portions measuring 0.607 Ha, 0.607 Ha, and 0.28 Ha respectively. The Defendants stated the subdivision was effected during the deceased lifetime though the same were registered after his death. The Defendants pleaded that after the deceased death a Succession Cause Kerugoya PM Succession Cause No. 216 of 1996 was filed where the Court directed the deceased land parcel be shared between the two houses equally. The deceased second wife Priscilla Wanjiku, appealed the decision vide Embu High Court Appeal No. 30 of 1999 and the decision of the Lower Court was set aside with the Court ordering that the deceased land parcel was to remain subdivided into 3 portions where land parcel Mutira/Kaguyu/2120 was to go to the Plaintiff and his brother Munene Gakuya, in equal shares; land parcel Mutira/Kaguyu/2121 to the Defendants herein in equal shares, and land parcel Mutira/Kaguyu/2122 to Priscilla Wanjiku Gakuya absolutely.

3. The Defendants further pleaded that although the Plaintiff and his brother sought and were granted leave to Appeal the Embu High Court decision to the Court of Appeal, they never filed the Appeal in the Court of Appeal. The Defendants further averred the Plaintiff was aware of the subdivision way back in 1993, and consequently the institution of the present suit in 2020 was statute barred by reason of the *Limitation of Actions Act* Cap 22 Laws of Kenya. Further the Defendants averred that the present suit is *resjudicata* as the issues raised are the same issues that were the subject of litigation in Kerugoya PM Succ Cause No. 216 of 1996; Embu HCCA No. 30 of 1999 and Kerugoya ELC No. 200 of 2014.
4. Consequent to the statement of Defence, the Defendants filed a Notice of Motion dated 10th November, 2020 expressed to be brought under Order 2 rule 15(1)(b) an (d) of the *Civil Procedure Rules*, Sections 3A and 7 of the *Civil Procedure Act* and all other enabling provisions of the Law. The Defendants prayed for orders:-
 1. That the entire suit be struck off, with costs for being *resjudicata* and time barred by virtue of the *Limitation of Actions Act*.
 2. Costs of the application be provided for.
5. The application was supported on the grounds that the parties have litigated on the same subject matter since 1995 and the Plaintiff has been unsuccessful on all occasions and there is necessity for the litigation to come to an end. The application was further supported on the annexed Affidavit of David Mwai Gakuya, the 2nd Defendant *vide* which he reiterated the contents of the Defence.
6. The Plaintiff filed grounds of opposition to the application dated 24th February, 2021 where he averred the application was incompetent and incurably defective and was frivolous, vexatious and otherwise an abuse of the Court process and sought its dismissal with costs.
7. The Court on 1/3/2021 directed that the Notice of Motion application dated 10/11/2020 be canvassed by way of written submissions. The Defendant/Applicants filed their written submissions on 16/3/2021. Though the matter was scheduled for mention on 26/3/2021 the Court record does not indicate that any proceedings took place on that date. The matter remained inactive and that prompted the Court on 20/1/2023, to issue a Notice to the parties to show cause why the suit should not be dismissed for want of prosecution under the provisions of Order 17 rule 2(1) of the *Civil Procedure Rules*. The Notice to show cause was fixed for hearing on 9/3/2023 and on the date, only the Advocate for the Defendants appeared and drew the courts attention to the pending application and to the fact that the Defendants had complied with the directions of the Court and had filed their submissions. The Plaintiff had not filed any submissions. The Court reserved ruling on the application for 20/4/2023.



8. I have considered the application, the Supporting Affidavit and the annexures thereto and the submissions made on behalf of the Defendants in support of the application. On the basis of the pleadings it is evident and clear that the same parties were involved in a succession cause, namely Kerugoya RM Succession Cause No. 216 of 1996 which precipitated Embu HC Succession Appeal No. 30 of 1999. In the Subordinate Court, the Succession Court ordered that land parcel Mutira/Kaguyu/124 owned by Reuben Gakuya Mbuti (deceased) be shared between the deceased two houses equally (1st and 2nd wife) but on Appeal by the 2nd wife, Priscilla Wanjiku Gakuya, the High Court set aside the ruling of the Resident Magistrate's Court and ordered that:-

1. The deceased's estate be divided into 3 parcels as had been the wish of the deceased and the same be distributed as follows:-
 - a. LR. No. Mutira/Kaguyu/2120 – Mwaniki Gakuya and Munene Gakuya jointly in equal shares.
 - b. LR. No. Mutira/Kaguyu/2122 – Priscilla Wanjiku Gakuya (whole).
 - c. LR. No. Mutira/Kaguyu/2121 – Johnson Mwangi Gakuya and David Mwai Gakuya – Jointly in Equal shares.

9. The Plaintiff and his brother James Munene Gakuya were the Respondents in the High Court Appeal at Embu. The Plaintiff again with his brother filed Kerugoya ELC No. 200 of 2014 against Priscilla Wanjiku Gakuya seeking a declaration that she held land parcel Mutira/Kaguyu/2122 in trust for the deceased 2 houses. Hon Justice S. N. Mukunya struck out the suit with costs holding that the same was *res judicata*. He observed as follows:-

“Having perused the pleadings and documents filed in Court with the pleadings and having listened to the submissions by Counsel for the Defendant, I am satisfied that the suit land herein was litigated on between the parties, in Kerugoya Succession Cause No. 216 of 1996 where the Lower Court ordered that the suit land be shared equally. I am also satisfied that the Plaintiffs appealed that decision to Embu High Court vide Appeal No. 30 of 1999 and the Lower Court's decision was set aside and the land was given to the Defendant herein. The Plaintiffs herein filed an application to the Court of Appeal to file an Appeal out of time. The Applicant was allowed 30 days leave to do so on 4th September, 2001. No Appeal has ever been filed. The issue of ownership of the suit land in this case is therefore settled.

The matter was between the parties herein. The suit land was a subject matter in the aforesaid cases. This matter is therefore *resjudicata*. There is therefore nothing this Court can decide ----“

10. There is no dispute that suit property Mutira/Kaguyu/124 (subdivided into parcels 2120 to 2122) has been the subject of litigation since 1996 and the parties have been the same (the Plaintiff and his brother on one side, and Priscilla Wanjiku Gakuya (now deceased) and her sons the Defendants herein on the other side). The Succession proceedings in the Kerugoya Subordinate Court related to the same land as did the resultant Appeal before the Embu High Court.

11. To the extent that there was no Appeal filed against the decision of the Embu High Court, its decision constituted a final determination of the matter which this Court being of concurrent jurisdiction



cannot reopen. The Court of Appeal in the Case of *Ukay Estate Ltd & Another –vs- Shah Hivji Manek Ltd & 2 others* (2006) eKLR outlining the rationale for resjudicata doctrine observed as follows:-

“The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.” (emphasis ours).

12. In the present matter it is apparent the Plaintiff being fully aware of the previous litigations still wishes to open a fresh round of litigation. The law cannot allow that as parties cannot continue in court endlessly over the same issues and subject matter that has been decided upon. Once the High Court made its determination on the distribution of the deceased estate, that was the end of the matter and that decision could only be altered either, by way of review or Appeal and not by instituting a fresh action. This Court cannot reverse the decision of the High Court just like the High Court cannot reverse the decision of this Court. I am in the premises satisfied the Plaintiff instituted the present suit in abuse of the Court process and the same is unsustainable for being resjudicata.
13. The Defendants also sought to have the suit struck out for being statute barred on account of the *Limitation of Actions Act* Cap, 22 Laws of Kenya. The actions complained about by the Plaintiff occurred way back in 1996 when allegedly the suit land was fraudulently subdivided. There is no doubt the Plaintiff became aware of the subdivisions at the very latest in 2001 when the High Court rendered its decision respecting the distribution of the deceased estate which as per the confirmed grant issued on 13th November, 2001 indicated the particular subdivisions, and who the beneficiary of each subdivision was. Any suit challenging the subdivisions for any reason could only have been instituted before the expiry of 12 years by virtue of the provisions of Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. The Plaintiff pleaded fraud and at the same time sought to have the land restored back to the mother title Mutira/Kaguyu/124 and hence was essentially making a claim to recover land. Section 7 of the *Limitation of Actions Act* provides as follows:-
 - “7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.
14. In the premises, I am persuaded the Plaintiff’s suit fails on both grounds, for being resjudicata and for being statute barred on account of Limitation. I find the suit to be vexatious and an abuse of the Court process. I allow the Defendants Notice of Motion application dated 10th November, 2020 and order the suit struck out with costs to the Defendants.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF APRIL 2023.

JOHN M. MUTUNGI

JUDGE

