



REPUBLIC OF KENYA



KENYA LAW
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**Gichobi & 6 others v Ngure & another (Environment & Land Case
23 of 2016) [2023] KEELC 20725 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 23 OF 2016**

**JM MUTUNGI, J
OCTOBER 18, 2023**

BETWEEN

**EUNICE MUTITU GICHOBI 1ST PLAINTIFF
JESINTA WANJIKU GICHOBI 2ND PLAINTIFF
JULIUS KARIUKI GICHOBI 3RD PLAINTIFF
LUCY MUTHONI GICHOBI 4TH PLAINTIFF
CATHERINE WAMBUI GICHOBI 5TH PLAINTIFF
JOHN NGURE GICHOBI 6TH PLAINTIFF
STEPHEN GITARI GICHOBI 7TH PLAINTIFF**

AND

**JOSEPH GICHOBI NGURE 1ST DEFENDANT
STEPHEN NGUMI WERU 2ND DEFENDANT**

JUDGMENT

Background

1. The Plaintiffs herein vide a plaint dated 3rd February 2016, instituted the instant suit and sought Judgment against the Defendants jointly and severally for the following orders:
 - a. A declaration that Land parcel No. BARAGWE/GUAMA/879 (suit land) is trust land and the same is held by the 1st Defendant in trust for himself and that of the Plaintiffs.
 - b. Cancellation of the title of the suit land if registered in the names of 2nd Defendant and the same be registered in the name of the 1st Plaintiff and the 1st Defendant jointly.



- c. A caution restricting any transaction relating to the said land.
 - d. Cost of the suit
2. The Plaintiffs contend that the 1st defendant has been the registered owner of land parcel BARAGWE/GUAMA/879, and has been married to the 1st Plaintiff under Kikuyu Customary Law since 1966 or thereabout. The Plaintiffs contend that on or about the 15th day of December 2015, they learnt of Civil Suit N0. 336 of 2013 which had been filed in Kerugoya Magistrate's Court and which sought to transfer the suit land to the 2nd Defendant. Additionally, the Plaintiffs contended that the suit land was the only matrimonial property and that the 1st Plaintiff and 1st Defendant have six children who have been living in the suit land. The plaintiffs further claimed that they were not party to the Civil suit at Kerugoya Magistrate's Court and had not been informed of the reason why they had not been joined to the suit.
 3. The suit is contested by the 2nd and 1st Defendants who filed their statement of defence dated, 1st December 2016 and 20th April 2017, respectively. The 2nd Defendant partially admitted and denied the allegations made in the plaint. He contended that in Civil Suit No. 336/2013, that he had filed against the 1st Defendant, the 1st defendant filed an admission and Judgement was entered in his favor. He further contended that he was not obligated to join the Plaintiffs in Civil Suit No. 336 of 2013 as they were not parties to it.
 4. It was the 2nd Defendant's position that there existed a valid decree in Civil Suit No. 336 of 2013, which granted him ½ acre of LR NO. BARAGWE/GUAMA/879 which remained valid and unchallenged.
 5. On his part, the 1st defendant admitted the content of the plaint wholly and affirmed that the suit land was the only family land and that he was cheated by the 2nd Defendant to sell it to him.
 6. According to the 1st Defendant, his intention was to take a friendly loan but instead, the 2nd Defendant made him sign documents which the 2nd Defendant ultimately used to claim he had bought the land.

Plaintiffs' Case

7. PW1, EUNICE MUTITU GICHOBBI, the 1st Plaintiff herein testified that the 2nd to the 7th Plaintiffs, were her children. She adopted her witness statement dated 3rd February 2016 as part of her Evidence in Chief and relied on the documents that she exhibited in support of her claim. She stated that the 2nd to the 7th Plaintiffs had authorized her to represent them in the suit and testified that the suit land is registered in her husband's name, the 1st Defendant herein, and that her husband had been sued in the Lower Court by the 2nd Defendant but she was not a party to that suit. She further testified that she did not know the 2nd Defendant though he claimed to have bought a portion of the land. The 1st Plaintiff claimed that the 1st Defendant could not sell the land without consent because he was holding the land as trustee on behalf of the family. In Cross Examination by the 2nd Defendant, the 1st Plaintiff confirmed that the land was registered in the name of the 1st Defendant and stated that she did not know of any monies that were paid to the 1st Defendant by the 2nd Defendant.

1st Defendant's Case

8. DW1, JOSEPH GICHOBBI NGURE, the 1st Defendant testified that he did not know that he was selling the land. He stated that he never wanted to sell the land but that he had a loan and the 2nd Defendant assisted him to pay. He stated that some brokers used his application for correction of name to indicate that he was selling the land. He admitted that the 2nd Defendant sued him in the Magistrate's Court and that the 2nd Defendant got Judgment in his favour. He however maintained that he did not



voluntarily sell the land as he had six children and he had no other land. He stated that his children are adults and they have homes and children who reside in the same land.

9. In Cross Examination by the 2nd Defendant, the 1st defendant reiterated that the 2nd Defendant assisted him to pay the loan. That the 2nd Defendant was not his relative and that he made him sign some papers. He stated that he had not notified his family about the sale of the suit property and that they never went to the Land Control Board for sale of the said land.

2nd Defendant's Case

10. DW2, STEPHEN NGUMI WERU, testified that the 1st Defendant came to him and sought his assistance to pay a debt and in return, the 1st Defendant would give him ½ acre of his land. He testified that they went to an Advocate's office where an agreement was prepared. The terms were that the 1st Defendant was to apportion ½ acre of the suit land to the 2nd Defendant. That at the time of signing the agreement the 1st Defendant indicated that his title and identification card had issues which required to be corrected. He further testified that he sued the 1st Defendant in the Lower Court, where Judgment was given in his favor. The Magistrate's Court gave an order to subdivide the suit land and he went to the Land Control Board and was given consent to subdivide the land. He further testified the 1st defendant's wife filed the present suit and as a consequence, the Court issued prohibitory orders restraining any dealings with the suit land pending the determination of this case.
11. The 2nd Defendant prayed that the prohibitory order be lifted so that he can get his portion of the suit land. In the alternate, the 2nd Defendant intimated that the Plaintiffs can refund his money with interest.
12. In cross examination, the 2nd Defendant stated that he did not sue the plaintiffs in the lower court as they were not party to the agreement he entered into with the 1st Defendant. The 1st Defendant was to give him a portion of ½ acre of the suit land but he refused to go with him to the Land Control Board. The 2nd Defendant stated that he got an order from Court which he used to go to the Board.

Submissions, Analysis And Determination.

13. After the closure of the trial the Court directed the parties to file their final closing submissions. The Plaintiffs and the 1st Defendant opted not to file any submissions indicating they would rely on the pleadings and the evidence. The 2nd Defendant filed written submissions dated 26th June, 2023 on 18th July, 2023.
14. The 2nd Defendant in his submissions asserted that the instant suit was res judicata by reason of the issue relating to the dispute between the 1st and 2nd Defendant in respect of the sale of a portion of the suit property having been finally determined in Kerugoya CMCC No. 336 of 2013. The 2nd Defendant submitted that there was in existence a valid Judgment and decree in the Magistrates Court where he was decreed as being entitled to ½ Acre portion of the suit property. The 2nd Defendant submitted that orders/decrees issued by the Magistrates remain valid and have neither been varied, set aside and/or appealed against. The 2nd Defendant argued the present suit is res judicata under the provisions of Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. The 2nd Defendant in support of his submissions placed reliance on the Case of Peter Mbogo Njogu –vs- Joyce Wambui Njogu & Another (2005) eKLR where Lenaola, J (as he then was) relied on the holding by Kuloba, J in the Case of



Mwangi Njangu –vs- Meshack Mbogo Wambugu & Another HCCC No. 2340 of 1991 (unreported) where inter alia Kuloba, J stated:-

“Once a decision has been given by a Court of competent jurisdiction between two persons or their privies over the same subject matter, neither of the parties would be allowed to relitigate the issue again or deny that the decision had in fact been given subject of course to certain conditions.”

The Learned Judge made further reference to the Judgment/decision by Kuloba, J in the Mwangi Njangu Case (supra) where Kuloba, J in considering what would constitute res judicata had the following to say:-

“To allow this suit to go on will allow the Plaintiff to embroil the entire Judicial system by all Court levels into interminable litigation warfare over the same one acre of land, between the same parties or their privies for as long as their ingenuity will carry them. They will come in all guises. They will ask for declarations at one time; injunction at another or simultaneously damages; transfer of title, nullification thereof, eviction. They will sue in singles; they will sue in plural. They will add anyone coming into contact with this land. Title to this one acre of land will forever be in question. The same question will be gone into over and over again by tribunals of competence. If a litigant were allowed to go for ever re-litigating 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 what use the doctrine of res judicata.”

15. In the present suit the issues for determination are whether in the face of the decision in Kerugoya CM’s Civil Case No. 336 of 2013 the suit is res judicata as against the 2nd Defendant; further whether the 1st Defendant held the suit land in trust for the Plaintiffs and therefore could not deal with the same in any manner without their consent.
16. It is not disputed by the parties that there was indeed Kerugoya CMCC No. 336 of 2013 where an order was issued awarding the 2nd Defendant ½ acre portion of land parcel Baragwe/Guama/879. The Plaintiffs acknowledge the existence of the suit at Paragraph 5 of the Plaint. The Magistrate’s Court heard the matter and issued an order and consequent decree for the 1st Defendant in the Magistrate’s Court case to transfer the suit land to the 2nd Defendant herein who was the Plaintiff in the suit before the Magistrate’s Court.
17. No evidence was adduced by the Plaintiffs and/or the 1st Defendant to show that the order and decree issued before the Magistrate’s Court was either varied and/or set aside on appeal. The Order and Decree thus remain valid and in force. The suit before this Court is not an Appeal against the Magistrate’s decision and/or an application for Judicial review. That means the Magistrate’s Order/Decree remains valid and alive. The Plaintiffs claim they were not aware of the suit before the Magistrate’s Court and claim the suit land was matrimonial property and/or ancestral land and that the 1st Defendant holds the same in trust for them. Unfortunately, those are issues that could only be raised before the Magistrate’s Court before it rendered its Judgment. Alternatively, if the Plaintiffs discovered the existence of the suit after the decision had been made they could either have applied for the decision to be reviewed and/or set aside and their joinder to the case to ventilate their interests. Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules respectively allows any person or party affected by an Order or Decree to apply for review of the Decision/Order upon satisfying any of the conditions for review set out under Order 45 Rule 1 of the Civil Procedure Rules. The Plaintiffs therefore, if they



considered themselves aggrieved by the Order/decision of the Magistrate's Court should have sought to have the same reviewed and/or set aside.

Section 80 of the *Civil Procedure Act* provides as follows:-

- “ 80. Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

My understanding of the above provision is that one need not to have been a party in the suit to apply for review of a decree or order. The requirement is that a person considers himself to be aggrieved, and as long as he can satisfy any of the conditions for review under Order 45 he would lawfully be entitled to have the decree reviewed.

18. In the instant matter it is clear that the 1st Defendant as owner of the suit property offered to sell ½ acre portion of the suit property to pay off a debt he had accrued. The 1st Defendant was the husband and father of the 1st and 2nd to 7th Plaintiffs respectively. By the time of filing the present suit the Plaintiffs had notice of the suit Kerugoya CMCC No. 336 of 2013 that had been decided. The decision in the Magistrate's Court directly related to the same land the subject matter in the present suit. That decision stands and has not been challenged. As observed earlier the option the Plaintiffs had was to apply for review and setting aside of the order of the Magistrate's Court and joinder in the suit to ventilate their interests in the suit.
19. To the extent that the decision in Kerugoya CMCC No. 336 of 2013 stands, this Court cannot properly entertain the instant suit as the issue as to the ownership of a portion of ½ acre of land parcel LR No. Baragwe/Guama/879 was adjudicated upon by a competent Court of Law. The issue is res judicata and this suit is unsustainable. The Plaintiffs having acknowledged the existence of the decision of the Lower Court that directly related to the subject matter of the present suit ought to have challenged the decision to have the same reviewed and/or set aside. To entertain the suit and make a decision would lead to the possibility of having conflicting decisions which is not desirable.
20. It is therefore my determination that the present suit is not sustainable and I hereby order the same dismissed but make no order for costs. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 18TH DAY OF OCTOBER 2023.

J. M. MUTUNGI

ELC - JUDGE

