



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 113 OF 2015**

FRANCIS KABOI GACHOKI.....PLAINTIFF

VERSUS

SAMMY KINGEI KAGITO.....DEFENDANT

**RULING**

The plaintiff, acting in person filed this suit against the defendant on 5th October 2011 seeking the following substantive order:-

***1. Cancellation of Title in relation to L.R No. BARAGWE/RAIMU/2504 and L.R No. BARAGWE/RAIMU/2505 to revert back to L.R No. BARAGWE/RAIMU/1515.***

His claim was premised on the pleadings that he was the original owner of land parcel No. BARAGWE/RAIMU/536 which he caused to be sub-divided into two portions being L.R No. BARAGWE/RAIMU/1515 measuring five (5) acres which he retained and L.R No. BARAGWE/RAIMU/1516 which he transferred to **JANE WAMBUI KITHUMBI**. However, when he conducted a search at the Lands office, he discovered that the defendant had fraudulently caused the land parcel No. BARAGWE/RAIMU/1515 into two portions namely L.R No. BARAGWE/RAIMU/2504 and L.R No. BARAGWE/RAIMU/2505. The defendant thereafter transferred parcel No. L.R No. BARAGWE/RAIMU/2405 into his name – he must have meant 2504. He therefore lodged a complaint with the Kirinyaga District Criminal Investigation office but to no avail. Even his complaints to the Director of Survey and the Commissioner of Lands yielded no fruits.

The defendant filed a defence through Maina Kagio Advocate denying involvement in any fraudulent sub-divisions of land parcel No. L.R BARAGWE/RAIMU/1515 into two portions L.R No. BARAGWE/RAIMU/2504 and 2515 and putting the plaintiff to strict proof thereof. The defendant added that he became the owner of land parcel No. L.R BARAGWE/RAIMU/1515 following an order of the Court in **KERUGOYA PMCC No. 91 of 2001** where it was ordered that one (1) acre out of that parcel of land be transferred to him and the Executive officer of that Court was directed to sign all necessary documents to effect that transfer. Subsequently, land parcel No. BARAGWE/RAIMU/1515 was sub-divided and one of the resultant parcels L.R No. BARAGWE/RAIMU/2505 measuring one (1) acre was registered in his name. About two years after the Court order, the plaintiff lodged a complaint with the Ministry of Justice alleging that the land had been sub-divided without his consent and a caution was placed on the land. The defendant issued a notice to the plaintiff to have the caution removed and it was removed by the Court on 17th January 2011. The defendant therefore gave notice in his defence that he would be raising a Preliminary Objection and seeking the dismissal of the plaintiffs suit on grounds that:-

***1. It is fatally defective, bad in law, misconceived and an abuse of the Court process.***

**2. The plaintiff's suit is res-judicata.**

**3. The plaintiff's suit is time barred.**

That Preliminary Objection is the subject of this ruling and when the parties appeared before me on 16th March 2016, it was agreed that it would be canvassed orally on 11th April 2016 since the plaintiff was acting in person. However, the plaintiff did not attend Court on that day and the Court was not given any reasons for his absence. Counsel for the defendant Mr. Maina Kagio who had come prepared to argue the Preliminary Objection orally was therefore allowed to file his written submissions which he did. I have therefore not had the advantage of any submissions from the plaintiff.

I have considered the pleadings together with the list of documents by both parties and the written submissions by counsel for the defendant.

The Preliminary Objection is three (3) folds namely:-

**1. That the suit is fatally defective, bad in law, misconceived and an abuse of the Court process.**

**2. That the suit is res-judicata.**

**3. That the suit is time barred.**

I will interrogate 1 and 2 above together because they are in a way inter-related since a suit that is res-judicata would really mean that it is also bad in law, misconceived and an abuse of the process of the Court.

The doctrine of res-judicata is provided for in Section 7 of the Civil Procedure Act in the following terms:-

***“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”***

The rationale behind res-judicata is that there should be an end to litigation. A party should not be vexed by repetitive litigation over the same matter. Further, Courts are already burdened and over-whelmed with cases and so the limited judicial resources should not be used by Courts repeating themselves on issues already decided by other Courts of competent jurisdiction. It has also been held in **HENDERSON VS HENDERSON 1843 60 ALL ER 378** that when a matter becomes the subject of litigation in and adjudication by a Court, it is required that all the parties bring forward all their whole case because res-judicata applies, except in special cases, not only to points upon which the Court was required to form an opinion on but also to every point which properly belonged to the subject under litigation – see also **POP-IN-KENYA) LTD & OTHERS VS HABIB BANK, A.G ZURICH C.A CIVIL APPEAL No. 80 of 1988 (NBI)**.

In demonstrating that this suit was infact subject of previous litigation, the defendant has availed the pleadings and orders in **KERUGOYA PRINCIPAL MAGISTRATE'S COURT CIVIL SUIT No. 91 of 2001 SAMMY KINGEI KAGITO VS FRANCIS GACHOKI** in which the Court on 12th June 2003 authorized the Executive officer to sign all documents on behalf of the defendant therein (who is the plaintiff in this case) to facilitate the sub-division and transfer of one (1) acre of land out of parcel No. BARAGWE/RAIMU/1515 to the defendant herein. There appears to have been no appeal filed against that order and the plaintiff in his pleadings has not challenged the existence of that suit. Indeed in his verifying affidavit, he has deponed that there has never been any other litigation over the subject matter in any Court. It is obvious however that there has infact been previous litigation involving land parcel No. BARAGWE/RAIMU/1515 in **KERUGOYA PRINCIPAL MAGISTRATE COURT CIVIL CASE**

**No. 91 of 2001** which ordered the sub-divisions of that parcel of land and even without appearing to pre-judge the issues, it is difficult to see how the plaintiff can sustain a plea that the sub-division of land parcel No. BARAGWE/RAIMU/1515 into two portions namely L.R No. BARAGWE/RAIMU/2504 and 2505 were effected fraudulently. Having said so, however, it is clear that this suit is res-judicata. The same parties herein litigated before **KERUGOYA PRINCIPAL MAGISTRATE'S COURT in Civil Case No. 91 of 2001** over the same subject matter and orders were issued on 13th June 2003 that resulted in land parcel No. L.R BARAGWE/RAIMU/2505 being created out of land parcel No. L.R BARAGWE/RAIMU/1515. It is really an abuse of the Court process for the plaintiff to vex the defendant over the same land after a competent Court issued orders some thirteen (13) years ago from which no appeal was preferred.

The defendant has also raised the issue that this suit is time barred. It is obvious from the documents produced herein that the defendant became the registered proprietor of the land parcel No. L.R No. BARAGWE/RAIMU/2505 on 23rd September 2003 when the title deed thereof was issued to him. This suit was filed on 5th October 2015. **Section 7 of the Limitation of Actions Act** provides as follows:-

***“An order 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 occurred to him or, if it first occurred to some person through whom he claims, to that person”***

This suit was filed some two weeks out of time and is therefore statute barred as no leave was sought and granted to do so.

In the circumstances therefore, this suit is not only res-judicata and therefore an abuse of the Court process but it is also statute barred.

The defendant's Preliminary Objection is up-held with the result that the plaintiff's suit is ordered struck out. Costs to the defendant.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> AUGUST, 2016**

Ruling dated, delivered and signed in open Court this 19<sup>th</sup> day of August, 2016.

Plaintiff present in person

Mr. Macharia for Mr. Kagio for Defendant present.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> AUGUST, 2016**