



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 7 OF 2020

JOSEPH NGUNJIRI MURIITHI.....1ST APPELLANT

JOHN KAROKI MURIITHI.....2ND APPELLANT

-VERSUS-

SARAH MUMBI GITHINJI.....1ST RESPONDENT

SAMUEL MURIITHI GITHINJI..... 2ND RESPONDENT

(sued as the administrators and legal Representatives of the late PETER GITHINJI MURIITHI alias GITHINJI MURIITHI)

JUDGMENT

1. This is an Appeal arising from the Ruling and Orders of the Honourable A. Mwangi Principal Magistrate, Karatina dated 6th February, 2020 in *Karatina PMELC No. 15 of 2019*.

2. By their Complaint filed before the Trial Court on 12th July, 2019, the two Appellants – Joseph Ngunjiri Muriithi and John Karoki Muriithi had sought for a declaration that the Respondent’s husband Githinji S/O Muriithi held title to all that parcel of land known as

Ruguru/Kiamariga/606 in trust for himself and the Appellants. They further sought a determination of the trust, partition of the land and registration of the same in their respective names.

3. But in her statement of Defence dated and filed on 2nd August, 2019 before the Trial Court, the Respondent – Sarah Mumbi Githinji sued in her capacity as the administrator and Legal Representative of the estate of the late Peter Githinji Muriithi, objected to the grant of the orders sought. Among other things, it was the Respondent’s contention that the Appellants suit was *res judicata* as the matters raised therein were according to her the same matters that were directly and substantially in issue in Nyeri High Court Succession Cause No. 261 of 1994 between the same parties.

4. Subsequent to the filing of the pleadings and by a Notice of Motion application dated 13th September, 2019, the Respondent urged the Court to strike out the suit on the grounds that the suit was *res judicata*, scandalous, frivolous, vexatious and an abuse of the court process. The Respondent further stated in her application that the Complaint as filed by the Appellants herein was defective, incompetent and bad in law.

5. Having considered the said application and in her Ruling dated 6th February, 2020 aforesaid, the Learned Trial Magistrate made a finding that the suit was indeed *res judicata* and proceeded to strike out the Appellants suit with costs to the Respondent.

6. Aggrieved by the said Ruling and determination, the Appellants moved to this Court vide a Memorandum of Appeal dated 20th February, 2020 but filed herein on 1st October, 2020 urging the Court to overturn the decision of the Lower Court on the grounds that:

1. *The Learned Trial Magistrate erred in fact and in law in dismissing the Plaintiff’s (case) on the basis of the doctrine of res judicata, while it was clear that the probate court had declined jurisdiction.*
2. *The Learned Trial Magistrate erred in law and in fact in misdirecting herself on the law applicable to customary trust; and*
3. *That the Learned Trial Magistrate erred in fact in upholding the preliminary objection whereas there was pending before it*

issues of fact and law that ought to have been heard and determined on merits.

7. Pursuant to directions given herein on 5th May 2021, the Appeal was canvassed by way of written submissions. I have perused and considered the said submissions and the authorities to which I was referred by the parties.

8. The gist of the Appeal before me is that the Learned Trial Magistrate erred and misdirected herself in making a finding that the suit filed by the Appellants was *res judicata* as the subject matter was the same as that which was in dispute between the same parties in Nyeri High Court Succession Cause No. 261 of 1994.

9. The doctrine of *res judicata* is set out in **Section 7 of the Civil Procedure Act**. The doctrine ousts the jurisdiction of a Court to try any suit or issue which had been finally determined by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

10. A close reading of **Section 7 of the Act** reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will thus apply only if it is proved that:

(i) *The suit or issue raised was directly and substantially in issue in the former suit;*

(ii) *That the former suit was between the same parties or parties under whom they or any of them claim;*

(iii) *That those parties were litigating under the same title;*

(iv) *That the issue in question was heard and finally determined in the former suit; and*

(v) *That the Court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.*

11. A perusal of the Ruling by the Learned Trial Magistrate reveals that the trial Court was conscious of these requirements. The Court asked itself whether the issues raised before her were directly and substantially in issue in the previous suit and whether the parties were the same as those in the High Court Succession Cause. The Trial Court further considered whether the issues herein were heard and finally determined in the former suit and whether the Court that formerly heard the claim was competent to do so. It was the Court's opinion that all the requirements had been satisfied and hence the holding that the suit was *res judicata*.

12. I have taken a fresh look at the material placed before the Trial Court but I am however unable to arrive at the same conclusion. In their own Amended Plaint filed on 8th August, 2019 before the Trial Magistrate, the Appellants herein had admitted the existence of the said Nyeri High Court Succession Cause No. 261 of 1994. It was however their contention that the issue of the existence of a customary trust had not been dealt with after the Court declined to deal with the same.

13. The Appellants cannot, in my view, be faulted for taking that position. A perusal of the Ruling by the Honourable Lady Justice Mumbua Matheka delivered on 23rd May, 2019 in the said High Court Succession Cause No. 261 of 1994 which was produced before the Trial Court reveals that the Cause therein related to the estate of one Peter Githinji Muriithi. The said Peter was a brother to the two Appellants herein and the husband of the 1st Respondent.

14. It was also clear that the Appellants together with their brother's widow Sarah Mumbi Githinji had been issued with Letters of Administration for the estate of their brother. The Appellants subsequently filed summons for confirmation of the grant in which they proposed that the suit property known as Ruguru/Kiamariga/606 be shared equally among the three of them. When the 2nd Respondent who is a son of the deceased and the 1st Respondent heard of the proposal, he filed an affidavit of protest in the Succession Cause. In response to the protest, the Appellants swore an affidavit filed in Court on 17th November, 2015 stating that they were beneficiaries of their brother's estate because when he was registered in 1959 during demarcation, he was so registered as a trustee of their mother's house.

15. At Page 8 of her Ruling, the Learned Judge observed as follows:

"Section 66 of the Law of Succession Act provided guidelines to the Court as to the preference to be given to certain persons to administer where the deceased died intestate. The deceased herein died intestate. He did not leave a will appointing the two brothers as the administrators of his estate and they produced no evidence in support of the alleged trust, and if indeed one existed, this was the wrong forum for the matter."

16. In that observation the Court was quite clear that it was not competent to deal with the issue of customary trust and it would therefore not be concluded that the issue before the Trial Court had been dealt with and finally determined by a Court competent to try the suit in which the issue was raised and the subsequent suit.

17. That observation was indeed in consonance with a plethora of case law which have time and again asserted that the mandate of the probate court is quite restricted in scope. Speaking to the same matter in – **In the matter of the Estate of Peter Igamba Njoroge, [Nakuru**

Succession Cause No. 432 of 2009 and Succession Cause No. 864 of 1996 (2015) eKLR] M. K. Ibrahim J (as he then was) observed as follows:

“...Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of a trust. This is not the function of a Succession Court where the claimant is neither a beneficiary nor a dependent. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties ...”

18. Arising from the foregoing, I am in agreement with the Appellants that the Learned Trial Magistrate misdirected herself when she held that the High Court had considered the Appellants claim based on customary trust and had made a final determination on the question of the ownership of the suit property. The Succession Cause merely determined the beneficiaries of the estate of the late Peter Githinji Muriithi and not the ownership of the suit land.

19. Accordingly I find merit in the Appeal, set aside the orders of the Learned Trial Magistrate and direct that the suit be placed before a Magistrate other than the Honourable A. Mwangi, PM, for trial.

20. I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY FEBRUARY, 2022.

In the presence of:

No appearance for the Appellants

The Respondents present in person

Court assistant - Kendi

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J. O. OLOLA

JUDGE