



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 100 OF 2013

JECINTA GATHONI KURIA.....PLAINTIFF

VERSUS

JULIA WANGUI WAWERU.....1ST DEFENDANT

KARURA FARMERS COMPANY LTD.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

DISTRICT LANDS REGISTRAR, NAIROBI.....4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....5^H DEFENDANT

RULING

The Preliminary Objection

The Plaintiff filed a Notice of Motion herein dated 19th January 2013 seeking orders of status quo and inhibition in relation to the suit property herein, namely LR. Nairobi Block 141/170. Her grounds for the application are that the suit property initially belonged to her but was illegally and fraudulently registered by the 1st Defendant.

The 1st Defendant subsequently filed a Preliminary Objection dated 11th February 2013 on the ground that the Plaintiff's application was *res judicata* and was barred by section 7 of the Civil Procedure Act. The parties were directed to file written submissions on the Preliminary Objection. The 1st Defendant's counsel filed two sets of submissions on 22nd March 2013 and 31st July 2013. He argued therein that the matter herein has already been adjudicated in **Civil Suit No. 969 of 2004, Julia Wangui Waweru vs Jacinta Gathini Waweru** at the Nairobi Chief Magistrate's court.

The counsel submitted that the 1st Defendant herein sued the Plaintiff herein in the said suit, for a declaration that the 1st Defendant was the rightful owner of the suit property, and an injunction restraining the Plaintiff herein from interfering with the said property. Further, that the suit was heard and judgment passed in favour of the 1st Defendant herein by Kiema R.M. on 27th July 2007. The counsel further submitted that the addition of the 2nd, 3rd, 4th and 5th Defendants to the present suit does not change the fact that the issues in this suit are the same, and he relied on the decision in **Solomon Kitundu & 2 Others vs Park Towers Limited & 2 Others, (2006) e KLR** in this respect.

The Plaintiff's counsel filed submissions dated 19th April 2013 and filed on the same date, wherein he argued that section 19 of the Environment and Land Act bars the application of the Civil Procedure Act, and section 7 of the Civil Procedure Act does not therefore apply to this court. It was his submission that the said section 19(2) provides as follows:

“(2) The Court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by the principles of natural justice.”

The counsel further submitted that in the event section 7 of the Civil Procedure is found to be applicable, the 1st Defendant has not met the threshold required for a preliminary objection to lie as stated in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** and **Seventh Day Adventist Church E.A. Ltd vs Evangelical Lutheran Church (2013) e KLR**. The counsel submitted in this regard and relying on various judicial authorities that the 1st Defendant's pleadings and submissions are argumentative and therefore raise issues of facts that need to be ascertained; that this Court cannot close its eyes to the allegations of fraud raised in the Plaint filed herein; and the objector had not admitted to the correctness of the Plaintiff's facts.

Lastly, the Plaintiff's counsel submitted that the suit herein are not *res judicata* for the reason that the issue in this suit is that of the legality of the 1st Defendant's title to the suit property, while the issue in **Nairobi CMCC 969 of 2004** was trespass and the remedy of an injunction was granted to the 1st Defendant. Further, that the parties in the two suit are not the same, nor are they litigating under the same title, as the Plaintiff in the subordinate court is the 1st Defendant herein, and the 2nd to 5th Defendants herein were not parties in the previous suit. The counsel also contended that the 1st Defendant has not demonstrated that the subordinate court had competent jurisdiction, and that the said court was not invited to make a determination on whether the 1st Defendant acquired title legally. It was his contention that this issue has not been finally determined.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. Before I determine the substantive issues raised I need to address the preliminary issue in the submissions by the Plaintiff's counsel on the application of the Civil Procedure Act to land disputes. The counsel in this respect relied on section 19 of the Environment and Land Act. It is however to be noted that the said section is one of the sections of the Environment and Land Court Act that was amended by the Statute Law (Miscellaneous Amendments) Act, 2012 (No. 12 of 2012), and now reads as follows:

“19.(1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.

(2) The Court shall be bound by the procedure laid down by the Civil Procedure Act.”

Contrary to the learned counsel's submissions, the Civil Procedure Act is specifically applied to proceedings before the Environment and Land Court by the amended section. Counsels are urged to access the updated version of the Environment and Land Court Act and other laws from the National Council for Law Reporting electronic database of the Kenya Law Reports and Laws of Kenya.

The outstanding substantive issues to be decided in this preliminary objection are firstly, whether the 1st Defendant's preliminary objection raises a pure point of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise

of judicial discretion.”

The objection raised of *res judicata* is a pure point of law as it has the effect of determining this suit, and since the fact of judgment having been delivered in **Nairobi CMCC 969 of 2004** is not disputed. It in this regard important to note that the relevant facts that are deemed to be correct and that need not to be ascertained as stated in the ruling given in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (supra)** are those raised in the preliminary objection, and not those raised in the pleadings filed in the suit as a whole. To proceed in the manner proposed by the Plaintiff of looking at the facts raised in all the pleadings filed by the parties would result in courts deciding on issues raised in suits at a preliminary stage and without a hearing.

On whether the application herein is *res judicata*, section 7 of the Civil Procedure Act provides as follows in this regard:

“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 requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

In the present suit I have perused the pleadings and judgment given in **Julia Wangui Waweru vs Jacinta Gathini Kuria, Nairobi CMCC 969 of 2004**, and note that in the Plaint therein dated 30th January 2004, the Plaintiff therein who is the 1st Defendant herein, sought a declaration that she is the rightful owner of the suit property herein, and orders of injunction against the Defendant therein, who is the Plaintiff herein. The judgment was delivered on 27th July 2007 and Kiema R.M entered judgment in favour of the Plaintiff therein, as sought in her Plaint.

With respect to the Plaintiff’s submissions with regard to the subordinate court’s jurisdiction, the issue of a court’s jurisdiction must be raised at the earliest possible moment for the reasons given by the Court of Appeal in **The Owners of Motor Vessel “Lillian S”. v Caltex Oil Kenya Ltd** [1989] KLR 1 as follows:

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

Since the issue of jurisdiction was never raised by the Plaintiff in the subordinate court, she cannot raise it now as that horse has long since bolted, and the subordinate court has heard and determined the suit in **Nairobi CMCC 969 of 2004**. Furthermore, no reasons have been given by the Plaintiff nor grounds shown as to why the subordinate court lacked jurisdiction. It is therefore my finding that the subordinate court is deemed to have had jurisdiction and to have competently heard and determined the said suit.

On the submissions made as regard the matters in issue in the two suits, I have perused the Plaint filed herein dated 19th January 2013. The Plaintiff herein is seeking a declaration that the 1st Defendant’s title to the suit property herein was irregularly, fraudulently and illegally acquired, and orders of cancellation

of the said title. The Plaintiff herein also seeks various other orders consequent to such cancellation including indemnity to the 1st Defendant, the 1st Defendant's eviction from the suit property and an injunction against the said defendant. The Plaintiff's Notice of Motion dated 19th January 2013 also seeks temporary injunction orders, on the basis that the suit property was illegally and fraudulently registered in the 1st Defendant's name.

The main issue herein therefore is the legality of the Defendant's title to the suit property, that was decided on by the court in **Julia Wangui Waweru vs Jacinta Gathini Kuria, Nairobi CMCC 969 of 2004**, which declared the 1st Defendant to be the owner of the suit property. All the orders sought herein are aimed at cancellation of the said 1st Defendant's title, and the Plaintiff herein ought to have raised the allegations of fraud, irregularity and illegality she raises herein in **Julia Wangui Waweru vs Jacinta Gathini Kuria, Nairobi CMCC 969 of 2004**.

I am guided in this respect by Explanation (4) to section 7 of the Civil Procedure Act which provides that any matter which might and ought to have been made ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The issues raised in the present suit are therefore deemed to have been directly and substantially in issue in **Julia Wangui Waweru vs Jacinta Gathini Kuria, Nairobi CMCC 969 of 2004**.

I will address the last issue of whether the parties in this suit are the same as in the previous suit. It has been argued that the 2nd to 5th Defendants herein were not parties in **Julia Wangui Waweru vs Jacinta Gathini Kuria, Nairobi CMCC 969 of 2004**. and indeed this is the position. However, it is my finding that the 2nd to 5th Defendants are joined as parties in this suit in their capacity as parties who were privy to the illegal and fraudulent registration of the title to the suit property in the 1st Defendant's name. This is shown in the particulars of fraud and illegality and irregularity alleged on the 2nd, 3rd and 4th Defendants part in paragraphs 27 and 28 of the Plaint filed herein. The 5th Defendant is joined as a party in his capacity as legal advisor to the 3rd and 4th Defendants.

It is thus the case and finding of this court that the 2nd-5th Defendants herein are being sued under the same title and capacity as that of the 1st Defendant. In addition, this court will not allow matters already decided in previous suits to be re-litigated by adding additional parties to new suits, which parties represent the interests that were, or ought to have been raised in the previous suit. It is in the interests of expeditious and efficient dispensation of justice that matters in issue in a case are litigated at once and with finality.

Arising from the foregoing reasons I find the 1st Defendant's Preliminary Objection dated 11th February 2013 has merit, and the suit herein and Notice of Motion dated 19th January 2013 are accordingly dismissed for being *res judicata*.

The Plaintiff shall bear the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of ____Janaury____, 2014.

P. NYAMWEYA

JUDGE