



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HCC CASE NO. 518 OF 2013

MICHAEL GICHIRA NJERU PLAINTIFF

VERSUS

SAMUEL MAGU MUGO 1ST DEFENDANT

JOHN WANJOHI MWANGI MUGO 2ND DEFENDANT

MONICA NYAMBURA MUCERU 3RD DEFENDANT

RULING

By a plaint filed herein on 27th February 2012, the plaintiff filed this suit against the defendants seeking an injunctive relief with respect to the parcel of land No. INOI/KIAMBURI/271 and the cancellation of register which shows the same to be registered in the defendants names. He also sought costs and interest. The claim is premised upon a pleading that whereas L.R No. INOI/KIAMBURI/271 (hereinafter referred to as the suit land) was all along the property of the plaintiff's deceased father one NJERU MUGO, the 1st defendant herein, with the help of Court orders that were obtained fraudulently had himself registered as the owner of the said suit land yet he was not in anyway related to the plaintiff's deceased father. The 1st defendant then sold this land to the other defendants who now want to evict the plaintiff.

In their defence, the 1st and 2nd defendants plead that they are strangers to the plaintiff's claim but most importantly add that the case is an abuse of the Court process as this same matter was the subject in Nairobi ELC No. 440 of 2007, Kerugoya L.D.T No. 17 of 2007, Kerugoya S.R.M Case No. 101 of 1992 and Wanguru Succession Case No. 35 of 1997. They therefore plead that they would raise the issue of res-judicata.

In her defence, the 3rd defendant says she is a bone fide purchaser of the suit land and that the suit is res-judicata as the same was litigated in Nairobi High Court Civil Cases No. 1731 of 2001 and 440 of 2007 both of which were dismissed. She then puts in her own counter claim over parcel No. INOI/KIAMBURI/1161 which is a sub-division of the suit land.

In addition to the above, the 3rd defendant filed a Notice of Motion under **Sections 7 and 8 of the Civil Procedure Act** seeking the dismissal of this suit for being res-judicata. That motion is the subject of this ruling.

I have considered the application and the submissions by counsels together with the annextures.

It is clear to me that Nairobi H.C.C.C No. 1731 of 2001 and Nairobi ELC No. 440 of 2007 are really one and the same thing. The case was originally registered as Nairobi H.C.C.C No. 1731 of 2001 but was later changed to Nairobi ELC Case No. 440 of 2007 in which this decree of Onyancha J was finally issued.

The Preliminary Objection being raised herein relates to this matter being res-judicata in view of the fact that the same parties have litigated before in other Courts over the same suit land. The doctrine of res-judicata is provided for under **Section 7 of the Civil Procedure Act** as follows:-

“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”

It is clear from the above that before res-judicata can be properly invoked, the following conditions must be met:

- 1. The matter directly and substantially in issue must be the same matter which was directly and substantially in issue in the former suit.***
- 2. The former suit must have been between the same parties or parties under whom they claim***
- 3. The parties must have litigated under the same title***
- 4. The Court which decided the former suit must have been a competent Court and lastly,***
- 5. The matter directly and substantially in issue must have been heard and finally determined***

I have looked at the ruling in Nairobi H.C.C.C No. 1731 of 2001 and the decree extracted in Nairobi ELC No. 440 of 2007 and as I have said above, this was one and the same case because the ruling of Onyancha J in Nairobi H.C.C.C No. 1731 of 2001 is dated and delivered on 7th April 2010 and the resultant decree in Nairobi ELC No. 440 of 2007 refers to the same date and ruling. The parties are also the same. It is also not in dispute that the case herein revolves around the ownership of L.R No. INOI/KIAMBURI/271 (the suit land). That was also the same property subject matter of Nairobi H.C.C.C No. 1731 of 2001 wherein the plaintiffs were LOISE NJAMBI NJERU, SYMON GICHUKI NJERU, JOHN KURIA NJERU and MICHAEL GICHIRA NJERU while the defendant was SAMUEL MUGO MAGU. In dismissing that suit, Onyancha J held as follows:-

“I have however considered the claim in this suit before me. The main issue in it is clearly the ownership of L.R No. INOI/KIAMBURI/271. The parties at least in the amended plaint are Symon Gichuki Njeru, John Kuria Njeru and Michael Gichira Njeru. They are all immediate sons of Loise Njambi Njeru who was either the plaintiff or defendant in Kerugoya Land Dispute Tribunal case No. 17 of 2001 or Kerugoya S.R.M CC No. 101 of 1992. Indeed she was the 1st defendant in this case until the plaintiffs decided to delete her name from the amended plaint herein”

The judge then goes on to observe as follows:-

“In my view and finding, removing of Loise Njambi Njeru’s names from the picture does not obliterate the existing records. The facts remain that the plaintiffs who are the children of Loise Njambi Njeru claim any rights to the suit land only through her. The dispute over the above stated land is clearly one which had been heard and finally determined in the two cases above mentioned. It cannot be allowed to be heard again and afresh under this suit. Put differently, the issues in this suit between the same parties or parties claiming under them, have in the said suits been heard and finally determined and cannot be heard under this suit. This suit is accordingly, res-judicata the two above mentioned suits”.

The Judge then proceeded to dismiss the suit. There is nothing to show that any appeal was preferred against that ruling delivered some four (4) years ago.

Looking at the pleadings herein, it is clear that the plaintiff in this case was the 4th plaintiff in Nairobi H.C.C.C No. 1731 of 2001 while the 1st defendant in this case was the defendant in Nairobi H.C.C.C No. 1731 of 2001. It is also clear from paragraph 13 of the plaint in the case now before me that the 2nd defendant (JOHN WANJOHI MWANGI MUGO) is the son to the 1st defendant (SAMUEL MAGU MUGO) and that the said 1st defendant transferred the suit land to 2nd defendant who now wants to evict the plaintiff. It is also the plaintiff's case that the 3rd defendant herein (MONICA NYAMBURA MUCERU) has purchased the suit land from the 1st and 2nd defendants. It is clear in my mind from the pleadings herein that although the 2nd and 3rd defendants were not parties in Nairobi H.C.C.C No. 1731 of 2001, their claims in this suit are not different from the claim of the defendant (SAMUEL MUGO MAGU) in Nairobi H.C.C.C No. 1731 of 2001. Explanation 6 under **Section 7 of the Civil Procedure Act** states as follows:-

“Where persons litigate bone fide in respect of a public right or of a private right claimed in common for themselves and other persons, all persons interested in such right shall, for purposes of this section, be deemed to claim under the persons so litigating”

I find that the claims of the 2nd and 3rd defendants in this case are so closely intertwined with the claims of the defendant in Nairobi H.C.C.C No. 1731 of 2001 and I am prepared to find, which I hereby do, that the 1st and 2nd defendant's claims in this case was well ventilated by the claim of the defendant in Nairobi H.C.C.C No. 1731 of 2001 since they claim under him. It is my finding therefore, that in view of the decision in Nairobi H.C.C.C No. 1731 of 2001, this suit is res-judicata. Counsel for the plaintiff has referred me to the following cases in support of the submissions that this suit is not res-judicata:-

1. ***KENYA SHELL LTD VS KILELESHA SERVICE STATION LTD (2006) e K.L.R***
2. ***ENOCK KIRAO MUHANJI VS HAMID ABDALLA MBARAK MALINDI ELC NO. 58 of 2012***
3. ***BERNARD MUGO NDEGWA VS JAMES NDERITU GITHAE EMBU H.C.C.C No. 101 of 2006 e K.L.R***

The **ENOCK KIRAO MUHANJI** case (supra) dealt with a situation where the subordinate Court which handled the former suit between the parties did not have jurisdiction to hear the suit before it. It has not been suggested that Onyancha J who dismissed the previous suit had no jurisdiction over the matter. That authority is therefore easily distinguished from this case now before me.

The case of **BERNARD MUGO NDEGWA** (supra) similarly dealt with a situation where the former suit was handled by a Land Disputes Tribunal which had no jurisdiction over the suit before it. That case is also of no assistance to the plaintiff in this case.

I have also looked at the case of **KENYA SHELL LTD** (supra) but I see nothing in it to support the plaintiff's case.

The plaintiff has also submitted that the defendants have not furnished this Court with the proceedings in KERUGOYA P.M.C.C No. 101 of 1992. That may be so. However, the Preliminary Objection was founded on the claim that this suit was litigated in Nairobi H.C.C.C No. 1731 of 2001. In that suit, the Judge did make reference to Kerugoya P.M.C.C No. 101 of 1992 and it was therefore not necessary for this Court to be provided with the proceedings or judgment in that case because the Judge in Nairobi H.C.C.C No. 1731 of 2001 must have had an opportunity to look at the proceedings or judgment in that case in the course of his ruling.

It is also the plaintiff's submissions that Judge Ong'udi at Embu found that this case raises triable issues and directed that the matter goes on for hearing. I have read the ruling of the said Judge delivered in Embu High Court on 19th February, 2013 on an application by the plaintiff for injunctive orders. The Judge dismissed the said application and infact went on to observe that the plaintiff was ***“circumventing appeals and other forms of challenging lawful orders by filing fresh suits by***

advocates” which she found amounts to “*an abuse of due process*”. The High Court also made the following comment which is relevant for purposes of this ruling:

“I therefore find that the applicant has not satisfactorily demonstrated that he deserves the orders sought especially after lying that there had been no previous proceedings between him and the defendants over the same suit property. Prima facie the issue of res-judicata appears to be lifting its horns. However, that will be for the trial Court”

What the Judge meant was that she could discern an issue of res-judicata at that stage but left it to be determined by the trial Court and that is the application being canvassed now in this Court. It was never the Judge’s findings that the suit raises triable issues because that issue never came up for determination before her.

The plaintiff has also submitted that the plaint should not be struck out and has referred the Court to case law on when to allow a suit to be struck out. However, the issue being raised in this Preliminary Objection is not about striking out any pleading. The issue is that this suit is res-judicata having been determined in another forum. Those are two different issues.

Ultimately therefore, having considered all the matters herein, I find that this suit is res-judicata. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

24TH FEBRUARY, 2014

24/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. Kamunda for Applicant – absent

Respondent

Mr. Njoroge for Okwaro for 3rd respondent – present

COURT: Ruling delivered this 24th day of February, 2014.

Mr. Njoroge for Okwaro for respondent present.

B.N. OLAO

JUDGE

24TH FEBRUARY, 2014