



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Case 66 of 2011**

**MUGWIMI KABUTHI & 8 OTHERS.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**STEPHEN MURITHI MUGWIMI.....1ST DEFENDANT/APPLICANTS**

**JAMES KARIUKI MUGWIMI.....2ND DEFENDANT/APPLICANT**

**RULING**

This is the notice of motion dated 7/11/2011 brought under Order 2 rule 1(A)–(D) Civil Procedure Rules for the following orders;

- 1. Dismissal of suit with costs as the matter raised herein is resjudicata.***
- 2. Costs of the application.***

Its supported by the grounds on the face of the application and supported by an affidavit sworn by the 1<sup>st</sup> Defendant.

The 6<sup>th</sup> Plaintiff/Respondent filed a replying affidavit dated 20/1/2012 and in paragraph 3 denies that any issues have been adjudicated or concluded between the Plaintiffs and Defendants. Both Counsels agreed to dispose of the application by way of written submissions which were filed. Ithiga advocate states that all issues raised were concluded in Runyenjes Resident Magistrate's Civil case No.18/1984, Embu HCCA NO.24/02, Embu MISC. APPLICATION NO.69/07 and Embu NO.39/08. All these matters Mr. Ithiga says have been decided on and has attached the Rulings. He submits that the matter pending is an appeal through the back door. He referred to ***COURT OF APPEAL NYERI NO.306/05 FREDRICK WACHIRA NDEGWA -VS- BEATAL KANYORA MUTHUI.***

Mr. Kariithi for the Plaintiffs/Respondents is of the view that the matter is not res-judicata as the same has never been heard. And that the person who had a case in Runyenjes was one Mugwimi Kabuthi the father to the Plaintiffs. And that matter was not deliberated on. He submitted that what has been determined by the Courts are mere technicalities.

I have before me the numerous files related to this matter. I must on the onset point out that I have before me Runyenjes Resident Magistrate Civil Case No.18/94 housed in Embu HCC No.39/08. This is very wrong because of two things;

- 1. HCC NO. 39/08 is not an appeal file.***

**2. There is no order transferring the Runyenjes file to this Court. Even the file cover reads HCC NO 39/08 FORMERLY RUNYENJES RMCC NO.18/94. This is quite misleading and the Executive Officer must arrange and return the Runyenjes file to its rightful place.**

Hon. Justice Khaminwa in her Judgment in Embu HCCA NO.24/02 ordered that the Runyenjes RMCC NO.18/94 be heard afresh at Runyenjes. This was never complied with. The parties in the Runyenjes case are all the Plaintiffs herein plus their father Mugwimi Kabuti who they say is deceased. Their claim is against the two Defendants over the same parcel of land Nos. NGANDORI/KIRIGI/835 & NGANDORI/KIRIGI/836.

When the matter was redirected to Runyenjes the Plaintiffs herein decided they would not pursue that line. They came and filed Embu HCC NO.39/08 where the parties were the same. They attempted twice to amend the plaint which attempts were disallowed by Hon. Justice Karanja vide her Rulings dated 30/6/2009 and 2/3/2010. I agree that this was on technicalities.

On 10/6/2011 the Plaintiffs decided to file an originating summons concerning the same parties and the same parcels of land. This is now the present suit Embu HCC NO.66/2011. They had in the meantime placed cautions on the two parcels. The said cautions were lifted vide Orders issued in Embu HCC No.39/08 by Hon. Justice Muchelule on 20/7/2011. So as far as this Court is concerned, the Plaintiffs have 3 cases between the same parties and same subject matter pending before the Courts i.e.

**1. Runyenjes RMCC NO.18/94**

**2. Embu HCC NO.38/09**

**3. Embu HCC NO.66/2011**

In as much as they argue that the matters have not been determined why do they have multiplicity of pending cases over the same matter and between the same parties? This practice must stop forthwith.

The application before me is dated 7/11/2011 and it concerns Embu HCCC NO.66/2011. The Applicant wants the said Civil Suit dismissed for being res-judicata. The Applicant brought the application under Order 2 rule 1 A-D Civil Procedure Rules. These provisions are not found under the Civil Procedure Rules. His application ought to have been filed under section 7 Civil Procedure Rules. According to section 7 Civil Procedure Rules no Court has powers to try an issue in which the matter has been directly and substantially in issue in an earlier matter and the parties were the same.

For res-judicata to arise the issue must have been heard and decided on merits otherwise the plea cannot be sustained. In the case of **SAMUEL KIIRU GITAU -VS- JOHN KAMAU GITAU NAIROBI HCCC NO.1249/98** Justice Visram as he then was stated;

***“For a matter to be res-judicata it must be one on which the Court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been “heard and finally decided” not withstanding that the former suit was disposed of by a decree on an award”.***

The key words here are **“Being heard and decided”**.

As outlined above the Runyenjes civil case No.18/94 has never been heard and decided following the decision in Embu HCCA No.24/02. Secondly Embu HCC No.39/08 has not been heard. The applications for amendment were dismissed on technicalities. The matter is still pending. The issues and parties are the same. Therefore the present suit cant be said to be res-judicata. This abuse of the Court processes by the Plaintiffs/Respondents will have to stop so that they proceed with one file to its end. I will disallow the application dated 7/11/2011. I however make the following orders.

**1. Runyenjes RMCCC NO.18/94 original record to be returned to the said Court forthwith.**

**2. The Plaintiffs/Respondents are given 30 days within which to withdraw the two other suits pending i.e.**

**I) RMCC NO.18/04 - RUNYENJES**

**II) HCC NO.39/08 - EMBU**

**3. Mention on 17/4/2013 to confirm compliance and issuance of further directions. The Plaintiffs are further informed that this suit will not proceed in anyway until the above orders are complied with.**

**4. Since its the Plaintiffs/Respondents who are responsible for all this mess they will pay costs.**

**DATED AND DELIVERED AT EMBU THIS 20<sup>TH</sup> DAY OF MARCH 2013.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;  
Mr. Ithiga for Defendants  
Mr. Waweru for Plaintiffs  
Njue – C/c  
Parties**