



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

ENVIRONMENT & LAND CASE NO. 56 OF 2013

EVANS KAMAU MWAURA..... PLAINTIFF

VERSUS

ESTHER GATHONI KAMAU

SAMUEL KARANJA

EVANS KAMAU MWAURA DEFENDANTS

RULING

A Preliminary Objection was taken on behalf of the Defendants in this suit on the ground that the suit is *res-judicata*. It was contended that the issues being raised in this suit were finally and conclusively determined in Kitale High Court Succession Cause No. 260 of 2006 and that no appeal has been preferred against the decision in the Succession Cause.

In the Succession Cause, the Defendants herein were Petitioners who had been granted Letters of Administration of the estate of the late Evans Mwaura Kamau. The only property available for distribution was land described as Suwerwa Plot No. 003174 within Trans-Nzoia County. The Petitioners applied for confirmation of grant but the Plaintiff herein who was the caveator in the Succession Cause filed objection on the ground that the property which was up for distribution was actually not available for distribution as it was his own property.

The protest by the caveator was considered based on the caveator's Affidavit of protest and the Petitioner's Affidavits in reply. In a ruling delivered on 23/04/2013, Justice Karanja dismissed the protest and went ahead to confirm the grant in terms of the agreed mode of distribution.

The Preliminary Objection was opposed by Mr. Kaosa Counsel for the Plaintiff herein who argued that this being an Environment and Land Court is not bound by rules of Civil Procedure and therefore the issue of *res-judicata* does not arise. Mr. Kaosa further argued that the judge in the Succession Cause had clearly indicated in his ruling that the issue of ownership could be handled in an ordinary suit in a Land Court.

I have considered the Preliminary Objection raised herein. There is no doubt that the parties in the Succession Cause are the same ones in this suit. The basis of the Plaintiff's claim in the Succession Cause was that he was the owner of Plot No. Suwerwa 174. The judge in the Succession Cause considered the caveator's (now the Plaintiff's) claim and arrived at a conclusion that the plot in issue was family property and that the caveator was only out to disinherit the rest of the family members using the advantage of

similarity in names between the families of Moses Mwaura Kamau.

I wish to quote the relevant part of the judge's ruling in this Succession Cause where he said as follows:-

“Since the dispute does not involve any other property, it may safely be assumed that the said Plot No. 174 Suwerwa Settlement Scheme is the same parcel of land described herein as Plot No.003174 Suwerwa Settlement Scheme.”

The position taken by the Petitioners is that the caveator's protest is devoid of merit. Their case is grounded on the facts deponed in Affidavits deponed on 29th June, 2011 by the first and second Petitioners as well as a family member, Tabitha Murugi Mwaura and the deceased's brother, Jackson Chege Mwaura.

Basically, the Petitioners' case is that the material property does not belong to the caveator and all that was stated in support of his protest was full of falsehood. It is the Petitioners' contention that the material property belonged to one Moses Mwaura Kamau who died in 1993 having been predeceased by his late son, the deceased herein and leaving behind three wives and/or three houses. The Petitioners contend that having been the eldest or first born son of the late Moses Mwaura Kamau, the deceased herein was registered as the proprietor of the material property to hold in trust for the second and third Petitioners as representatives of the other two houses of the late Moses.

The Petitioners have indicated that the caveator is a brother to the second Petitioner and they are from the second house of the late Moses who it is said purchased the material property sometimes in 1965 from the Settlement Fund Trustees. The documents in the Petitioners' list of documents filed herein on 22nd April, 2010 clearly indicate that the property was indeed purchased from the Settlement Fund Trustees in 1965. The documents further indicate that the purchaser and hence the beneficial owner of the property was one Evans Kamau Mwaura. It is herein shown that the name Evans Kamau Mwaura is shared between three people in this matter i.e. the deceased, the third Petitioner and the caveator. It has herein been established without dispute that all the three people who share the name Evans Kamau Mwaura are related and that their relationship stems from the fact that they are all sons of the late Mosses Mwaura Kamau who is said to have been the actual legal or beneficial owner of the material property. Therefore, his aforementioned three sons would invariably be expected to benefit from the material property which appears to have been kept in the hands of the deceased's son to hold in trust for the three houses of the late Moses Mwaura Kamau.

Considering the foregoing, it would not be far fetched for this Court to opine that the caveator has taken advantage of his name which is similar to that of the deceased to lodge this protest with a view to disinherit all the other members of the three houses of the late Moses Mwaura Kamau. No court of justice can allow such a thing”.

Having reached the above conclusion, the judge again went on to state as follows:-

“It is without doubt that the bone of contention between the Petitioners and the caveator is the ownership of the material property. This being a Succession Cause, it does not fall within the province of this Court to make a finding on the ownership of the material property as between the Petitioners and the caveator. That is a role best suited for a Land Court in an ordinary civil suit”.

The Plaintiff seems to have filed this suit following the latter part of the judge's ruling quoted hereinabove. A look at the Plaintiff leaves no doubt in me that the Plaintiff is raising the same issues which he had raised in the Succession Cause. The issue in the Succession Cause was whether he was the owner of Plot No. Suwerwa 174. The Court after considering his case found that he was actually not the owner of the plot. He went ahead to confirm the grant and the plot in issue was distributed.

The Plaintiff did not prefer any appeal against the ruling of the judge. He instead filed the present suit. I do not think it will be proper for the Plaintiff to raise the same issues which had been settled. The issue is clearly *res-judicata*. The Plaintiff's Counsel appeared to complain about the apparent contradiction in the judge's ruling in the Succession Cause. It does not fall on me to make any finding on this. This is a matter which can only be raised before a higher Court. What is clear from the judge's ruling is that he settled the issue of whether the plot belonged to the caveator or not when he made a finding that the property was family property and was available for distribution to all the three houses of the late Moses Mwaura Kamau. The filing of this suit amounts to re-opening matters which have been determined by a competent Court. I find that the present suit is *res-judicata*. The upshot of this is that the Preliminary Objection is upheld. The suit herein is struck out with no order as to costs.

It is so ordered.

Dated, signed and delivered in Open Court on this 26th day of June, 2013.

E. OBAGA

JUDGE

In the presence of the Plaintiff/Applicant.

Court Clerk: Joan.

E. OBAGA

JUDGE

26/06/2013