



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO. 201 OF 2012

ELIEZER MWANGI.....PLAINTIFF

VERSUS

JACINTA NYAMBURA KARIUKI..... DEFENDANT

RULING

The defendant has raised a Preliminary Objection that the suit herein is *res judicata* as the issues therein have been dealt with by other courts of competent jurisdiction.

The preliminary of objection is premised on the fact that the issues raised by the plaintiff have been determined by Justice Khamoni in Nairobi High Court Civil Case No.3575 of 1988 and Justice Kuloba in Nairobi HCCC No.775 of 1997.

For a party to succeed on the preliminary objection of *res judicata*, he must prove the following:-

- (1) **The parties to the suits are the same.**
- (2) **The title in dispute is the same.**
- (3) **The matters in issue are identical.**
- (4) **There is similarity or concurrence of jurisdiction.**
- (5) **Finality of the previous decisions.**

Applying these conditions on the case before this court, and having perused the pleadings and listened to the counsel for the plaintiff and counsel for the defendant I do **find that the parties in the suit are the same**. The plaintiff in Nairobi High Court Civil Case No.3575 of 1988, and NBI HCCC No.775 of 1997 (O.S) was **Mr. Eliezer Mwangi** save that he was a second plaintiff in the latter case. The said **Eliezer Mwangi** has brought this suit for dissolution of trust in land parcel No.Loc.18/Kirere/781 and subsequent transfer from the defendant to himself. The defendant **Mrs Jacinta Nyambura Kariuki** is also known as **Mrs Nyambura Paul Kariuki** in HCCC No.3575 of 1988 and **Jacinta Nyambura Kariuki** in Nairobi HCCC No.775 of 1997. The name was corrected on 11th July 1989 as found by Hon.(Rtd) Justice Khamoni on the 21/2/1997 in HCCC No.3575 of 1988. The plaintiff has not appealed against the decision of Justice Khamoni. This court finds that the defendant has satisfied that the parties are identical.

On **sameness of title under dispute** the court finds that all suits revolve around title **No.Loc.18/Kirere/781** hence the finding by this court that the defendant has also satisfied the court that the title under dispute is the same.

The matters in issue in the NBI HCCC No.3575 of 1988 were whether the plaintiff was entitled to land reference **No.Loc.18/Kirere/781** on grounds that the defendant held the suit parcel of land in trust for the plaintiff, and whether the plaintiff had acquired the land through adverse possession. In a nutshell the two issues that the court determined in the two concluded suits were whether the plaintiff had acquired rights through trust or adverse possession. In the current suit, the plaintiff still claims that there exists a trust in his favour in respect of the suit-land and therefore seeks a court order that the trust be dissolved and a transfer be effected to the plaintiff. In NBI HCCC No.775 of 1997, the issue of adverse possession was determined by Justice Kuloba when he struck out the originating summons for being res judicata.

On similarity or concurrence of jurisdiction, this court finds that the two suits were, and the current suit is being litigated in a court of similar and not concurrent jurisdiction thus the High Court of Kenya.

The Supreme Court of Kenya in **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione [2013] eKLR Application No. 4 of 2012** held that Concurrent jurisdiction was “jurisdiction which could have been exercised simultaneously by more than one court over the same subject matter and within the same territory, giving a litigant the right to choose the court in which to file the action”.

On finality of previous decisions, This court finds that NBI HCCC No.3575 of 1988 and Nairobi HCCC NO 775 of 1997 were litigated to their finality with the only remaining option being an appeal or review but cannot be re litigated.

In the treatise of *Halsbury's Law of England at Paragraph 1224* it is stipulated as follows :that **“...subject to an appeal, and to being amended or set aside, a judgment is conclusive evidence against all the world of its existence, date and legal consequences, this will be the position even where a judgment is reversed on appeal, acts done under an order made pursuant to the judgment are lawful if done before the the appeal” as was held in House Ltd v. Expert Clothing service and sales Ltd [1987] 1 EGLRES**

In subsequent proceedings between the same parties on the same cause of action the defendant can plead the former judgment as an estoppel. Moreover a judge ought not disregard a previous order in the same proceedings even if he considers it was without jurisdiction as was held in Cohen v. Jonesco [1926] 2KB

The upshot of the above is that the matter **directly** and **substantially** in controversy in this suit as foundation of the claim for relief was also **directly** and **substantially** in controversy or open to controversy in the aforementioned previous suits between same parties and was determined by the court of the same jurisdiction to this court. The preliminary objection is allowed, the suit is struck out. The counter claim is allowed in terms of prayer 20 (b). costs of the suit to the defendant.

Dated, signed and delivered at Nyeri this 17th day of July 2013.

A. OMBWAYO

JUDGE