



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

E.L.C CASE NO. 40 OF 2012

WILSON NDEGWA KAMAU PLAINTIFF

(Suing as legal representative of KAMAU NDEGWA)

VERSUS

SABINA WAITHIRA KAMAUDEFENDANT

RULING

The Plaintiff herein suing as the legal representative of the Estate of KAMAU NDEGWA has filed this suit against the defendant seeking an order that this Court do rectify the register in respect of a parcel of land No.

LOC 2/GACHARAGE/790 by ordering the cancellation of the defendant's name thereon as having been obtained by fraud particulars of which have been pleaded in paragraph 6 of the plaint.

The defendant filed a defence denying the allegations of fraud and adding that this matter has been litigated in other Courts and is therefore res-judicata and the suit ought to be struck out.

The defendant also filed a Notice of Motion under ***Section 1A, 1B, 3A, 3B and 7*** of the ***Civil Procedure Act*** seeking the striking out of the suit for being res-judicata. The same was supported by an affidavit of the defendant/applicant in which she deponed, inter alia, that apart from this suit, there have also been the following cases.

1. ***Kigumo Senior Resident Magistrate's Court L.D.T Case No. 20 of 2009 (annexture SW1)***
2. ***Kigumo Senior Resident Magistrate's Court L.D.T Case No. 66 of 2005 (annexture SW2)***
3. ***Muranga Principal Magistrate's Court Case No. 21 of 2010 (annexture SW3 (a) and (b)).***

However, in her replying affidavit, the plaintiff/respondent deponed that the suit property i.e. Loc 2/GACHARAGE/790 was the property of his late father who passed away on 13th May 1999 and that on or about 5th June 2008 the defendant who is widow of deceased but not mother of plaintiff fraudulently transferred the said land into her name. He adds that the Muranga Principal Magistrate's Court Case No. 21 of 2010 did not proceed for trial as it was withdrawn since he had no grant ad litem so it is not res-judicata. And as for the Kigumo L.D.T Case, it was null and void. He also raises other issues which are not relevant in this application.

Both counsels have made submissions which I have considered together with the annexures and affidavit by both sides.

The dispute herein relates to property known as LOC 2/GACHARAGE/790 which the plaintiff alleges that the defendant fraudulently registered in her names following the death of her husband Kamau Ndegwa.

The defendant denies fraud and claims that this suit is res-judicata because of the three previous cases listed above.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following words:-

“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”.

From the above, I can discern five essential elements that must exist before a claim of res-judicata can successfully be raised and these are:-

- 1. The matter directly and substantially in issue in the subsequent suit 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 competent and lastly***
- 5. The former suit must have been heard and finally decided by the Court.***

Having looked at the annexures placed before me in this case, there is no doubt that there has been previous litigation between the parties herein involving the same subject matter herein i.e. LOC 2/GACHARAGE/790. The previous cases have been listed above. The Kigumo Senior Resident Magistrate’s Court Case L.D.T No. 20 of 2009 confirmed the decision of the Kigumo Land Disputes Tribunal ordering the Murang’a Land Registrar to remove the caution placed by the defendant therein (plaintiff herein) on the above mentioned land. It is not clear what happened after that decree which is defendant’s annexure SWK 1. What is clear however is that Kigumo Senior Resident Magistrate’s Court Case No. L.D.T 20 of 2009 involved adopting the award of the Tribunal in respect of a dispute over registered land. Such Tribunal had no jurisdiction in a dispute involving registered land – see **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHER C.A. CIVIL APPEAL 256 of 2002** where the Court held as follows:-

“It is clear that the proceedings before the Tribunal related to both title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3 (1) of the Land Disputes Tribunal Act. By Section 159 of the Registered Land Act, such a dispute can be tried by the High Court or by the Resident Magistrate’s Court in cases where the latter has jurisdiction”.

Clearly therefore, the orders in Kigumo Senior Resident Magistrate’s Case No. L.D.T 20 of 2009 were null and void as the Kigumo Land Dispute Tribunal had no jurisdiction to entertain a dispute over registered land. Therefore, the decision in that Tribunal does not make this case res-judicata since the said Tribunal had no jurisdiction i.e. was not competent to try the case – see illustration 4 above. Similarly, Kigumo Senior Resident Magistrate’s L.D.T Case No. 66 of 2005 also was a confirmation of the decision of the same Tribunal and therefore suffers the same fate as Kigumo Senior Resident Magistrate’s Court Case No. L.D.T 20 of 2009. And with respect to Muranga Principal Magistrate’s Court Case No. 21 of 2010, it is deponed in the replying affidavit that the case did not proceed to hearing as it was withdrawn. That is not dispute and indeed what is contained in the defendant’s annexure SKW 3 is only the plaint in that case.

Ultimately therefore, having considered all the above, it is clear that the plea of res-judicata

cannot be sustained in this case because of the following reasons:-

1. *The Court in both Muranga Court Case No. L.D.T 20 of 2009 and 66 of 2005 were orders confirming decisions of a Tribunal which had no jurisdiction to hear the dispute and were therefore not competent in terms of Section 7 of the Civil Procedure Act*
2. *The Muranga Principal Magistrate's Court Case No. 21 of 2010 was not "heard and finally decided by the Court" as required under Section 7 of the Civil Procedure Act.*

The Notice of Motion filed by the defendant/applicant herein on 20th March 2013 is accordingly dismissed with costs.

Before I leave this matter, I have noticed that it bears the same case number as another case at this Court being **MICHAEL MUGO IRERI VS NELSON NTHIGA IKOU & ANOTHER**. I have advised the Deputy Registrar to have that anomaly sorted out and the parties be advised accordingly as this can cause confusion to the parties and their advocates.

B.N. OLAO

JUDGE

7TH AUGUST, 2013

7/8/2013

Coram

B.N. OLAO – JUDGE

CC – Muriithi

Mr. Kimani for Plaintiff present

No appearance for Defendant

COURT: Ruling delivered this 7th day of August 2013 in open Court.

B.N. OLAO

JUDGE

7TH AUGUST, 2013

