



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 354 OF 2008**

**PETER KINYUA**

**WAWERU.....1<sup>ST</sup>**  
**PLAINTIFF**

**SIMON WARUTERE**

**WAWERU.....2<sup>ND</sup>**  
**PLAINTIFF**

**MARY WAIRIMU KIBERA (Suing as the legal representative of the estate of the late**

**RAJAB KIBERA**

**WAWERU.....3<sup>RD</sup>**  
**PLAINTIFF**

**VERSUS**

**NJERI MWENJE & JANE NYAWIRA MWENJE (Sued as the joint administratrixes of the estate of the late**

**MWENJE**

**WAWERU.....D**  
**DEFENDANTS**

**RULING**

By the Notice of Motion dated 22/9/2010, the defendants pray that this suit be dismissed for being res judicata in view of Nyahururu PMCC Succession Cause No. 83/1992 and Nyeri HCCA No. 5/1996. The defendants describe themselves as the widows of Mwenje Waweru (deceased) who was the allottee by the Settlement Fund Trustee Land Parcel Plot No. 456 Lesirko Scheme. The application was supported by an affidavit sworn jointly by the defendants and grounds found on the face of the application. It is the defendants case that the deceased died on 21/1/1984, and proceedings in respect of his estate were commenced on 24/8/1992 (NMW1) at Nyahururu Magistrate's Court. The 1<sup>st</sup> plaintiff lodged an objection in that Cause on 6/11/1992 claiming that the land comprising the deceased's estate was family land and held in trust by the deceased. The objection is exhibited as NMW2. The court referred the matter to arbitration which was done by elders and the award was filed in court (NMW3). The 1<sup>st</sup> plaintiff was dissatisfied with the award which was in favour of the defendants and he applied to have it set aside by an application dated 9/5/1995 (NMW4). The said application was dismissed on 24/1/1996. The plaintiff was dissatisfied with the dismissal order of 24/1/96 and appealed in Nyeri HCA No. 5/96 on 22/2/1996

(NMW6) but on 19/10/2001, the appeal was dismissed under **Order XLI rule 31(2)** of the **Civil Procedure Rules** for failure by the 1<sup>st</sup> plaintiff to set down the appeal for hearing for over 6 years (NMW4,6 & 7). After dismissal of the appeal, the defendants applied to the court for grant of letters of administration (NMW8a & b). Thereafter, an application for confirmation was filed and a confirmed grant was issued on 22/7/04. It is the defendant's contention that after the plaintiffs appeal was dismissed by the High Court on 19/10/01 and the plaintiffs' advocates were notified, no steps were taken by the plaintiffs till the 3/2/05 when all the plaintiffs filed summons for revocation/annulment of grant in HCC Succ. No. 66/05 which was later numbered Succession Cause No. 520/2007 (NMW10). The application for revocation was withdrawn on 24/11/08 vide the order of the court dated 24/11/08 (NMW11). It is the contention of the defendants that the issues relating to the deceased's estate have already been determined in the above mentioned suits and this matter is therefore res judicata. Mr. Chege counsel for the defendants relied on the decision of **GODFREY NGIMBI MWATI & OTHERS V MILKA NYAMBURA HCC No. 341/1999** where the SRM Kangema had dealt with a matter of succession and the dissatisfied party later proceeded to the High Court for determination of the beneficial interest in the deceased's estate and the court held that the matter was res judicata. In the case of **REP V. CMC NYERI & CENTRAL PROVINCE LAND DISPUTES APPEALS COMMITTEE Misc. Apl. No. 288/08** where the High court held that a party seeking to litigate the matter that had been determined and where he was aware of and in which he did not take the opportunity to ventilate his case, could not purport to file another suit to seek redress.

The plaintiffs filed a replying affidavit in opposition to the application, sworn by the 2<sup>nd</sup> plaintiff, Simon Warutere on behalf of the other plaintiffs. He denied that this matter is res judicata because the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were never parties to the succession proceedings before the Nyahururu PM's Court No.82/1992 or HCCA No.5/1996. He also deponed that in any event, Nyeri HCCA No. 5/1996 was not heard on merit but was dismissed for want of prosecution. The only proceedings in which the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were involved in is Nakuru HCC Succ. No. 66/05 and 520/1997 but they withdrew it following J. Koome's decision in **MUGA GITU V MARGARET WANJIRU KIMUGE HCC No. 569/05 (SWW1)** in which the party sought to have a grant revoked for reasons that it was obtained after withholding material facts that the applicants had been settled on the land since 1964. The court held that the applicants should file a separate suit to determine the issue of trust outside the succession proceedings.

In the main suit, the issue plaintiffs seek the following orders:-

1. A permanent injunction do issue restraining the defendants from interfering with **LR NO NYANDARUA/LESIRKO/456** or with the plaintiffs' quiet occupation of their respective portions;

2. A declaration that the late Mwangi Waweru and now the administrators of his estate held the Title **NYANDARUA/LESIRKO/1456** in trust for their own benefit and that of the plaintiffs.

Having heard the rival submissions on the application and the authorities relied upon, it is evident from the proceedings that only the first plaintiff was the party involved in the proceedings before the Nyahururu Court and the appeal to the High Court which was ultimately dismissed. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs only came onto the scene when together with 1<sup>st</sup> plaintiff, filed revocation of grant proceedings in NKU Misc. No. 66/2005 or Succession Cause No. 520/07 that was later withdrawn, it was never heard on the merits.

The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs claim that they are settled on the suit land which was the subject of the deceased's estate. If indeed they reside on that plot, then they are neighbours of the 1<sup>st</sup> plaintiff and the defendants. They cannot possibly commence this court that since 1992 then the succession proceedings were filed in the Nyahururu court and the 1<sup>st</sup> plaintiff filed objection therein, they have not been aware of these proceedings. The defendants deponed that the plaintiffs used to attend court during the proceedings and I am persuaded to believe that all the plaintiffs were aware of the said proceedings. All of them claim to have had an interest in the deceased's estate. When the 1<sup>st</sup> plaintiff filed objection proceedings in

Nyahururu Succ. No. 82/1992 at the core of these proceedings was the estate of the deceased. It is still the same as before the court. There is no reason why the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not join the to prosecute the succession proceedings and protect their interest then. The doctrine of res judicata was intended to bring order in litigation to an end. The appeal before Nyeri High court was dismissed on 19/10/2001 after the 1<sup>st</sup> plaintiff failed to prosecute it for 6 years. It took the plaintiffs over 4 years to file the summons for revocation on 3/2/2005. Nothing happened in the matter till the summons were withdrawn on 24/11/2008 after 3 years and on the same date this suit was filed. In my view the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs must have been aware of the proceedings in Nyahururu Court and had the opportunity to agitate their case therein as did the 1<sup>st</sup> plaintiff but instead, decided to sit on their rights. They cannot be allowed to litigate by one party going ahead while the others wait on the fence to see what will happen only to join the proceedings late in the day. Litigation has to come to an end and that is why the doctrine of res judicata. It seems in this case the plaintiffs have been intentionally dragging their feet. The above findings notwithstanding, the plaintiffs claim to have been in occupation of the suit land since 1964 to date. It seems that the plaintiffs are claiming to have beneficial interest in the said suit land. In **MUGA GITU V MARGARET WANJIRU KIMUGE 569/05**, the court held that despite their failure to be involved in the succession proceedings, the plaintiffs could pursue their claim as beneficial owners. That is a matter that will require an inquiry into the plaintiff's claim by the court taking viva voce evidence. It would be unfair for this court to determine the matter on the basis of the objection raised.

For the above stated reasons I will decline to strike out this case for being res judicata but allow the plaintiffs to articulate their case at a full hearing. The issue relating to the Mwenje's estate has been in the courts since 1992, it is advisable that the plaintiffs speed up the hearing of this matter so that it is resolved once and for all. I decline to dismiss the suit for being res judicata. Costs to be in the cause.

**DATED and DELIVERED this 11<sup>th</sup> Day of March 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Kipkoech holding brief for Mr. Ndegwa for the plaintiffs.

N/A for the defendants.

Kennedy – Court Clerk.