



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 65 of 2009

GILGIL DISTRIBUTORS LIMITED.....PLAINTIFF

VERSUS

GRACE RWAMBA NJERU.....1ST DEFENDANT

**VIRGINIA NJERI & ESTHER WANJA
(Sued as the Administrator of the Estate of the late
JOHN MAINA KAMANGARA).....2ND DEFENDANT**

RULING

The plaintiff claims in her plaint in this suit that by an agreement in writing dated 16th July 1996, she bought a piece of land situate at Gilgil Town and known as LR No. 1317/540 (the land) from the late John Kamangara (the deceased). After payment to him of the full purchase price, the deceased signed a transfer in her favour and handed the original title deed to her. Soon after the purchase she took possession of it and has been parking her vehicles on it. On or about 19th February 2009, she saw the first defendant depositing building materials on it and on enquiry the first defendant also claimed to have bought the land from the deceased. She therefore filed this suit against the first defendant and the administrators of the estate of the deceased and sought a declaration that she is the owner of the land and a perpetual injunction to restrain the defendants from interfering with her quiet possession of it.

In her defence the first defendant states that prior to the plaintiff's purported purchase of the land, she had herself bought the land from the deceased and as the court in Nakuru CMCC No. 2128 of 1996 (the first suit) decided the deceased had therefore no title to pass on to the plaintiff. The matter having been decided in the said case, the first defendant avers that this suit is bad in law as the matter is res judicata. Together with the defence, the first defendant filed a notice of preliminary objection raising the same point of res judicata.

Contemporaneous with the filing of the suit the plaintiff filed an application for a temporary injunction to restrain the defendants from developing or in any way interfering with her quiet occupation of the land until this suit is heard and determined. When the application came up for hearing before me on 21st October 2009, Mr. Kimatta for the first defendant raised the preliminary objection. He argued that the plaintiff having been a party to the first suit and her appeal against the judgment in that case having been dismissed, the matter is res judicata and this suit is therefore incompetent and should be struck out.

In response Mr. Matiri for the plaintiff contended that as the land is registered under the Registration of Titles Act which defines court as the High Court, the Principal Magistrates Court which decided the first suit had no jurisdiction and the matter is therefore not res judicata. Moreover, he further argued, as the High Court in the said appeal found the plaintiff's joinder in the first suit was irregular her participation in that first suit was in the circumstances inconsequential.

I have considered these rival submissions. The doctrine of res judicata is a rule of the conclusiveness of judgments based partly on the maxim of Roman jurisprudence "*Interest reipublicae ut sit finis litium*" (it concerns the state that there should be an end to law suit), and partly on

the Latin maxim “Nemo debet bis vexari pro una at eadam causa” (no man should be vexed twice over for the same cause). The general doctrine is founded on consideration of high public policy to achieve two objectives namely that there must be a finality to litigation and that the individual should not be harassed twice over with the same account of litigation. It means that the parties should be estopped from litigating on an issue that has been definitively settled by judicial decision. It is also an affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or a series of transactions that could have been-but was not-raised in the first suit.

Res judicata is therefore a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage lumps together under a single name two different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in the earlier suit. The second is the effect of relitigation of matters that have once been litigated and decided.

Section 7 of the Civil Procedure Act has enacted the doctrine of res judicata in the following terms:-

“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 of competent jurisdiction to try any 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 this provision, it is clear that there are three essential elements in the doctrine of res judicata. They are (1) an earlier decision on the issue, (2) a final judgment on the merits by a court of competent jurisdiction, and (3) the involvement of the same parties, or parties in privity with the original parties.

With these principles in mind, I have considered counsel’s submissions in this case. With respect Mr. Matiri’s contention that the plaintiff’s joinder in the first suit was irregular cannot hold. The plaintiff herself sought to be joined in that case and she was. Thereafter she fully participated in the hearing of the case contending that she was an innocent purchaser without notice. The court considered all that along with other points raised in that suit and found that the deceased, having earlier on sold the land to the first defendant in this case who was the plaintiff in that case, had no right to sell it again to the plaintiff in this case who was the second defendant in that case. The court therefore granted to the first defendant an order of specific performance. The plaintiff appealed against that decision. It would seem that soon thereafter the deceased died but the plaintiff did not formally apply to substitute him with his legal representatives and that is the main reason why her said appeal was dismissed.

On my part I am quite clear in my mind that the plaintiff was a proper party in the first suit and the major issue in that case was: who, as between the plaintiff and the first defendant had a better title to the land. As I have said the court found for the first defendant and granted her prayer of specific performance. The appeal against that decision having been dismissed and there being no further appeal to the Court of Appeal, I find that the matter has finally been decided. The only issue that remains to be decided is whether the Acting Principal Magistrate who decided the first case had jurisdiction to deal with the matter.

Section 5(1) of the Magistrate’s Court Act Cap 10 of the Laws of Kenya which sets out the jurisdiction of the Magistrate’s Courts states:-

“Subject to any other written law the resident magistrate’s court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed one hundred thousand shillings, or three hundred thousand shillings where the court is held by a principal or a senior resident magistrate and five hundred thousand shillings where the court is held by a chief magistrate or a senior principal magistrate:

Provided that the Chief Justice may, by notice in the Gazette, increase the limit of jurisdiction of –

- (a) a chief magistrate to a sum not exceeding three million shillings;
- (b) a senior principal magistrate to a sum not exceeding two million shillings;
- (c) a principal magistrate to a sum not exceeding one million shillings;
- (d) a senior resident magistrate to a sum not exceeding eight hundred thousand shillings; or
- (e) a resident magistrate to a sum not exceeding five hundred thousand shillings.”

It is clear from this provision that the Magistrate's courts jurisdiction is subject to what is provided in any other written law. As Mr. Matiri submitted the suit piece of land is registered under the Registration of Titles Act, Cap 281 of the Laws of Kenya which defines the court as "the High court." Section 64 of the Act provides:-

"In any proceedings respecting any land or in respect of any transaction or contract relating hereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court."

It follows therefore that the Ag Principal Magistrate who heard the first suit did not have jurisdiction to hear a dispute on land registered under the Registration of Titles Act. In the circumstances I agree with Mr. Matiri that the matter is not res judicata and this suit has to be heard by this court. Consequently I overrule Mr. Kimatta's preliminary objection with costs to the plaintiff

DATED and Delivered this 9th February, 2010.

D.K. MARAGA
JUDGE.