



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 154 of 1987**

**SAMWEL MWANGI MIANO ..... 1<sup>ST</sup> PLAINTIFF**

**DOUGLAS KARIUKI MAINA ..... 2<sup>ND</sup> PLAINTIFF**

**versus**

**JOSPAT MURAGE MIANO ..... 1<sup>ST</sup> DEFENDANT**

**JAMLECK WAWERU MIANO ..... 2<sup>ND</sup> DEFENDANT**

**HANNAH WANGARI MIANO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff's have brought this action in respect of Parcel No. KIINE KIBINGOTI/NGUNGUINI/492 seeking an order of the court that the same is jointly owned between them and the defendant by virtue of the fact that they (the plaintiffs) have been in continuous and uninterrupted occupation of the whole land for over a period of 12 years. They therefore prayed that the court would transfer the land into their names. The court ordered that the originating summons be heard by way of *viva voce* evidence. PW1 Samwel Mwangi Miano stated that he had lived on that land which was given to his father by the clan since 1958. He stated that the land was given to the late Miano Murage his father and that it was 8.4 Acres. His prayer was that the court would divide that land between his late father's two wives one being his mother and the other being his step mother. He stated that when his father passed away in 1972 the chief and the clan members divided that land into two. That he lives on 4 acres of that land. On those 4 acres he said he had cultivated coffee together with his deceased brother each of them holding two hundred coffee bushes. On that land they do irrigation and in this regard he exhibited two receipts from the Kibirigwi irrigation farmers' cooperative society being payment for water. He said that he has lived on that land for over thirty years. That land originally was in the name of Miano Murage deceased but was now in the name of Josphat Murage Miano. On being cross examined this plaintiff said that he was born in 1957. He denied knowledge of previous cases that had been filed in respect of this suit land by his mother Wangui Miano. Although he had said that he had entered the land in 1972 in an affidavit which was referred to him he accepted by 1976 he was still in school. He also accepted that it was his mother Wangui Miano who got him on the suit property. PW 2 was Douglas Kariuki Maina the second plaintiff. He stated that PW 1 was a brother to his late father Maina Miano. He said he was 41 years old having been born in 1966. On the suit property he said that he lives there with his family. In total he said that they were 25 children on the land. That on the land they had cultivated coffee bushes, fruit trees and bananas. That since he was born he had continued living on that land. That by this case he was making a claim on behalf of his late father's estate. On being cross examined he said that he attained 18 years in 1985. He denied that previous cases had been filed against the defendant. PW 3 Wangui Miano said that PW 1 was her son. She said that her late husband was called Miano Murage. Her co-wife is Hannah Wangui Miano. She stated that she is seeking the court to subdivide the suit property between her and her co-wife. On being cross examined about the previous suits filed by herself against the defendant over the suit property she denied knowledge of the same. The defendant in their defence began by saying that the present suit was *res judicata*. The defendants stated that the District Magistrate's Court Kerugoya decided that the land be divided between Wangui Miano and defendant in equal part. That decision was subjected to an appeal before a Senior Resident Magistrate in SRMCC No. 8 of 1980. The judgment of that appeal was to the effect that the lower court erred in dividing the land in equal portions and the Senior Resident Magistrate found that the defendants herein were the only persons entitled to inherit the suit property of Miano son of

Murage. The Kerugoya District Magistrate Court's decision was set aside and substituted with an order that the first and second defendant would be the legal heirs of the deceased whilst the third defendant would have a life interest in the land. Wangui Miano was dissatisfied with that decision and filed an appeal in the high court namely High Court Civil Appeal No. 300 of 1980 Nairobi. The High Court dismissed that appeal and upheld the finding of the Senior Resident Magistrate. In reaching that decision the high court found that Wangui Miano did not prove that she was cultivating the suit property. That High Court decision was delivered on 17<sup>th</sup> June 1983.

Considering the evidence adduced herein before it is clear that the issue of who was entitled to inherit the suit land from Miano Murage was the subject of hearing first before the Kerugoya District Magistrate Court, secondly in an appeal before the Senior Resident Magistrate Court and lastly in an appeal before the High Court. Wangui Miano who was the plaintiff in those previous actions is the mother of the first plaintiff and was the mother of the deceased father of the second plaintiff. That being the case it is clear that this case is caught by the doctrine of *res judicata*. **Section 7** of the Civil Procedure Act provides:-

***“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.”***

This section forbids the court not only entertaining a matter which has been determined by a competent court but also where parties litigate under the same title in a matter so determined. In order to understand that doctrine it is necessary to consider past decided cases.

A case in point is **POP-IN (KENYA) LTD & 3 OTHERS –V- HABIB BANK AG ZURICH**. The holding of that case was in the following terms:-

***“The plea of Res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.”***

The court in making decision in the above case also approved the finding of the case of **HOYSTEAD AND OTHERS V TAXATION COMMISSIONER, (1925) ALL ER RE 56 AT P6** as follows:-

***“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgement upon a different assumption of fact; .....Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted.”***

The *locus classicus* of that aspect of *res-judicata* is the judgement of **WIGRAM VC IN HENDERSON V HENDERSON (1843) HARE 100, 115** where the Judge says as follows:-

***“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”***

**Section 7 and Explanation 6** of the Civil Procedure Act clearly shows that the present suit is indeed *res judicata*. That explanation provides:

***“Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.***

It is clear that Wangui Miano on making the first claim over the suit property and the determination of her claim is a

bar to her children bringing fresh action against the defendants seeking to inherit the suit property. When Wangui Miano litigated before court the case was finally determined by a competent court. The plaintiff s who now seek to bring fresh action are litigating under the same title of Wangui Miano. Particularly PW 1 clearly stated that it was his mother Wangui Miano who brought him on the land which he now claims to have acquired half a portion of it by way of adverse possession. It ought to be noted that although the plaintiffs claim according to pleadings filed herein was one of adverse possession when it came to giving evidence the plaintiffs and their witnesses proceeded to give evidence of their entitlement to the land by virtue of the relationship to the original owner Miano Murage. The plaintiffs therefore did not even attempt to prove their case as per the pleadings filed herein. Accordingly the plaintiffs claim over the suit property fails and this case is hereby dismissed with costs to the defendants.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2008**

**MARY KASANGO**

**JUDGE**