



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 13A of 2007

MARGARET MUMBI KAGIRI.....PLAINTIFF

Versus

KAGIRI WAMAIRWE.....DEFENDANT

RULING

The Plaintiff approached this court by way of an Originating Summons seeking certain declarations in relation to the property **NYERI/NAROMURU/1771**. As an interlocutory application, the Plaintiff sought injunction to stop selling or transferring of that land by the Defendant pending the determination of the suit. When the matter came up for hearing on a certificate of urgency, the court granted *ex parte* orders to the Plaintiff. When the matter came up for hearing interpartes on the 19th April 2007 the Defendant raised a preliminary objection in the following terms:

The suit is Res-Judicata vide Nyeri HCCC NUMBER 33 OF 2001 and Court Of Appeal Civil Appeal Number 181 of 2002.

In support of that objection, the Defendants counsel stated that the application for injunction and the entire suit were caught by the doctrine of *Res-Judicata*. Defence counsel then took the court through portions of the plaint in **HCCC NO. 33 of 2001** to show the similarity of that previous suit to the present suit. He submitted that an application was filed by the Defendant in that other suit for the dismissal of the suit. That application was heard and a decision was delivered by the court on 12 February 2002. By that decision the Plaintiff's suit was dismissed. The Plaintiff being dissatisfied with that dismissal filed an appeal namely **CIVIL APP. 181.2002** and after hearing that appeal the Court of Appeal dismissed the Plaintiff's appeal. The Defendant relied on the case of **E.N. WAINAINA VS HAAS. (1988-1992) 2 KAR Pg 79**. In that case the Court of Appeal held that a court was not entitled to re-hear an issue that had been heard and determined by a previous court. The Defendant's counsel argued that in the present case the Plaintiff is seeking declaration that the aforesaid property is held jointly between her and the Defendant who is her estranged husband. He stated that that was also what the Plaintiff had sought in HCCC No. 33 of 2001 which had finally been determined. He stated that the Plaintiff's interest in the suit land had finally been decided by the court in the previous suit and that therefore the Plaintiff was not entitled to reopen that issue. He stated that had the Plaintiff wished to raise the issue under *Section 17* of the Married Women's Act, she had the opportunity in the previous suit. That to try to re-open that issue was contrary to the provisions of *Section 7* of the Civil Procedure Act regarding *Res-Judicata*. The Defendant also relied on the case of **MBURU KINYUA -V- GACHINI TUI** particularly the holding thereof as follows:

“dismissing the appeal (Madan J. A dissenting), (1) that the second application was res-judicata since the facts on which it was based were known to the appellant at the time when he made the first application.”

The Plaintiff’s counsel opposed the objection raised by the Defendant. In so doing he submitted that this suit and the previous one are different. He further stated that the Plaintiff had disclosed in the Originating Summons herein the existence of the previous suit. In respect of the Court of Appeal judgment which dismissed the Plaintiff’s appeal, Plaintiff’s counsel drew the court’s attention to portions of that judgment and stated that the Court of Appeal in dismissing the appeal had faulted the Land Control Board which had given a letter of consent to the Plaintiff to subdivide the suit property. In this present suit he stated the Plaintiff is claiming that she contributed to the purchase of the suit property and in that regard she seeks a declaration from the court that the suit property is matrimonial property. He concluded by saying that this issue was not the subject of the previous suit. He also added that in the previous suit the Plaintiff and the Defendant were husband and wife but at present the Plaintiff has filed for a divorce. Those in brief were the arguments presented before the court.

In order to appreciate the argument raised by the Defendant it is essential to reproduce the Plaintiff in HCCC33 of 2002. The Plaintiff in that Plaintiff averred as follows:

1. (i) The first defendant is a male adult and an estranged husband of the Plaintiff. He is a man of no fixed abode but is reputed to be a resident of Nyeri Town (service of summons will be effected through the Plaintiff)

(ii) The second defendant is an employee of the Kenya Government in charge of the Lands Registry Nyeri (service of summons will be effected through the plaintiff).

(iii) The third defendant is sued as the legal personality of the government of Kenya

rtue of the conduct of the Second defendant and is therefore vicarious liable on behalf of the government (service of summons will be effected through the plaintiff).

(iv) The Fourth defendant is a statutory body with its registered office in Nairobi (service of summons will be effected through the plaintiff)

2. That on or about 18th December 1981, Kieni East Divisional Land Control Board granted a letter of consent to transfer 37 acres out of land parcel number NYERI/NAROMORU/613 from the first defendant into the joint names of the plaintiff and the first defendant.

3. That the 37 acres of land referred in the consent was parceled out as parcel number NYERI/NAROMORU/627.

4. That the first defendant without executing the Transfer instrument deserted the plaintiff and subsequently attempted to sell the land to a third party, thereby prompting the plaintiff to register a caution against parcel number Nyeri/Naromoru/627 on 20th April 1983 claiming half share interest pursuant to the land control Board Consent.

5. That at all material times the plaintiff has been resident on the land together with children of her marriage with the first defendant.

6. That on or about February 1999 the plaintiff went to the second defendant to carry out a search and to her surprise, she discovered that the second defendant had unlawfully lifted the caution and facilitated a fraudulent subdivision and issued three title Deeds of the subdivisions of parcel number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771.

7. That the second defendant on or about 9/3/99 at the protest of the plaintiff placed a Restriction against the aforesaid titles unlawfully issued titles.

8. That on or about December 1999 the plaintiff received a Notice from the fourth defendant addressed to the first defendant and copied to herself to the effect that the land had been subdivided into three parcels and that the fourth defendant had charged them due to the first defendant's debt owing to the fourth defendant. The fourth defendant enclosed certificate of search which disclosed that the first defendant had caused parcel number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/171 all in the name of the first defendant, and that a charge had been registered despite the Restriction earlier placed by the second defendant.

9. It is the plaintiff's case that lifting of the caution on Title Number Nyeri/Naromoru/627 and the subsequent issuance of subdivision Titles Numbers number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri/ Naromoru/1771 was illegal and fraudulent and further the Registration of the charge by the Fourth defendant in the face of a Restriction was unlawful.....

REASONS WHEREFORE

I. A declaration that the lifting of the plaintiff caution on parcel Number Nyeri/Naromoru/627 and the subsequent subdivision of the aforesaid title and transfer and issuance of title on land parcel number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771 and also the charge on the subdivision titles was unlawful and fraudulent.

II. An order of cancellation of Titles Numbers Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri/Naromoru/1771 and reinstatement of the original title Number Nyeri/Naromoru/627 and the caution.

III. A declaration that the title number Nyeri/Naromoru/627 is the joint property of the plaintiff and the first defendant AND an order that the Title Number Nyeri/Naromoru/627 be transferred in the joint names of the plaintiff and the first defendant and in the event of a refusal by the first defendant to execute transfer documents the Deputy Registrar of this honourable court e authorised to do so.

In the present suit which is by way of Originating Summons, the Plaintiff has prayed for the following determination by the court.

“1) Whether the properties acquired by the plaintiff and defendant herein and held jointly and/or severally by both or either of them and acquired after the marriage between the plaintiff and respondent in or about the year 1956 and in particular Land parcel known as NYERI/NAROMURU/1771 can be declared by this honourable court to be family assets and/or properties.

2) Whether the family assets and/or properties mentioned in (1) hereinabove can be shared equally between the plaintiff and the respondent and/or the best mode of distribution of the aforesaid family assets and/or properties bearing in mind the circumstances of this case.

3) Whether the defendant by himself, his agents and/or servants should be restricted by way of an injunction from alienating, transferring, encumbering and/or in any other way disposing/dealing with the family assets and/or properties aforesaid without leave or further orders of this honourable court.

4) That this honourable court be pleased to grant any such further orders or reliefs as may be just in the circumstances.”

In order for the court to determine whether this matter is caught by the doctrine of *Res-Judicata* under Section 7 explanation 4 of the Civil Procedure Act, it is important to consider what that section provides. The provision of that section is as follows:-

“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.

Explanation (1)...

Explanation (2)...

Explanation (3)...

Explanation (4) – any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.

It is clear that this section and explanation four requires that when a party comes before court would bring their whole case before the court. The Plaintiff in the previous suit sought that the court would order the subdivision of the suit property in accordance to the letter of consent given to her by the land board awarding her some portion of the land. In the present suit the Plaintiff has come claiming as a wife and seeking that the court will determine that she contributed to the purchase of the suit property and that therefore she is entitled to get some of it. 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 **HOYSTED 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”.

The finding of the court therefore is that the Plaintiff’s suit in its entirety is caught by the doctrine of *res-judicata* and therefore cannot stand and the same is hereby dismissed with costs to the Defendant.

Dated and delivered at Nyeri this 11th day of May 2007.

MARY KASANGO

JUDGE