



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 986 of 2003

NGUGI KIUNAPLAINTIFF

VERSUS

NELLY WANJIKU MWENJE1ST DEFENDANT

MARY WAJIKU MWENJE.....3RD DEFENDANT

ALICE WANGUI WAWERU.....4TH DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI.....5TH DEFENDANT

RULING

In an application dated and filed in this Court on 18th September 2007 the 3rd and 4th defendants (applicants herein) through counsel, sought the dismissal of a suit filed herein on 25th September 2003 with costs on the ground that it is res judicata because the dispute over the ownership of *Muguga/Gitaru/278* was determined in an earlier suit otherwise known as *Nairobi HCC No. 2850 of 1980*.

The application was based on the grounds set out on the body thereof and the averments in the affidavit deponed to by *Alice Wangui Waweru*, the 4th defendant/applicant.

These grounds are that the issue of ownership of the original *L.R. Muguga/Gitaru/278* was determined in *Nairobi HCCC No. 2850 of 1980*, that the plaintiff herein was the 2nd defendant in *Nairobi HCCC No. 2850 of 1980*, that the 1st defendant in *Nairobi HCCC No. 2850 of 1980* is the son and brother of the 3rd and 4th defendants herein respectively that the 1st defendant herein is a co-wife of the 2nd and 3rd defendants herein, that the plaintiff in *Nairobi High Court Civil Case No. 2850 of 1980* is the son to the 2nd defendant herein and that the claim herein is based on an alleged ownership of the original *L.R. No. Muguga/Gitatu 278* by the plaintiff.

In the supporting the 3rd defendant/applicant *Alice Wangui Waweru* depones that the file on *L.R. Muguga/Gitaru/278* had been closed and subdivided into *L.R. Muguga/Gitaru/1911, 1913, 1915, 2103, 1873 and 1874*; that she is the daughter of the 3rd defendant; that her brother, the late *Kennedy Mburu Mwenje*, had together with the plaintiff herein been sued by their brother *Benson Kamau Mwenje*, the son of 2nd defendant in Nairobi *HCCC No. 2850 of 1980* in relation to the original *Muguga/Gitaru/278*, that the 1st defendant is the deponent's step-mother.

That in Nairobi High Court Civil Case No. 2850 of 1980 Honourable Justice Shields ordered that L.R. Muguga/Gitaru/278 belonged to three (3) surviving widows of the deceased Wamarema Mwenje; that the said widows are the 1st and 3rd defendants still alive and Mary Wanjiku Mwenje, 2nd defendant, who has since died.

That the plaintiff herein who was the 2nd defendant in that case never appealed against that judgment, except to file the present suit.

According to the deponent the present suit is based on the ownership of L.R. Muguga/Gitaru/278 now closed and subdivided as per paragraph 2 of the supporting affidavit herein; hence this issue cannot be raised herein since it was dealt with in the said HCCC No. 2850 of 1980 and that the present suit is res judicata.

No replying affidavit or grounds of opposition were filed by the plaintiff/respondent in any to this application.

It came up for hearing on 8.10.2007 and counsel for 3rd and 4th defendant/applicants submitted on the application largely repeating the grounds set out on the body of the application and the averments deponed to in the affidavit.

Counsel referred to the annexures to the supporting affidavit, namely a ruling in HCCC No. 2850 of 1980 in which the plaintiff herein was the 2nd defendant and the judgment in the same case.

The dispute in the former case related to suit property L.R. Muguga/Gitaru/278 and that when the ruling and judgment were delivered there in the present plaintiff was a party thereto and did not take any action if he was dissatisfied with any rent thereof.

According to counsel, the plaintiff is estopped from claiming any rights or ownership of the original L.R. Muguga/Gitaru/278 or any of its subdivisions.

Though this application was served upon the plaintiff/respondent; he neither filed a replying affidavit nor grounds of opposition.

And though during the hearing the plaintiff/respondent sent in a lawyer to represent him, order L Rule 16 of the civil Procedure Rules could not permit him to submit in opposition to the application.

The annexures to the supporting affidavit include search certificates for plot numbers L.R. Muguga/Gitaru/1911, 1913, 1915, 2103 and 2105. These are acknowledged to be some of the plots subdivided from the original number L.R. Muguga/Gitaru/278; which actually means the original plot no longer exists.

Though in paragraph 4 of the plaint filed in Court on 25th September 2003 the plaintiff alleges he is the registered proprietor of L.R. Muguga/Gitaru/278 it would appear this is the year the HCCC No. 2850 of 1980 was going on and that after the judgment of Judge Shields around 2003 the parties in whose favour that judgment was delivered, including plaintiff herein set about to subdivide the said land in the portions herein set out in paragraph 2 of the supporting affidavit.

Of course the plaintiff in the 1980 suit had filed an application for the preservation order during the pendency of that suit but that after it was dismissed, the two defendants therein who included the plaintiff herein set out to subdivide the land as aforesaid. I say including the plaintiff because he was the 2nd defendant in that case and in favour of whom the judgment was delivered.

From the search certificates annexed to the supporting affidavit, the subdivided plots were issued in the year 2004 to the beneficiaries, some of whom are the 1st to 4th defendants, the 2nd defendant of whom is the plaintiff's own mother.

The mother herself as wife of original owner of plot No. 278 is not complaining and the plaintiff does not tell Court why he should be complaining about the subdivision when there is a Court order out of which this whole exercise was derived when he never appealed against it.

In view of the facts of this case, and that the plaintiff's own mother is still alive, Section 7 of the Civil Procedure Act bars the plaintiff from filing the present suit to claim any interest in L.R. Muguga/Gitaru/278. ***Allow this application and dismiss the suit filed herein on 25th September 2003 with costs of both this application and the suit see Muded & Another C. Fita & Another [1988] KLR 211.***

Delivered, dated and signed this 23rd day of October 2007.

D. K. S. AGANYANYA

JUDGE