

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 26 of 2006

EVANGELINE KARUGWATA PLAINTIFF

VERSUS

CYPRIANO KANJI GIKONO DEFENDANT

RULING

The plaintiff's suit is for a declaration that she is entitled to L.R.Taita/Nkuene/1631, and a permanent injunction to restrain the defendant from evicting her. The defendant in his defence has stated that he acquired the suit property through High Court Succession Cause No.63 of 2000.

The defendant also contends that the grounds being relied on in this suit, namely, fraud and trust were dealt with and determined in H.C.Succession Cause No.63 of 2000.

On the basis of that averment, the defendant has raised a preliminary point arguing that this suit is *res judicata*. Counsel for the defendant submitted that the plaintiff had relied on the ground of trust and fraud in HC.Succession Cause No.63/2000 which were determined by the Judge in that cause and cannot therefore be raised in the present suit.

Responding, learned counsel for the plaintiff maintained that the present suit is not *res judicata* because it is based on trust while the succession cause was premised on fraud. He also submitted that the point being raised as a preliminary objection is in fact not a pure point of law as it is bound to entail investigating H.C Succession Cause NO.63 of 2000.

I will begin the consideration of this objection with this last point. Mukisa Biscuit Manufacturing Co.Ltd V West End Distributors Ltd (1969) EA 696 laid down what constitutes a preliminary objection.

First it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It is a point which if argued as a preliminary point may dispose of the suit.

But it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The doctrine of *res judicata* is in fact a jurisdictional issue. It bars a court from trying a suit in which the matter in issue has been directly and substantially in issue in a previous suit involving the same parties (See Section 7 of the Civil Procedure Act). Being an issue of jurisdiction, the doctrine is therefore purely a legal point and is capable of disposing of a suit. But the question is; is this suit *res judicata* H.C.Succession Cause No.63/2000? Extracts of the cause are annexed the plaintiff's application dated 17th March, 2006 in this file.

On 12th November, 2003 the plaintiff filed a Chamber Summons application in which she sought, among other things, to be joined in Succession Cause, an injunction against the defendant, inhibition of the suit property and revocation of the grant.

In her ruling delivered on 16th March, 2006 Sitati, J dismissed the application, holding, *inter alia*, that fraud had not been proved and went ahead to state that;

“The applicant has not claimed that the respondent holds the land in trust for her and for himself. In the absence of such a claim and proof thereof, the respondent’s interests in the suit land, conferred upon him by registration are thus protected”

The plaintiff clearly took the queue from the above statement and brought the present suit where she is claiming part of the suit property basing that claim once more on fraud and now on trust.

While the court (Sitati, J) specifically found that fraud had not been proved by the plaintiff, there was no direct finding on trust, but an opinion was expressed that, may be, the plaintiff could have based her claim on trust.

Section 7 of the Civil Procedure Act, Example (4) provides;

“(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”

So, the issue of trust ought to have been the basis of the application which the plaintiff failed to raise and is therefore estopped from raising it in the present suit.

Parties cannot be allowed to institute fresh cases on the basis of finding of the court. I am persuaded that this suit is *res judicata* application dated 12th November, 2003 in H.C.Succession Cause No.63 of 2000. The suit, on that ground, is struck out with costs to the defendant.

Dated and delivered at Meru this 12th day of October, 2007.

W. OUKO

JUDGE