



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

Civil Case 14 of 2006

MARY MAGIRI. PLAINTIFF

VERSUS

JOHN KABURU MAGIRI DEFENDANT

RULING

1. The Applicant herein, Mary Magiri seeks Orders of a temporary injunction under Order XXXIX Rules 1 and 2 as well as an inhibition under s. 128 of the Registered Land Act, Cap 300. In the Chamber Summons dated 21.2.2006 she seeks those orders in respect of land known as Ntirimiti Settlement Scheme/1056 and 1057 for reasons that;

(a) Land Parcel Nos. NTIRIMITI SETTLEMENT SCHEME 156 &1057 are subject matter of this suit and the same ought to be secured to ensure that they do not change lands before this suit is heard and determined.

(b) The Plaintiff/applicant has a stake in this suit land having lived there for a long time and made developments on the same.

(c) The plaintiff is apprehensive that the suit land will be alienated by the Defendant herein and cause her irreparable loss and damage.

(d) This parcel of land was already secured by inhibitions in the earlier case between the Plaintiff and the Defendant which the Plaintiff fears that once they are removed the suit land might be sold.

(e) That though the Defendant/Respondent is the Registered owner, he only has a bare title which he has not clothed with possession as the subordinate court found for a fact that the Applicant resides on the suit land as far back as 10.8.2001 when it visited the locus in quo.

2. In her supporting Affidavit sworn on 21.2.2006, it is her contention that the two parcels of land were originally part of land parcel No. Ntirimiti Settlement Scheme/219 but that the Defendant through fraud and deceit caused the subdivision of the parcel of land and created plot Nos. 1056 and 1057 aforesaid. That the original parcel of land belonged to M'Magiri M'Anampiu and pursuant to a Certificate of Confirmation of Grant issued to Karuthu Magiri on 16.4.1999 the said land was to be inherited by the said Karuthu Magiri who is the lawful husband of the Applicant through whom the Applicant claims.

3. The Applicant has deponed further that upon proceedings being filed in HCC Appeal No. 62/2001 Orders of inhibition were issued and upon conclusion of the Appeal, the inhibition order was removed and that pending hearing of the suit herein, the order of inhibition should be reinstated.

4. In response, the Defendant John Kaburu Magiri filed a replying Affidavit sworn on 8.3.2006 and in it he depones that he lawfully bought parcel No. Ntiriti Settlement Scheme/219 and later sub-divided it into two portions. That the Plaintiff/Applicant has no claim to it and if she did, then she should have enforced it within CMCC NO 608/1998 and HCCA 62/2003. When she did not do so, the issues now raised are res judicate in view of the decisions in those matters which finalized the matters in dispute.

5. Advocates for the parties repeated the assertions in the Affidavits but counsel for the Applicant argued that s.7 of the Civil Procedure Act does not apply to this case as the causes of action in the prior suit and the present suit are completely different while counsel for the Defendant/Respondent urges that explanations 4 and 5 in s.7 aforesaid squarely apply to this case and the suit being res judicata cannot stand and it should together with the Application under consideration be struck out.

6. I should add that counsel for the Defendant argued that the Succession Cause which conferred rights over the suit land to the Applicant was invalid as at that time the land was already registered in the names of the Defendant who was not the deceased proprietor of the land under contest in the Succession Cause. In any event, that if the Applicant is claiming through her husband, no evidence has been tendered to show that her husband was ever registered over the suit land.

7. I have seen the Plaint in this matter and at paragraph 4 thereof the Plaintiff claims that her husband was one M'magiri M'Anampiu (deceased) who was the original registered owner of the land. That to frustrate her inheritance of the land vide Succession Cause 232/1998, the Defendant deceitfully and using fraud had the land registered in his name and went on to sub-divide it. The Plaintiff then claims the land and wants the register rectified to show that she is the correct person to have been registered over the land in place of her deceased husband.

8. I have also seen the Plaint in CMCC 608/1998 where the Plaintiff is the Defendant and in that suit the present Defendant was seeking orders that the present Plaintiff be evicted from parcel No.219 aforesaid. It was his claim then that he had bought the land from one Ruteere M'Ngutwari at an unspecified consideration and thereafter he acquired an indefeasible title to it. That the present Plaintiff was a trespasser in the suit land and ought to be evicted. The Plaintiff in her defence denied knowledge of Ruteere M'Ngutwari and averred that the land as at 1.1.1983 belonged to her husband Magiri M'Anampiu. In the judgment in that suit N.H. Oundu Esq. Learned Resident Magistrate upon hearing parties found that the present Defendant bought the land from "**M'Ruteere M'Ngaruthi**" who had title to it and the present Plaintiff had no claim to it. Orders of injunction were issued and the trial magistrate quipped;

"Until the defendant effectively challenges the plaintiff's title and dislodges him he has the right to quiet possession."

9. I did not have the benefit of having the proceedings and judgment in HCCA 65/2003 produced by parties but from the affidavits filed it was determined in favour of the plaintiff.

10. At this stage there are a few matters that cause me some concern about the Application:-

(i) Nowhere in the application before me does the applicant exhibit any document showing that M'Magiri M'Anampiu had a valid claim to the suit land. Even if it is so stated in HC. Succ. Cause No. 232/98, it is incumbent upon the Applicant to establish that fact before she can establish that she is entitled through him to the suit land.

(ii) I note that the person who is stated as heir of the suit land from M'Magiri M'Anampiu is one Karuthu Magiri. Neither in CMCC No. 608/1998 or in this suit are we told anywhere that Mary Magiri is the same person as Karuthu Magiri. It may be so but from where I sit, those are two different persons and no effort is made anywhere in the pleadings before me to establish that link. Without that link I do not see what interest Mary Magiri has in the suit land. If it is so, a party with sloppy and casual pleadings sadly must suffer the consequences of that sloppiness.

(iii) In CMCC No. 608/1998 at paragraph 3 and 4 of the Plaintiff, the Defendant in this suit claimed that he was the registered owner of the suit property and had acquired absolute proprietorship to it. He averred at paragraph 5 thereof that the present Plaintiff was a trespasser to a portion of it and sought orders that she should be evicted there from and a permanent injunction issued against her. In the Defence at paragraph 3, the plaintiff averred that the land belonged to her husband and at paragraph 4 thereof she averred that she occupied the land. At paragraph 6 she stated thus;-

“The Defendant in regard to the allegations contained in paragraph 4 of the plaintiff states that the plaintiff even if he is the present registered proprietor obtained such registration fraudulently and stealingly (*sic*) and puts the plaintiff to strict proof thereof.”

11. I should reiterate that at paragraph 4 of the Defence she also states that **“She has been in occupation and possession of the said land claiming ownership and made developments thereon.”** It is to my mind clear that in that suit although the main prayer was for an eviction, the issues to be addressed were as to ownership of the suit land. If it were not so, then the Defendant (now plaintiff) would not have called as witnesses Silas Gituma and Lokidilo Kinjori (D.W.2 and D.W.3 in that suit) to show that her husband had been allocated the land in 1975. The learned trial magistrate having seen the copy of the register produced by the plaintiff in that suit and weighed it against an offer dated 10.8.1983 accepted on 14.9.1984 dismissed the latter and found for the plaintiff. In saying so, he said.

“The parties are dealing with registered land. The Plaintiff is the registered proprietor....”

The defendant has not effectively pleaded fraud. She did not file a counter claim.....or by another suit challenge the plaintiff’s title. If any fraud were committed against her late husband then that wrong must have been by the Settlement Fund Trustee and M’Rutere M’Ngaruthi. The defendant has not challenged this. It cannot be done by complaints to the local District Commissioner. The Defendant had the best opportunity by way of a counter-claim in this suit. She failed to make use of it. She can then only bring a fresh suit”.

12. With this background in mind is the suit res-judicata? If I find that it is then it must crumble and if not, then I shall return to the question whether the orders sought herein can be granted.

13. It is generally agreed by legal authorities that for a matter to be declared res-judicata these conditions are necessary;

(i) the matter directly and substantially in issue in the subsequent suit must have the same and was in issue substantially as stated (see explanation 3 in s.7) or constructively (see explanation 4) in the former suit.

(ii) The former suit was between the same parties or parties through whom any of them claim.

(iii) Parties must have been litigating under the same title in the former suit.

(iv) The court that heard and determined the former suit had jurisdiction to try the issue now in issue in the subsequent suit.(see explanation 2 in s.7)

(v) The matter in the subsequent suit was heard and finally determined by the court trying the former suit. (see Mulla on the Code Of Civil Procedure 13th Edition Vol 1 page 55 for a discussion on the subject.)

14. There is no doubt in this case that the same parties were litigating in CMCC No. 608/1998 over the same parcel of land and as I have shown above, each claimed ownership through a non-party to that suit. The same parties in this suit are litigating over the same parcel of land and each is again claiming ownership to it. I heard counsel for the applicant to be saying that the **“same matters in issue”** are not in issue now. In Karsan vs Bhogal [1953] 20 EACA that expression was defined to mean **“not any matter in issue in the suit but has reference to the entire subject matter in issue in controversy; it is not enough that one or the same issues are in common. The subject matter in the subsequent suit must**

be covered by the previous suit, not vice-versa”[see Mwangi Njangu vs Mechack Mbogo Wambugu HCCC 2340/91 (UR)]

15. To my mind all matters that ought to have been debated between the parties were debated in CMCC 608/98 and to re-open them now would be res judicata.

16. Having so said however, I have not been asked to make specific orders as regards the suit generally or that I should immediately strike it out. What I have shown is that the applicant has neither shown that she has a legal interest capable of being protected nor has she shown that she will suffer irreparable loss; she has also not shown that damages is not an adequate remedy and clearly is not a party entitled to an injunction if I was to bow down to the dictates of Giella vs Cassman Brown (1973) E.A. 358.

17. If she is not entitled to an injunction, I have seen and heard nothing that would entitle her to an inhibition.

18. In effect what I am saying is this; the subject of the dispute is land, a very sensitive subject but a party that approaches that subject with sloppy pleadings and does not place himself/herself favourably before the eyes of equity cannot expect that favour however sensitive the subject is. I am now certain that the Applicant is one such party. That is all there is to say at this stage.

19. The application dated 21.2.2006 is hereby dismissed with costs to the Respondent.

20. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 3rd DAY OF MAY 2006

I. LENAOLA,

JUDGE