



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 341 of 1999

1. GODFREY NYINGI MWATI

2. MUNYUA MARARO

3. SAMWEL WANDAKA MWATI

PLAINTIFFS

VERSUS

1. MILKA NYAMBURA MAGU

2. JAMES MWANGI MAGU

3. JOHNSON NYINGI MAGU

4. JOSEPH THIONGO MAGU DEFENDANTS

RULING

The Defendants through their advocate M/s Lucy Mwai has raised a is preliminary objection to the Plaintiff's suit contending that the suit res judicata. The facts are basically not in dispute. There was a Succession Cause No. 73 of 1994 filed at Kangema Resident Magistrate's Court by the 1st Plaintiff Godfrey Nyingi Mwati seeking Letters of Administration in respect of the estate of his late brother Benjamin Magu Mwati (hereinafter referred to as the deceased). The 1st Defendant Milka Nyambura Magu who is the widow of the deceased objected to the Letters of Administration being issued to the 1st Plaintiff. The Senior Resident Magistrate Kangema Court upheld her objection and issued Letters of Administration to the 1st Defendant. The 1st Defendant thereafter applied for confirmation of the grant and distribution of the estate. The 1st Plaintiff did not raise any protest. As a result the estate of the deceased which comprised of Loc 14/Kairo/762 and Loc 10/Kairo T 187 was distributed to the 1st Defendant and her sons who are 2nd, 3rd and 4th Defendants.

The Plaintiffs subsequently filed this suit in which it was contended that land parcels Loc 14/Kairo/762 and Loc 10/Kairo T 187 belonged to their father but was registered in the name of the deceased who was their elder brother during the land consolidation and demarcation in Murang'a in 1962. The deceased was to hold the same in trust for himself and the Plaintiffs. The Plaintiffs contended that the Defendants as the heirs of the deceased were only entitled to the share of the deceased. The Plaintiffs therefore sought a declaration that the Defendants are registered as proprietors of Loc 14/Kairo/762 and Loc 10/Kairo/T. 187 in trust for the Plaintiffs in respect of $\frac{3}{4}$ thereof and an order for the trust to be determined and the plaintiffs' shares be identified and transferred to them.

Ms Mwai has submitted that since the Plaintiffs did not file any protest in the Succession Cause to the confirmation of the grant nor any appeal against the confirmation, and the subject of the current suit being the same as that of the Succession Cause, namely Loc 14 Kairo/762 and Loc 10/Kairo/T. 187, the Plaintiffs are bound by the judgment of the Kangema Magistrate's court in the Succession Cause. She therefore urged the court to find the current suit an abuse of the process of the court and strike it out.

Mr. Mindo who appears for the Plaintiffs has submitted that the current suit is not *res judicata* as the parties are not the same, the 2nd and 4th Defendants not having been parties in the previous suit. Mr. Mindo maintained that the cause of action was also not the same as the current claim is one based on trust which the Kangema Magistrate's Court had no jurisdiction to hear and determine.

It is evident that the 1st Plaintiff was the one who initiated the Succession Cause in the Kangema Court because he was claiming an interest in the deceased's estate. However after the court appointed the deceased's widow as the administrator of the estate, neither the 1st Plaintiff nor any of the other Plaintiffs laid any claim to the deceased's estate even though they were all well aware that the deceased's estate comprised of land registered in the name of the deceased i.e. Loc 14/Kairo/762 and Loc 10/Kairo/T187 and the same was due for distribution. It is evident that the subject matter of the Succession Cause was the administration and distribution of the estate of the deceased which comprised of Loc 14/Kairo/762 and Loc 10/Kairo T. 187. This is precisely the same subject in issue in the current suit i.e. ownership and distribution of the same land parcels.

It was submitted that the plaintiff's could not pursue their claim in the Succession Cause because the magistrates court did not have jurisdiction to determine issues of trust. No authority was however cited in support of this general proposition. Under Section 159 of the Registered Land Act the only limitation placed on the jurisdiction of a Resident Magistrate's Court to determine issues relating to land is monetary jurisdiction which is pegged at \$25,000 (or Kshs.500,000/-). This is in line with the holding of the Court of Appeal in the case of ***Muthiuta Vs Wanoe [1982] KLR 166.***

Under the Law of Succession Act, a Resident Magistrate has jurisdiction to hear and determine matters relating to administration of estate of a deceased provided the Resident Magistrate has been appointed in accordance with Section 47 of the Law of Succession Act and the gross value of the estate does not exceed Kshs.100,000/- as provided under rule 7(3) of the Probate and Administration Rules. It has not been alleged that the gross value of the estate of the deceased exceeded the monetary jurisdiction of the Resident Magistrate.

Moreover under rule 40(8) and (9) of the Probate and Administration Rules, where a protest has been filed in a Resident Magistrate's Court to the confirmation of a grant, the Resident Magistrate can either at the request of any party or on his own motion order that the Succession Cause be transferred to the High Court. The Plaintiffs did not file any protest and therefore did not take advantage of this provision. Although in the plaint there is an averment that an application was made for the Succession Cause to be transferred to the High Court, there is no explanation why that appears to have been abandoned and a new suit filed. Indeed there was room for the plaintiffs even to apply for revocation of the grant if the same was confirmed due to non-disclosure of material fact or the proceedings were defective. The plaintiff did not however opt for any of these options.

I am satisfied that the matter in issue in this suit which is whether the Plaintiffs' had any interest in the property Loc 14/Kairo/762 and Loc 10/Kairo/T187 was directly and substantially in issue in the Succession Cause, the Plaintiffs and the Defendants were all interested parties in the Succession Cause.

Although the court did not specifically deal with the Plaintiffs' claim, the claim was one which ought to have been raised in the Succession Cause so that the court could determine whether the land forming part of the deceased's estate was "Free property" available for distribution.

Explanation No. 4 to Section 7 of the Civil Procedure Act states that

"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.”

I come to the conclusion that the Resident Magistrate Kangema having determined the issue of ownership and distribution of Loc 14/Kairo/762 and Loc 10/Kairo/T. 187 the matter is now res judicata and the Plaintiffs cannot resurrect the issue through another suit.

I therefore uphold the preliminary objection and strike out the Plaintiffs’ suit as being an abuse of the process of the court.

Dated, signed and delivered this 6th day of June 2006.

H.M. OKWENGU

JUDGE