

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

Civil Case 224 of 2004

MARGARET NJERI WANJIBA.....PLAINTIFF

VERSUS

STEPHEN MACHARIA WANJIBA.....DEFENDANT

RULING

Both the plaintiff and the defendant are brother and sister. Their deceased mother RAHAB WANGARI WANJIBA was the registered proprietor of land parcel L.R.NO. ESCARPMENT SETTLEMENT/SCHEME/59.

Before she died she caused the suit land to be subdivided and the subdivision resulted into L.R. NO.ESCARPMENT SCHEME/1556, 1557, 1558 and 1559. When they took possession, the plaintiff settled on ESCARPMENT SCHEME/1556 while the defendant settled on 1558.

The plaintiff claiming that there was confusion in that No.1556 belonged to the defendant while No.1558 belonged to her filed this suit seeking orders to revert the plots. Before the suit could be heard Kimani counsel for the defendant raised a Preliminary Objection on the ground that the suit is resjudicata. He submitted that the plaintiff had instituted a land dispute cause No.16 of 1999 before the Lands Dispute Tribunal at Lavi which decided in favour of the defendant. She appealed to the Provincial Land Disputes Tribunal Central province being Provincial Land Disputes Tribunal No.146 of 2000 where she lost again.

The award was confirmed in favour of the defendant. The plaintiff then appealed to the High Court being HCCC NO. 523 OF 2000 and the appeal was dismissed in favour of the defendant. The second point raised by the defendant was that the transfers which were signed by the deceased mother of the parties were signed in 1995 and this suit was filed in 2004. Counsel submitted that the suit was time barred as time for rectification of records is 6 years.

Mr. Njau counsel for the plaintiff submitted that the suit is not resjudicata as the same was not heard on merit. He submitted that the plaintiff had filed a land dispute cause at the Kiambu Land Disputes Tribunal which decided in favour of the defendant. She appealed to the Provincial Land Disputes Tribunal which also decided in favour of the defendant. She appealed to the High Court which is dismissing her appeal made a finding that the Tribunal had no jurisdiction. This was a land dispute between members of the same family in respect of who should occupy which portion of the land. Since the death of their mother each party has been in possession of portion where each is residing about 10 years now. It was the plaintiff who instituted the dispute before the Tribunal and hence she had surrendered to the jurisdiction of the Tribunal. She cannot be heard now to state that the Tribunal had no jurisdiction. Moreover the matter in issue is who should occupy which portion of the family land.

Mr. Njau further submits that the matter is not resjudicata because it was not heard on merit. But the law is clear on this. A matter will be said to have been **“heard and finally decided”** notwithstanding that the former suit was disposed of in any of the following way:

- (i) ex parte
- (ii) by decree on an award
- (iii) by disposal owing to the plaintiffs failure to adduce evidence at the hearing

The plaintiff having decided and having surrendered to the jurisdiction of the Tribunal and where he lost having chosen to challenge the award through appeal and not through judicial review to have the proceedings declared a nullity and having lost his appeal the doctrine to resjudicata applies. The defendants Preliminary Objections upheld and accordingly the plaintiff's suit is struck out.

Dated and delivered at Nairobi this 13th day of July 2006.

J.L.A. OSIEMO

JUDGE