



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

Civil Case 707 of 2004

**KIHINGA FARMERS COMPANY LTD.....
.....PLAINTIFF**

VERSUS

**ELIUD MUCHOKI MAHIHU1ST
DEFENDANT**

**ANNAH WANGUI GAKURU... ..2ND
DEFENDANT**

**ELIJAH MURIMI MIANO... ..3RD
DEFENDANT**

**JAMES WARUI GAKURU.....4TH
DEFENDANT**

**WILSON WAMBUI MAHIHU.....5TH
DEFENDANT**

**MAINA A. GAKURU.....6TH
DEFENDANT**

**ESTHER WAKONYO GAKURU.....7TH
DEFENDANT**

**MARGARET WAIRIMU GAKURU.....8TH
DEFENDANT**

**WANJIRA GAKURU MUTHONI.....9TH
DEFENDANT**

**WANGU GAKURU MUTHONI.....10TH
DEFENDANT**

STEPHEN WANJOHI GAKURU.....11TH DEFENDANT

**MICHAEL WACHIRA MAHIHU.....12TH
DEFENDANT**

**WACHIRA MUCHOKI MAIHU.....13TH
DEFENDANT**

NICHOLAS WACHIRA GAKURU.....14TH DEFENDANT

**Alias NICHOLAS WACHIRA MAIHU.....14TH
DEFENDANT**

CHIEF LAND REGISTRAR.....15TH DEFENDANT

**AGRICULTURAL FINANCE CORPORATION.....16TH
DEFENDANT**

DIRECTORS OF SURVEYS.....17TH DEFENDANT

HON. ATTORNEY GENERAL.....18TH DEFENDANT

RULING

The plaintiff KIHINGA FARMERS LIMITED sued the 18 Defendants seeking various orders as stated in the plaint. The defendant upon being served with summons, filed a Notice of Preliminary Objection on the ground that the present suit is resjudicata as the issues raised in the present suit were raised and decided upon in **NAKURU HCCC NO. 372 OF 1978 and NYERI HCCC NO. 34 OF 1983**. In the Preliminary Objection he sought orders to strike out the suit as well as the verifying affidavit accompanying the plaint alleging that the same is false.

In the Nakuru Suit HCCC NO. 372 OF 1978 the plaintiff was KIHINGA FARMERS LTD and the defendant was NICHOLAS WACHIRA MAIHU in which the plaintiff claimed that it had entered into a Sale Agreement to purchase land parcel L.R. NO.2922/2 and 128 dairy cattle at a purchase price of Shs.500,000/= and Shs.193,000/= respectively.

The suit property was Agricultural Land and was subject to the Land Control Board consent which was not obtained within the statutory period under the provisions of the Land Control Act Cap 302 Laws of Kenya. The plaintiff had paid Shs.500,000/= for the purchase of the suit property and Shs.15,000/= to words the purchase of the dairy cattle.

Under the provisions of Section 7 of the Act; “If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act that money for consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

The plaintiff sued the defendant and sought judgment for:

- (1) Shs.500,000/=
- (2) Shs.15,000/=
- (3) Interest thereon at 8% p.a. from the date of filing the suit until judgment and thereafter at 6% p.a. until payment in full.
- (4) Costs of and incidental to this suit with interest thereon.

(5) Such further or other relief as this Honourable Court deems fit.

Judgment was entered in favour of the plaintiff on 19th April 1991 in the sum of Shs.515,000/= interest at 8% p.a. from 15th November 1978 to 19th February 1979 which was calculated at Shs.10,300/=. In the **NYERI HCCC NO. 34 OF 1983 ANNE WANGUI AND TWO OTHERS HAD SUED KIHINGA FARMERS LIMITED.**

The plaintiff sought orders for an injunction restraining the defendant its servants and/or agents and its shareholders and /or members from entering or remaining on the suit premises that is L.R. NO. 2922/2 among other orders.

The court issued a permanent injunction restraining the defendant, its servants and/or agents from entering the suit premises. That order was issued on 4th July 1989.

In the meantime the suit property L.R. 2922/2 was subdivided into various parcels which were transferred to the defendants and titles issued.

On 29th June 2004 KIHINGA FARMERS LIMITED filed this suit against the 18 defendants who are the transferees of the subdivisions of L.R. NO. 2922/2 seeking orders restraining the defendants from entering or trespassing upon those parcels and it also sought an order for cancellation of the issued titles. Upon being served with this suit, the defendants raised the Preliminary Objection on the ground that this suit is resjudicata.

In order that a decision in a former suit may operate as resjudicata in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit. **Resjudicata** by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. The mere fact that a matter directly and substantially in issue in a former suit is not sufficient to constitute the matter resjudicata; it is also essential that it should have been heard and finally decided.

In this suit, the plaintiff in the Nakuru case is the defendant in the Nyeri case and the plaintiff in the instant case and the suit property is L.R. NO. 2922/2.

The defendant in the Nakuru case is one of the plaintiffs in the Nyeri case and the 14th defendants in the instant suit and the plaintiff in the Nyeri case is the 2nd defendant in the instant suit.

With due respect to counsel, this suit fails squarely under the doctrine of resjudicata where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have from negligence inadvertence or even accident, omitted part of their case.

The plea of resjudicata applies except in special circumstances not only to point upon which the court was actually required by the parties to form the opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

See VIGRAM VC in ANDERSON VS. ANDERSON [1843] 67 ER 313 at page 319. The suit before me is resjudicata as the same issues were directly and substantially in issue in the previously constituted suit between the same parties and on the same subject matter.

It is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation. The plaintiff had paid for the suit land a sum of Shs.500,000/=. But

because he did not secure Land Control Consent L.R. NO. 2922/2 being agricultural land he decided to sue for the recovery of consideration as provided for under Section 7 of the Land Control Act Cap 302 in Nakuru HCCC NO 372 OF 1978. He obtained judgment in his favour with costs and interest. But because he declined to vacate the suit land the 2nd defendant in the instant suit filed the Nyeri suit HCC NO. 34 OF 1983 and it was restrained from entering the suit premises

The plaintiff then moved to this court and filed this suit in this court seeking to restrain the defendants from dealing with the subdivided parcels in the way they wished despite the fact that they had been issued with title deeds.

The plaintiff must be told in no uncertain terms that no matter how many suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts.

The Preliminary Objection is upheld and the Plaint is accordingly struck out with costs to the defendants.

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

J.L.A. OSIEMO

JUDGE