

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CIVIL SUIT NO. 3 OF 2003

ALICE WAIRIMU MUGO 1ST PLAINTIFF)

) APPLICANTS

BILHA WACHEKE MUGO 2ND PLAINTIFF)

VERSUS

WILSON MUTUMBO DEFENDANT/RESPONDENT

RULING

Alice Wairimu Mugo and Bilha Wacheke Mugo (hereinafter referred to as 1st & 2nd Plaintiff) brought this suit against the Defendant Wilson Mutumbo. The plaint is rather muddled up but the final prayers are for:

- (1) a declaration that the defendant holds 2 acres out of land parcel Number Aguthi/Gaki/1084 in trust for the Plaintiff.**
- (2) Determination of the said trust and transfer of 2 acres out of the said Aguthi/Gaki/1084 to the Plaintiffs.**

The Defendant has through his advocate raised a preliminary objection on the grounds that the suit is res judicata, as the issues raised were fully canvassed before the Nyeri Land Disputes Tribunal through Nyeri Land Disputes Tribunal case No. 14 of 1989 whose award was adopted vide Nyeri CM Award No. 102 of 2000.

The preliminary objection is opposed on the grounds that the orders of the Tribunal were set aside by the High Court on appeal and the issues have not therefore been addressed and dealt with conclusively. It was also submitted that the Plaintiff's were claiming land parcel No. 1084 and not land parcel No. 1085 which was the subject of the previous suit.

Section 7 of the Civil Procedure Act states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

In this case it is apparent that the previous proceedings i.e. Nyeri Land Disputes Tribunal Award No. 14 of 1989 and the High Court Civil Appeal No. 81 of 2001 were suits involving the Plaintiffs and one Johnson Wachira Mugo who is not a party to this particular suit. In fact an attempt by the Defendant in this suit to appeal against the tribunal award was frustrated because he was not one of the parties to the suit before the tribunal as is apparent from an Annexure AWM-III to the applicants affidavit. I find that the previous suits did not involve the same parties and therefore the issue of res judicata does not arise. I do therefore overrule the preliminary objection.

Having noted that the plaint is rather confused and unclear, I do order under Order VI A rule 5(1) of the Civil Procedure Rules that the Plaintiffs shall amend paragraphs 6, 7 & 8 of the plaint so as to properly

bring out the pleadings in order to enable the court determine the real question in controversy between the parties.

The amended plaint must be filed and served within 21 days from the date hereof.

Those shall be the orders of this court.

Dated signed and delivered this 12th day of May 2005.

H. M. OKWENGU

JUDGE