



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 36 OF 2020

SAMSON NDAMBO NGUGI PLAINTIFF

VERSUS

ANTHONY MUCHINA KAMAU.....1ST DEFENDANT

STANLEY KINUTHIA KAMAU.....2ND DEFENDANT

RULING

1. On the 13/11/2020 the Plaintiff filed suit against the Defendants seeking orders inter alia that Paul Ngugi & Bros and Paul Kamau Ngugi held the suit land LOC4/GAKARARA/1156/23 in trust for himself and for the benefit of his siblings and the three widows of the late Samson Ngugi Kamau, the previous owner of the suit land. That the suit land was encumbered with a trust and therefore all the previous title holders including the Defendants held the land subject to a customary trust interest in his favour and other members of his family. That the title in the name of the 2nd Defendant should be cancelled because it is encumbered by a customary trust in his favour.
2. Simultaneously with the suit the Plaintiff filed a notice of motion seeking restraining orders against the 2nd Defendant from wasting, damaging, alienating and disposing of the suit land pending the hearing and determination of the suit.
3. In response the Defendant took out Preliminary Objections expressed as follows;
 - a. That the Applicant's claim is defective, incompetent, misconceived and an abuse of the Court process.
 - b. That the Applicant has filed numerous applications including High Court Succession Cause No. 605 of 2002 at Nairobi where the same was heard and determined.
 - c. That the Applicant filed another application in the High Court Succession Cause No 3711 of 2004 at Nairobi and the Court made a ruling.
 - d. That the Applicant filed another application in the High Court Succession Cause No 46 of 2017 at Kiambu and the Court made a ruling and objected to the Applicant filing numerous matters.
 - e. That instead of appealing to the Court or making an application for review of the orders; the Applicant has filed numerous matters in other Courts which amount to an abuse of the Court process including High Court at Nairobi Civil Appeal No. 80 of 2005.
 - f. That the Applicant has also filed matters in Subordinate Courts at Thika, Kandara, Naro Moru and Kiambu.
 - g. That the Applicant's application be dismissed with costs.
4. Upon taking directions, the Plaintiff filed written submissions while the Defendants relied on the replying affidavit sworn by the 1st Defendant and dated the 7/12/2020.
5. I have read and considered the pleadings of the parties and all the relevant materials placed before me. The key issue is whether the Preliminary Objection is a pure point of law.
6. Section 7 of the Civil Procedure Act provides 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”.

7. The doctrine of resjudicata literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments. See the decision in the Indian case of **Subramanian Swamy V state of T.N AIR 2015 SC 460**. The doctrine is founded on high public policy intended to achieve two objectives namely; there must be a finality to litigation and that an individual should not be harassed twice over on account of the same litigation. It underscores the fundamental doctrine of law that there must be an end to litigation.

8. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the objection in reference to;

- a. Matters directly and substantially in issue in the former suit.
- b. Whether the parties are the same or parties under whom they are or any of them claim.
- c. Litigating under the same title.
- d. Competence of the Court.
- e. Matter has been heard and finally decided.
- f. In the case of **George W M Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR** the Court stated as follows;

“The doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.

Further the Court held that;

“.....the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in **Mwangi Njangu v Meshack Mbogo Wambugu** (supra) where he said: -

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays”.

It cannot be otherwise if the doctrine is to serve the twin public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter”.

9. It is now my duty to examine whether the suit before me is resjudicata using the prisms of the parameters set out in para 7 above. In order to achieve this I shall analyse the cases that the objector has beseeched the Court as occasioning this suit resjudicata.

10. From the pleadings filed in various Courts, it can be discerned that the suit property to wit **GAKARARA /1156/23 IN KANDARA Market** belonged to the late Samson Kamau Ngugi who was survived by sons and the following widows; Beth Mbura, Grace Wambui and Sophia Nyambura . That the late Rebecca Njeri obtained a confirmed grant and the property passed to her by the process of transmission after succession of the estate of the late Kamau Ngugi was finalized. That the children of the other widows filed application to revoke the grant and wanted to remove the suit land from the assets of the deceased. That the revocation was not allowed. That the deceased filed suit against their stepsons to recover rent and mesne profits for their illegal occupation and possession of the market plot. That the widows also filed suit against Antony Muchina to obtain their shares of the land and claimed trust vide **Kandara CMCC 173/13**.

11. In the Succession cause No 46 of 2017Hon Lady Justice Meoli while confronted by an application brought by Samuel Ndambo Ngugi, Peter Muchina Ngugi Joseph Njuguna Ngugi and James Macharia Ngugi against the 1st Defendant herein delved into a deep analysis of the cases cited above and came to the conclusion that the said case was resjudicata in view of the previous succession cases filed by the same parties.

12. In summary my observation is that the above cases are with respect to matters succession and the issue of trust was never determined. This is the basis of Hon Lady Justice Martha Koome (as she then was) advice to the parties in **HCCC No 3711 of 2004** when she stated that the available remedy to the parties was to file a civil suit to pursue claims in the suit land.

13. Other suits cited by the Defendant includes **CMCC No 150 of 2002** where the claim was with respect to eviction.

14. Of particular interest to the objection in my view is the SRMCC NO 173 OF 2013 in which the current Plaintiff has sued the current 1st Defendant over the suit land seeking declaratory orders that the suit land belongs to Sophia Nyambura, Beth Mbura and Grace Wambui being the deceased wives of the late Samson Ngugi and an order of cancellation of the title be made to facilitate the sharing of the property among the dependents of the three widows.

15. The parties and the subject matter in this suit are similar to the suit in the lower Court. The issues in SRMCC NO 173 of 2013 involves the sharing of the property among the children of the three widows of the late Samson Ngugi while in the current suit the Plaintiff's claim is based on customary trust.

16. That said there is no evidence placed before the Court to show that SRMCC NO 173 of 2013 has been heard and determined.

17. The Defendant has sought to persuade the Court that this suit is resjudicata based on the ruling of the Court in HCCC No 46 of 2017. I hold a contrary view because the matters though involving the members of the same family litigating in their various capacities either as children, mothers etc relate to the subject matter. The issues in succession revolved around the revocation and counter revocation of grants with respect to the estate of the late Samson Ngugi and his son Paul Kamau Ngugi.

18. In the case of **Elijah Gachoki and Another –v- Stanley Mugo Kariuki & Another citation Kerugoya H. C. Succession Cause No. 90/2013** the Court held that:

“It is also important to note that the Law of Succession Act Cap 160 Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard. I agree with the 2nd respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under Article 162(2) of the Constitution”.

19. Art 162 (2) of the Constitution read together with Section 13 of the ELC Act gives this Court jurisdiction to determine among other things matters relating to customary trust. The High Court therefore could not have determined the matter given the distinct jurisdiction limitations provided in the Constitution. I have read the whole ruling and I did not deduce that SRMCC NO 173 of 2013 was referred to show the litigious storm that has stoked the parties in respect to the suit land. SRMCC No 173 of 2013 was not in issue. It is not difficult to see that the parties have been involved in filing multiplicity of suits.

20. Article 27(1) and (2) of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The Constitution goes further to state that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The right to be heard as enshrined in Art 50 of the said constitution is one such rights.

21. Guided by Constitution, this Court is prepared to give the Plaintiff the benefit of the law. That is to say that his dispute premised on trust which I can see from the pleadings before me, has not been litigated and determined by a competent Court to finality.

22. Having said that it would appear to me that the prayers in SRMCC No 173 of 2013, if granted would settle the claim in the instant case. The parties did not address me on whether the current suit is subjudice. I direct that they do so at the next hearing.

23. The test in determining a Preliminary Objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd –Vs- West End Distributors Ltd [1969] EA 696** where the Court held that:

“. A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

24. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

25. It is trite law that matters of subjudice and resjudicata ought not to be raised through Preliminary Objections as such matters necessarily involve investigation of facts. In the case of **Henry Wanyama Khaemba –Vs – Standard Chartered Bank & Another (2014) eKLR** the Court stated;

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of resjudicata duplicity of suits having been spent will require probing of evidence as it is already evidenced from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on Preliminary Objection. Court of laws have always had a well founded quarrel with parties who resort to raising Preliminary Objections improperly.”

26. Guided by the above cases, it is clear that the Preliminary Objection is not a pure point of law because the circumstances of this case is blurred by factual details that require the Court to examine evidence. For example, the Court requires to peruse the SRMCC No 173 of 2013 to determine if the same was heard and determined to finality.

27. The Preliminary Objection is unmerited. It is dismissed with costs to the Plaintiffs.

28. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANGA THIS 11TH DAY OF FEBRUARY 2021.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Makura for the Plaintiff

1st & 2nd Defendants – Absent

Court Assistant; Njeri