

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 3004 OF 1994 (O.S)

MBATIA MUNIU..... PLAINTIFF

versus

MARY WANJIKU MUNIU 'A'.....DEFENDANT

J U D G M E N T

The applicant seeks a declaratory order to the effect that two properties namely LR Githunguri/Gathangari/11 and Githunguri/Gathangari/T.637 are family property and that the defendant holds the titles thereof to the extent of one-half share and interests therein in trust for him. He also seeks an order that the respondent do transfer the onehalf share in the suit premises to him.

The suit is defended by the respondent who has deponed that the subject properties were bought by her late husband for valuable consideration from a third party and that they can thus not form part of the applicant's family land.

It is also her plea that the suit is res judicata as it was heard and determined by the District Magistrate's Court in Succession Cause No. 18 of 1974.

Res judicata is catered for in Section 7 of the Civil Procedure Act, which stipulates that:

“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 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.”

The respondent led evidence that in the aforementioned Succession Cause, the applicant had claimed a right to the two subject properties and that the court had found that he had no right thereon.

The respondent produced as an exhibit, the proceedings of the said case and it is evident that the applicant was the fourth claimant and therefore a party to that suit and an active one at that. That suit involved these subject properties and the issue of their ownership was to be determined. The applicant had given sworn evidence that the subject properties were clan land. The learned magistrate, having taken the evidence of all the witnesses had found that the properties had been bought by the respondent's late husband, and that they never formed part of family property as claimed by this applicant. He had then declared the respondent, as the rightful heir of both the properties which he had earlier found were her late husband's properties. The applicant who had a right of appeal chose not to appeal.

To my mind the issues raised in this application are issues that were determined by the District Magistrate, who had jurisdiction to hear and determine matters such as this one, pertaining to succession.

I find that the matters in issue in that succession cause and the matters in issue in this application are directly and substantially the same.

For the above reasons, I find that this suit is res judicata, I have no jurisdiction to hear and determine the same by virtue of section 7 as aforementioned, and the same is hereby dismissed with costs.

Dated and delivered this 13th day of March 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Mr. Kingara for the plaintiff/applicant

Mr. Mbugua holding brief for Mr. Gatere for defendant/respondent