



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 26 OF 2019

GRACE WAINOI MUNENE.....PLAINTIFF

VERSUS

GEOFFREY KARUBIU KIBUCHI

LYDIA WANJIRU KIBUCHI

MARTIN MUTHII KIBUCHI

ELIZABETH NYAMBURA KIBUCHI.....DEFENDANTS

RULING

Introduction

In a Notice of Preliminary Objection dated 11th October 2019, the defendant raised the following point(s) of law:-

(1) That the plaintiff's suit is Res-judicata as the same suit has previously been heard and dispersed with.

The plaintiff in a plaint dated 1st July 2019 sought the following orders:-

(a) A declaration that the defendant held land parcel No. MUTIRA/KAGUYU/1614 in trust for themselves and the plaintiff herein.

(b) An order for determination of trust and registration of land parcel No. MUTIRA/KAGUYU/1614 in the name of the plaintiff.

(c) An order for sub-division of land parcel No. MUTIRA/KAGUYU/1614 into two, the plaintiff to get 2.5 acres and the defendants 2.5 acres.

(d) Costs of the suit with interest.

In a statement of Defence dated 19th August 2019, the defendants denied the plaintiff's claim. At paragraph 7 of the said statement of defence, the defendant expressed intention to raise a Notice of Preliminary Objection at the earliest opportunity on grounds that the suit is Res-judicata and an abuse of the Court process.

Defendant's Written Submissions

The defendant through the firm of J.K. Kibicho & Company Advocates submitted that in the year 1995, Jeniffer Wangeci Kibuchi who is the mother to the defendants herein filed a suit before this Court being HCCC No. 60 of 1995 against the plaintiff's husband, one Munene Irangi (now deceased). By consent, the matter was referred to the Land Disputes Tribunal in Kirinyaga District where an award was given on 9th October 1998 in which the issues in controversy were conclusively determined and consequently adopted as the judgment of the Court in SRMCC Award No. 77 of 1999 (Nyeri). The defendants further submitted that the award of the Land Disputes Tribunal at Baricho Kirinyaga read to the parties on 9th October 1998 was entered in the following terms:-

1. That both parties agreed that the parcel of land number MUTIRA/KAGUYU/1614 belonged to Jeniffer Wangeci Kibuchi.

2. That the plaintiff/applicant's late husband a Mr. Kibuchi Irangi deceased in 1970 entered into an agreement with one Kamonde Kibira (deceased) for buying and selling land parcel No. MUTIRA/KAGUYU/93 measuring 10 acres. That the said agreement was to the effect that the vendors Kamonde Kabiru deceased will sub-divide the land herein MUTIRA/KAGUYU/93 into two portions of 5 acres each respectively then transfer 5 acres by way of sale to the purchasers Kibuchi Irangi deceased at an agreed price of Ksh. 3,000 amount of which was paid to the vendor by the purchaser herein that towards the purchase price.

3. The suit land is not subject to the trusteeship (emphasis mine) as alleged by the objectors since no trusteeship as alleged by the objectors since no trustee ever proved by the objector's either during the life time of the plaintiff/applicant's late husband Kibuchi Irangi nor to the plaintiff/applicant who is the successor of the late Kibuchi Irangi who bought the suit land from one Kamonde Kabira (deceased).

4. That the defendants do vacate the suit land namely MUTIRA/KAGUYU/1614.

The defendants also argued that the said award was appealed to Nyeri High Court vide HCCA No. 23 of 2000 but the appeal was dismissed on 13th July 2001. It is further submitted that on 20th September 2004, the 1st defendant Geoffrey Karubiu Kibuchi sought representation to his late mother's Estate Jeniffer Wangechi Kibuchi who died on 30th May 2004 vide Succession Cause No. 2844 of 2004, Estate of Jeniffer Wangechi Kibuchi which comprised of only one asset – MUTIRA/GAKUYU/1614. The grant was confirmed on 2nd November 2005. On 14th January 2010, summons for revocation of grant were lodged by Munene Irangi who claimed to be the brother-in-law of the deceased. While dismissing the said application, **Justice Musyoka** (as he then was) observed as follows:-

“On whether there was trust which should have provided basis for involving the applicant and his siblings in the administration of the Estate, my view is that no trust was established by the Applicant.

..... The issue of trust was formerly determined by the Land Disputes Tribunal when it found that no such trust existed as the subject property was not family property but property acquired by the husband of the deceased (father of the defendants herein) (addition mine) through sale”.

On the second issue whether this Honourable Court has jurisdiction to hear and determine the entire motion, the defendants answered in the negative and submitted that the issues raised in this subsequent suit have been heard and determined and a judgment delivered. They cited *Section 6 of the Civil Procedure Act*. They also cited the case of *Owners of the Motor Vessel “Lilians” Vs Caltex Oil (Kenya) Limited (1989) K.L.R 1*.

Submissions by the Plaintiff

The plaintiff through the firm of Tess Kimotho & Co. Advocates submitted that this Honourable Court is clothed with the requisite jurisdiction to hear and determine this case under *Section 13 (1) of the ELC Act*. As to whether the matter is res-judicata, the plaintiff submitted that there has never been any suit between the parties herein over the same subject matter. She cited *Section 7 of the Civil Procedure Act* which is the guiding law regarding res-judicata.

Legal Analysis

The doctrine of Res-judicata is founded on **Section 7 of the Civil Procedure Act Cap. 21 Laws of Kenya** which 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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) – For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.

The Court of Appeal set out the test for res-judicata in the case of **The Independent Electoral and Boundaries Commission Vs Maina Kiai**

& Others (2017) e K.L.R where it was held:-

“Thus for the bar of res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are not distinctive but conjunctive terms:-

- (a) The suit or issue was directly and substantially in issue in the former suit.*
- (b) The former suit was between the same parties under whom they or any of them claim.*
- (c) Those parties were litigating under the same title.*
- (d) The issue was heard and finally determined in the former suit.*
- (e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.*

The arguments by the defendants in their Notice of Preliminary Objection is that the issue of trust and jurisdiction raised in this suit are issues that were raised and were heard and determined conclusively in the former suit before the Land Disputes Tribunal. The proceedings before the Land Disputes Tribunal adopted by the Senior Principal Magistrates Court (at Nyeri) Award No. 77 of 1999 and the Ruling in Succession Cause No. 2844 of 2004 (Nairobi) were annexed to the submissions by the defendants. What can be gleaned from those proceedings is that in the award by the Land Disputes Tribunal which was adopted by the Senior Principal Magistrate’s Court (Nyeri) Award No. 77 of 1999, the Court entered judgment in the following terms:-

(1) That the application is and hereby allowed.

(2) That the award of the Land Disputes Tribunal at Baricho Kirinyaga read to the parties on 9th October 1998 be entered as the judgment of this Honourable Court in the following terms:-

- 1. That That both parties agreed that parcel of land number MUTIRA/KAGUYU/1614 belonged to Jeniffer Wangechi Kibuchi.*
- 2. That the plaintiff/applicant’s late husband a Mr. Kibuchi Irangi deceased in 1970 entered into an agreement with one Kamonde Kibiria (deceased) for buying and selling land parcel number MUTIRA/KAGUYU/93 measuring 10 acres. That the said agreement was to the effect that the vendors Kamonde Kabiru deceased shall sub-divide the land herein MUTIRA/KAGUYU/93 into two portions of 5 acres each respectively then transfer 5 acres by way of sale to the purchaser Kibuchi Irangi towards the purchase price. The vendor died before the deal and before having been paid the balance of Ksh. 700/=. The balance of the purchase price was paid to the son of the vendor one GABRIEL MITHAMO who succeeded the vendor Kamonde Kibira deceased.*
- (3) The plaintiff/applicant’s late husband Kibuchi Irangi sued Gabriel Mithamo after the death of his father Kamonde Kabira deceased in HCCC Number 566 of 1978 at Nairobi , Kibuchi Irangi Versus Gabriel Mithamo of which it ordered Gabriel Mithamo the defendant to transfer to Jeniffer Wangechi Kibuchi 5 acres out of land parcel number MUTIRA/KAGUYU/93.*
- (4) It is therefore clear that the suit land is not subject to the trustship as alleged by the objectors either during the life time of the plaintiff/applicant who is the successor of the late Kibuchi Irangi who bought the suit land as herein stated from one Kamonde Kabira deceased.*
- (5) That Margaret Muthoni Kinyua the mother of the plaintiff/applicant’s husband who is now in her old age be given life interest.*
- (6) That no compensation will be paid to any development done by the defendants because they did without any consent of the plaintiff.*
- (7) That it was unanimous decision the Panel arrived to the Verdict the defendants, 1. Munene Irangi, (2) Ngatia Irangi, (3) David Kibuchi Irangi and (4) Ndiritu Gachiri do vacate the suit land namely MUTIRA/KAGUYU/1614 and Margaret Muthoni Kinyua to have life interest on the suit land.*
- (8) That the defendant number 1. Munene Irangi, 2. Ngatia Irangi, 3. David Kibuchi Irangi and (5) Nderitu Gachiri to vacate and give vacant possession on 1st January 2000.*
- (9) Defendant No. 4 Margaret Muthoni Kinyua to remain using and living on a portion she is currently occupying on the suit land during her life time.*
- (10) That costs of the whole case to be paid by the defendants.*

The defendants submitted that the award was appealed against in Nyeri HCCA No. 23 of 2000 but the Appeal was dismissed on 13th July 2009. On 20th September 2004, the 1st defendant Geoffrey Karubiu Kibuchi sought representation to his late mother’s Estate, Jeniffer

Wangechi Kibuchi vide Succession Cause No. 2844 of 2004. The subject matter of the succession was only one which is land parcel No. MUTIRA/KAGUYU/1614 and on 2nd November 2005, the grant was confirmed in his favour. The confirmed grant was objected to by Munene Irangi who claimed to be the brother in law of the deceased. The objection was dismissed by Justice Musyoka. A copy of the ruling by the learned Judge is annexed to the submissions. These averments were not controverted by counsel for the plaintiffs.

What I can discern from these proceedings is that the issues which are in controversy in this suit were the same issues which arose in the Land Disputes Tribunal case which was heard and determined and finally adopted as the judgment of the Court in Award No. 77 of 1999 (Nyeri). That award was later appealed to the High Court at Nyeri in HCCA No. 23 of 2000 which was dismissed on 13th July 2009. The suit property later became subject of Succession Cause No. 2844 of 2004 (Nairobi) where **Musyoka J.** (as he then was) observed as follows:-

“On whether there was trust which should have provided basis for involving the applicant and his siblings in the administration of the estate, my view is that no trust was established by the applicant. the issue of trust was formerly determined by the Land Disputes Tribunal when it found that no such trust existed as the subject property was not family property but property acquired by the husband of the deceased (father of the defendants herein) addition mine) through sale”.

The decisions by the previous Courts in the Land Disputes Tribunal which was adopted as the judgment of the Magistrate’s Court in Award No. 77 of 1999 (Nyeri) the Appellate Court in HCCA No. 23 of 2000 (Nyeri) and Succession Cause No. 2844 of 2004 (Nairobi) are clear confirmation that the issues in the present suit have been raised and heard and determined conclusively in the three previous decisions mentioned hereinabove.

It is trite law that the doctrine of resjudicata is meant to bar litigants who do not want to accept the finality of disputes but take same matter back to Court for a second bite at the cherry by putting on different face masks to appear new cause(s) of action when in fact they are not. In the case of **Kenya Commercial Bank Limited Vs Muiri Coffee Estate Limited & Another (2016) e K.L.R.**, the Court stated as follows:-

“The doctrine of resjudicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively”.

Following my analysis and evaluation of the issues and the facts herein, I am satisfied that the Notice of Preliminary Objection dated 11th October 2019 is well taken and the same is hereby upheld. Consequently, the plaintiff’s suit herein commenced by a plaint dated 1st July 2019 is hereby struck out for being resjudicata with costs to the defendants.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 19TH DAY OF MARCH, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Makazi for the Plaintiff
2. Defendant – present
3. Kabuta – Court clerk.