



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA NO. 2 OF 2021

AGNES WANGARI RIANO.....1ST PLAINTIFF

DANIEL WAWERU RIANO.....2ND PLAINTIFF

(suing as the personal representative of Samuel Mwangi Riano

VS

STEPHEN KIMEMIA WAINAINA.....1ST DEFENDANT

WAINAINA KIMEMIA.....2ND DEFENDANT

LAND REGISTRAR, MURANGA.....3RD DEFENDANT

(Being an Appeal from the Ruling of SPM Hon E M Nyaga in CMELC NO 40 OF 2020 delivered on the 13/10/2020)

JUDGMENT

1. Once upon a time there lived a man called Waweru Ndogo in Kamukabi Kinyona location, Gachocho Scheme in the then Fort Hall, presently Muranga County.
2. The said Waweru Ndogo sired three sons namely; Wainaina Ndogo, Samuel Riano Mwangi and Nimrod Waweru.
3. Wainaina Ndogo married Phyllis Wanjiru Wainaina and both begot Stephen Kimemia Wainaina, the 1st Defendant herein. The 2nd Defendant Wainaina Kimemia is the son of Stephen Kimemia and the grandson of Wainaina Ndogo and his wife Phyllis.
4. Phyllis died on the 7/2/2004 and the Defendants were appointed the Legal Administrators of her estate.
5. Samuel Riano Mwangi married Edith Wanjiru Riano and begot Agnes Wangari Riano and Daniel Waweru Riano, the Plaintiffs herein.
6. It is said that Samuel and his wife Edith were forcefully removed by Stephen and his mother Phyllis in 1987 and they and their family fled to Nairobi and Ongata Rongai in Kajiado County where they lived upto their demise in 2015 and 2011 respectively.
7. Samuel Riano Mwangi died on 15/11/2011 and the Plaintiffs were appointed Legal Administrators of his estate on the 29/6/2020.
8. Nimrod's son is said to be called Zephania Mwangi Waweru. He was the Plaintiff in **SRMCC No 218 of 1995 (Zephania Mwangi Waweru Vs Phyllis Wanjiru Waweru alias Wanjiru Ndogo)**. In this case Zephania sued Phyllis successfully for 3 acres based on a claim of customary trust from LOC 2/GACHARAGE/63 AND LOC 18GACHOCHO/415
9. It is averred that the family had at their disposal three properties namely LOC2/GACHARAGE/63, LOC18/GACHOCHO/415, AND LOC18/GACHOCHO/1440.
10. According to the copies of green cards on record the said properties were registered in the names of Ndogo Waweru on 10/1/1964, Ndogo Waweru on the 6/1/1965 and Wanjiru Ndogo on the 6/1/1965 respectively.
11. The subject matter of this Appeal is LOC18/GACHOCHO/415. This parcel was subdivided on the 11/1/1999 to yield parcel Nos LOC18/GACHOCHO/4224 and LOC18/GACHOCHO/4225 (the suit lands).

12. Fast forward in the year of the Lord 2020, over three decades since their father is said to have been divested of the suit land, the Plaintiffs filed suit on the 14/7/2020 against the Defendants (the scions of the House of Wainaina Ndogo and Phyllis Wainaina). They are sued as the legal representatives of Phyllis Wainaina.

13. The Plaintiffs sought the following orders;

a. A declaration that the suit land belongs to Samuel Riano.

b. A permanent injunction restraining the Defendants whether by themselves their agents servants employee and any other person claiming under them from trespassing onto entering cultivating demo.

14. It is their case that the suit land was at all material times registered in the name of Samuel their father in 1975.

15. They aver that the suit fraudulently and illegally became registered in the name of Phyllis. Particulars of fraud and illegality have been itemized under para 17 of the Plaint.

16. That in 1987 Phyllis and the 1st Defendant forcefully removed their parents Samuel and Edith from the suit land. They settled in Nairobi and Kajiado and were buried at the Langata Cemetery in Nairobi.

17. That in 1995 Zephania Mwangi Waweru obtained judgement in his favour for 3 acres on a claim of customary trust. This was the case of **SRMCC No 218 of 1995 - Zephania Mwangi Waweru Vs Phyllis Wanjiru Waweru alias Wanjiru Ndogo**. In this judgement Phyllis was to surrender 3 acres to Zephania son of Nimrod Waweru from parcels LOC 2/GACHARAGE/63 AND LOC 18GACHOCHO/415.

18. That as a result parcel LOC 2/GACHARAGE /415 was then subdivided into parcels LOC18/GACHOCHO /4224 and 4225 in 1999 as shown by the entries on the green card. That parcel LOC18/GACHOCHO /4224 was transferred to Zephania and parcel LOC18/GACHOCHO /4225 remained in the name of Phyllis.

19. That the 1st Defendant changed the factory number of tea deliveries and obtained a new one in his name which he used to deliver green leaf to Gacharage Tea factory for over 20 years. That to make amends the 1st Defendant in 2016 voluntarily transferred the tea account to the Plaintiffs who took possession of the suit land and made developments and improvements thereon.

20. That on 23/2/2020 the 2nd Defendant illegally invaded the suit land and caused damage and destruction on crops and structures thereon. That the illegal invasion in the absence of their consent amounts to trespass and breach of their rights to property.

21. The Defendants by their joint defence filed on the 17/8/2020 denied the Plaintiffs claims. They contend inter alia that; the Plaintiffs are bereft of legal standing to file suit; the ad litem grant relied upon is insufficient to mount a legal suit; the suit is resjudicata; parcel No LOC18/GACHOCHO /4224 is registered in the name of Thiongo Chege who died in 2000 while parcel LOC18/GACHOCHO /4225 is registered in the name of Phyllis Waweru Wainaina who died in 2004; the estates of the registered owners of the suit lands are not parties to the suit; the suit is time barred on account of SRMCC No 218 of 1995 to the extent that the Plaintiffs are seeking to enforce a decree in excess of 23 years old.

22. Further that the suit lands were the absolute properties (LOC2/GACHARAGE 63, 415 and LOC 18 GACHOCHO /1440) of Wainaina Ndogo which properties devolved to his family and dependants upon his death.

23. Finally, the Defendants raised the issue of territorial jurisdiction on account that the suit land is situate in Kigumo and the suit ought to have been filed there instead of Muranga.

24. True to form, the Defendants raised grounds of objection to the suit and sought orders to strike out the suit on the following grounds;

a. Suit is frivolous vexatious incompetent and an abuse of the due process of the law and Court.

b. The suit is resjudicata on account of SRMCC No 218 of 1995; SRMCC No. 122 of 2020 –Kigumo; Succ cause No 798 of 2020; Succ cause No 12 of 2005 –Kigumo.

c. The subject suit land to wit; LOC18/GACHOCHO /4224 and 4225 are registered in the names of Thiongo Chege and Phyllis Wainaina who are deceased.

25. The objection was heard and the Hon SPM Court delivered its decision on the 13/10/2020 upheld the Preliminary Objection and struck out the suit.

26. Aggrieved by the decision the Appellant moved this Court by way of an Appeal seeking the orders; that the Appeal be allowed; the ruling be set aside; the Court to reinstate the suit for hearing and costs be in favour of the Appellant.

27. The Appellant faulted the trial Court on the grounds that the suit should have been sustained by utilizing the overriding objectives also known as the oxygen rule and Art 159 of the Constitution of Kenya; the Court failed to exercise discretion; failed to appreciate the effects of occupation by the Appellants' *vis a vis* the burden of proof; that the Court erred by reaching a determination on resjudicata without the benefit of perusing the files; that the suit is based on trust thus no limitation of time could run against it.

28. Parties elected to canvass the Appeal by way of written submissions which I have read and considered.

29. On the issue of resjudicata the Appellants submitted that the Appellants have not been a party to any of the suits relating to the premises. That the Respondents did not proof any of the elements that make a matter resjudicata. That the Appellants desire to seek justice was cut short by the ruling thus throwing them out of the seat of justice unheard. That the Appellants have raised weighty issues of a claim of right in property in their suit and ought to have been heard.

30. Further that the need for the Court to inquire; how the title for parcel LOC 18GACHOCHO /415 was transferred to Phyllis while the original title is in their custody; how subdivisions were carried out, suit lands were held in trust by Wainaina Ndogo for his two brothers; called for further inquiry in a hearing.

31. The Appellants argue that Wainaina held the suit lands in trust for his two brothers and consequently any title held by Phyllis was encumbered by a family trust in favour of her family, Nimrod and Samuel and their heirs.

32. The Respondent on the other hand submitted that the subject matter of the suit is situate in Kigumo and that the suit ought to have been filed there. That as a result the trial Court did not have jurisdiction to hear and determine the matter.

33. On time bar the Respondents argued that the suit is time barred as it is coming almost 29 years after their parents relocated to Nairobi and Kajiado and never sought to regain ownership of the land until their death.

34. On resjudicata, the Respondents hold that the suit is resjudicata given the SRM CC No 218 of 1995 which dealt with the same subject matter, parties and the case was heard and determined by a competent Court. That the judgement emanating from the suit is 24 years old and is therefore time barred and is incapable of being enforced.

35. The issues for determination are;

- a. Is the suit resjudicata
- b. Is the suit time barred?
- c. Whether the objection is a pure point of law?
- d. Who meets the costs of the Appeal?

36. This being a first Appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

37. I shall accordingly analyse the case and make a finding accordingly.

38. 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 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 of 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."

39. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the question 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 that handled the previous cases.
- e. Matter has been heard and finally decided.

40. The essence of the doctrine of res judicata is further explicated by Wigram, V-C in **Henderson v. Henderson (1843) 67 E.R. 313**, as follows:

“ ... 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 *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an 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”.

41. The objection of the Respondent is that the suit is *res judicata* in view of the **SRMCC No 218 of 1995; SRMCC No. 122 of 2020 – Kigumo; Succ cause No 798 of 2020; Succ cause No 12 of 2005 –Kigumo.**

42. I have perused the pleadings and the judgement on record with respect to SRMCC No 218 of 1995. As stated earlier in the ruling, the parties in this case were **Zephania Mwangi Waweru Vs Phyllis Wanjiru Waweru alias Wanjiru Ndogo.** The cause of action was premised on customary trust. In this case Zephania sued Phyllis calling 3 acres on customary trust from parcels No LOC 2/GACHARAGE /63, LOC 18GACHOCHO /415 and LOC18/GACHOCHO /1440. The Court heard and determined the case and decreed that Phyllis to surrender 3 acres in favour of Zephania.

43. Going by the above circumstances of the suit, it is the finding of the Court the Appellants were not parties to the suit. Neither was their father namely Samuel a party to the suit. The subject matter however was the same to the extent that parcel LOC 18GACHOCHO /415 was at the center of the determination of the said suit. The cause of action being customary trust is different from the cause of action herein which to my mind is the recovery of land belonging to Samuel. The Appellants in the instant suit have not claimed land by way of customary trust. Trust has not been pleaded or particularized. Indeed, their claim is based on fraud and illegalities on the part of Phyllis, the Defendants mother and grandmother in the manner in which she procured the registration of the land in her name.

44. It is therefore my finding that the SRMCC NO 218 of 1995 is not *res judicata*.

45. With regard to the other suits to wit; **SRMCC No. 122 of 2020 –Kigumo; Succ cause No 798 of 2020; Succ cause No 12 of 2005 – Kigumo,** the Court was not privileged to peruse the pleadings and or judgements as none were supplied. I rely on the decision of the Court in the case of **Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880,** where the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed. *Also, that;*

“.....unless it is abundantly clear, when *res judicata* is raised, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings-of the previous case and the instant case- to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case.” [emphasis is mine].

46. It is trite that this Court does not have jurisdiction to hear and determine matters succession and probate and in all probability the cases may not be *res judicata*. I say so because the role of the probate Court is to ascertain the beneficiaries and the assets of the deceased estate for purposes of management and eventual distribution. Conversely the jurisdiction of this Court is *inter alia* in the main the determination of title to land as set out in Art 162(2) (b) read together with section 13 of the Environment and Land Court Act. In any event the act of perusing and investigating the facts inherently oust the objection from being a pure point of law.

47. In both instances the objection fails on the point of *res judicata*.

48. Is the suit time barred? This is a claim in land and am guided by Section 7 of the Limitation of Actions Act which states as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

49. The object of limitation is set out in the decision of the Court in the case of **Adnam v Earl of Sandwich (1877) 2QB 485,** where the Court held;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

50. In the main the Appellants therefore are seeking to recover land of their deceased parents from the Respondents. In the plaint they aver that their parents were forcibly removed from the land in 1987 and never returned back in their lifetimes. That would be 33 years later.

51. According to the green card on record, parcel LOC 18GACHOCHO /415 was registered in the name of Samuel on the 18/9/1975. It became registered in the name of Phyllis on the 11/4/1985 *vide* succession. At this time Samuel was alive and it is not clear whose succession it was given that the land was registered in the name of Samuel. That said the said title was closed on 11/1/1999 upon subdivision into parcels LOC18/GACHOCHO /4224 and 4225. There is no evidence as to who are the registered owners of these two parcels. None was presented to the Court.

52. The Appellants have stated that in 2016 the 1st Respondent volunteered to give them access to the suit land whereupon they made improvements on the tea husbandry as well as constructed some structures on the land. The suit of the Appellants as I understand is based on

fraud and illegality. Under the limitation of Actions Act an action based on fraud must be filed within three years from the date the Plaintiff became aware of the fraud or ought to have been aware of the same. In this case 3 years from 2016 is 2019. By filing this suit in 2020 the Appellants were out of time. The Appellants failed to demonstrate that they obtained leave of the Court to so file the suit.

53. Even if the period of 1987 when the Appellant's parents fled from the land or for that matter 1991 when the suit land was registered in the name of Phyllis is considered, this suit would still be long time barred beyond redemption.

54. The Appellants would want the Court to believe that their claim is based on customary trust. I have anxiously perused the pleadings and it is far from it. A party and by extension the Court is bound by the pleadings before it. That is not what the Appellants impleaded in this suit. Had it been a case of trust then I would be guided by the decision of the Court of Appeal decision in **Macharia Kihari vs Ngigi Kihari C.A Civil Appeal No. 170 of 1993**, where the Court held as follows: -

“Limitation period prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.

55. Having made the above findings in particular with respect to time bar which ousted the jurisdiction of the Court, I find no necessity to discuss the issue of territorial jurisdiction as doing this would be deminis.

56. I am guided by the classical case on jurisdiction of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Court held;

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

57. Jurisdiction being everything and having come to the conclusion that I have none, I must down my tools and take no further steps.

58. Is the objection a point of law? A Preliminary Objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. The Respondent's Preliminary Objection partially fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. The Court stated as follows: -

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

59. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

60. Going by the principles set out in the Mukhisa case, the Court answers the question in the positive as far as statute bar is concerned. In the end the Court has arrived at the same conclusion as the trial Court but for a different reason.

61. The Appeal partially succeeds. The decision of the trial Court is set aside and replaced with orders dismissing the suit entirely.

62. I order costs in favour of the Respondents.

63. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF JUNE, 2021

J G KEMEI

JUDGE

Delivered in the presence of:

Kimemia for the 1st & 2nd Appellants

Kirubi for the 1st & 2nd Respondents

AG is absent for 3rd Respondent