



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 17 OF 2019 (OS)

ALICE NYAKINYUA GATHAMBO.....PLAINTIFF

-VERSUS-

ELIZABETH MUTHONI GACHECHE

JEANE WANJIKU GACHECHE ANDREW

GATHAMBO GACHECHE

(Sued as administrators of the estate of GACHECHE HOSEA (Deceased)).....1ST DEFENDANT

DISTRICT LAND REGISTRAR, NYERI.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

A. INTRODUCTION

1. By an originating summons dated 14th June, 2019 expressed to be brought under **Section 80 of the Land Registration Act, 2012 and Sections 7 and 38(1) of the Limitation of Actions Act (Cap. 22)** the Plaintiff sought the following orders:-

(a) That this honourable court be pleased to issue and grant an order rectifying the record pertaining to land parcel No. Kirimukuyu/Kiria/638 registered in the name of Gacheche Hosea (Deceased) the defendant herein to Gathambo Gacheche the Petitioner's deceased father herein.

(b) That this honourable court do issue an order compelling the District Land Registrar Nyeri to cancel entry Nos. 3, 4 and 5 dated 24th February, 1976 in the green card for Land Parcel No. Kirimukuyu/Kiria/638 transferring the said property to Gathambo Gacheche to enable the latter's family petition for succession of their late father's estate.

(c) That the costs of this application be provided borne by the Respondents.

2. The said summons was based upon the grounds set out on the face of the motion and the contents of two supporting affidavits sworn by Alice Nyakinyua Gathambo on 14th June, 2019 and the exhibits thereto. The gist of the Plaintiff's suit was that Gathambo Gacheche was the rightful owner of Title No. Kirimukuyu/Kiria/638 (*the suit property*) and that her step brother, Gacheche Hosea had fraudulently obtained registration of the suit property by causing the land register to be altered by having Gathambo Gacheche's name as proprietor deleted and his own inserted as proprietor.

3. The Plaintiff further pleaded that upon the death of Gacheche Hosea the 1st Defendant took out letters of administration for his estate and listed the suit property as part of his estate. The said grant was confirmed on 13th June, 2020. The Plaintiff contended that his half-brother Gacheche Hosea was only entitled to a portion of 2 acres out of the suit property and not the entire land.

B. THE 1ST DEFENDANT'S PRELIMINARY OBJECTION

4. The 1st Defendant entered appearance to the suit on 16th July, 2019. The record further shows that they filed a notice of preliminary objection dated 26th October, 2019 contending that the suit was *res judicata* and bad in law as the matters directly and substantially in issue in the suit were also directly and substantially in issue in two previous decided cases namely, *Nairobi High Court Succession Cause No. 1869 of 1999 – In the Matter of the Estate of Gacheche Hosea (deceased)* and in *Nyeri CMCC No. 196 of 2018 (Originally Nyeri ELC No. 67 of 2017 – Alice Nyakinyua Gathambo v Elizabeth Muthoni Gacheche and 2 Others)*.

C. THE PLAINTIFF'S RESPONSE TO THE PRELIMINARY OBJECTION

5. The Plaintiff filed an affidavit sworn on 20th November, 2020 in reply to the 1st Defendant preliminary objection dated 26th October, 2020. It was contended that the preliminary objection was misguided and intended to mislead the court. It was contended that the instant suit was not *res judicata*. The Plaintiff pointed out that in previous proceedings the 2nd and 3rd Defendants were not parties and that those proceedings involved only the 1st Defendant and herself.

6. The Plaintiff further contended that the matters in issue in the aforesaid succession cause were different from the matters in issue in the instant suit and that the question of the alleged **fraud** on the part of Gacheche Hosea (*Hosea*) was never adjudicated on merit. It was further contended that the issue of **rectification** of the land register for the suit property was never canvassed in the succession cause.

D. THE PLAINTIFF'S APPLICATION FOR LEAVE TO AMEND PLEADINGS

7. During the pendency of the said preliminary objection the Plaintiff filed a notice of motion dated 18th February, 2021 under **Sections 1A and 3A for the Civil Procedure Act (Cap. 21), Order 1 rules 9 and 10, Order 8 rule 3 of the Civil Procedure Rules 210, and all enabling provisions of the law** seeking leave to amend her originating summons dated 14th June, 2019 to include the legal capacity in which she had filed the same.

8. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 18th February, 2021. It was contended that there was an omission in indicating the capacity in which she had filed the suit. The Plaintiff contended that she had obtained a limited grant *ad litem* in Nyeri Succession Cause No. 54 of 2019 for the purpose of prosecuting the suit as the legal representative of the estate of the late Gathambo Gacheche (*Gathambo*) on 30th August, 2019.

E. THE DEFENDANTS' RESPONSE TO THE APPLICATION

9. The 1st Defendant filed grounds of objection dated 19th March, 2021 in opposition to the Plaintiff's said application on several grounds. First, it was contended that the Plaintiff had no *locus standi* to file or maintain the suit hence allowing the amendment would be prejudicial to the 1st Defendant. Second, that the suit was incompetent and incurably defective since the limited grant which the Plaintiff obtained on 30th August, 2019 could not operate retrospectively. Finally, it was contended that the application was misconceived and an abuse of the court process.

10. The 2nd and 3rd Defendants also filed grounds of opposition dated 15th March, 2021 in response to the said application. It was contended that the Plaintiff lacked *locus standi* to file the suit in the first instance; that there was inordinate delay in filing the application; that the application was mischievous and intended to delay and subvert justice; and that the application was an afterthought and an abuse of the court process.

F. THE PLAINTIFF'S REJOINER

11. The Plaintiff filed what she called a 'reply' to the 2nd and 3rd Defendants' grounds of opposition. The Plaintiff contended that it was a requirement of the Chief Magistrate's Court at Nyeri that she had to file suit first before seeking a limited grant to prosecute it. The rest of the contents of the reply merely disputed the grounds set out in the grounds of opposition.

G. DIRECTIONS ON SUBMISSIONS

12. The material on record shows that on 27th January, 2021 the court directed that the 1st Defendant's preliminary objection shall be canvassed through written submissions. The record further shows that on 8th March, 2021 the parties were directed to canvass the Plaintiff's application dated 18th February, 2021 through written submissions as well. The parties were granted timelines within which to file and exchange their respective applications. The material on record shows that 1st Defendant filed submissions on the preliminary objection on 22nd February, 2021 whereas they filed their submissions on the Plaintiff's application for leave to amend the suit on 21st April, 2021. The Plaintiff filed further submissions on 19th February, 2021 in response to the preliminary objection and her submissions on the application for leave to amend on 12th April, 2021.

H. THE ISSUES FOR DETERMINATION

13. The court has perused the 1st Defendant's preliminary objection dated 26th October, 2020; the Plaintiff's reply thereto; the Plaintiff's notice of motion dated 18th February, 2021; the Defendants' grounds of opposition and the Plaintiffs reply thereto; as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

- (a) Whether the Plaintiff's suit is *res judicata*.
- (b) Whether the Plaintiff's suit is incompetent and bad in law for lack of *locus standi*.
- (c) Whether the Plaintiff is entitled to leave to amend the originating summons.
- (d) Who shall bear costs of the application and preliminary objection.

I. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff's suit is *res judicata*

14. The court has considered the material and submissions on record on this issue. Whereas the 1st Defendant contended that the instant suit was *res judicata* by reason of previous proceedings amongst the parties in Succession Cause No. 1869 of 1999 and Nyeri CMCC 196 of 2018 the Plaintiff contended otherwise.

15. There is no doubt from the material on record that the suit property was the subject of the said succession cause before the High Court at Nairobi. The suit property was listed as part of the estate of the late Hosea of which the 1st Defendant were the administrators. The Plaintiff was aggrieved by the confirmation of grant (which affirmed

the suit property as being part of the estate of the deceased) for essentially the same reasons set out in her originating summons dated 14th June, 2019.

16. The material on record shows that vide an application dated 7th February, 2014 the Plaintiff sought revocation of the grant on the basis that Hosea had through fraud or some dubious means obtained registration of the suit property. It was the Plaintiff's contention before the High Court that the suit property was family property which ought to have shared between the two households of Gathambo who was also the father of Hosea. In her view, Hosea was only entitled to a portion and not the whole of the suit property.

17. By a ruling dated 20th January, 2017 the High Court (Musyoka J) dismissed the said application with costs. The trial judge found and held that there was no evidence to show that the suit property was unlawfully or fraudulently acquired by Hosea or that the Plaintiff was entitled to a share thereof. There is no indication on record to demonstrate whether or not the Plaintiff challenged the said decision on appeal.

18. The material on record further shows that vide a plaint dated 14th April, 2017 the Plaintiff sued the 1st Defendants in Nyeri CMCC No. 196 of 2018 alleging essentially the same matters against Hosea in the manner in which he acquired the suit property. The 1st Defendant raised a preliminary objection to the said suit on the ground that it was *res judicata* on account of the High Court decision dated 20th January, 2017 in the succession cause. By a ruling dated 14th June, 2019 the trial magistrate upheld the said preliminary objection and consequently struck out the Plaintiff's suit with costs.

19. There is no indication on record to show whether or not the Plaintiff appealed against the ruling and order of the trial Magistrate holding that her suit was *res judicata*. Nevertheless, the Plaintiff was not deterred by the setback. As indicated in the earlier part of the ruling she filed the instant suit on 14th June, 2019 seeking to reclaim the suit property on behalf of Gathambo whom she still considered to be the legitimate owner thereof.

20. The court has considered the provisions of **Section 7 of the Civil Procedure Act (Cap. 21)** and the various authorities cited by the 1st Defendant which I need not reproduce there. The test for *res judicata* was summarized in the case of **Kimunye v The Pioneer General Assurance Society Ltd [1971] EA 263 at p. 265** as follows:

“The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising due diligence, might have brought forward at the time. *Green-hailgh v Mallard [1947] 2 ALL ER 255*. The subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply. *Jadva Karsan v Harnam Singh Bhogal (1953) 20 EACA 74*.”

21. The court is satisfied from the material on record that the Plaintiff is trying to reintroduce and re-litigate matters and issues which were adjudicated upon in previous proceedings. The grounds upon which the Plaintiff had sought revocation of grant in the succession cause are essentially the same grounds upon which he sought a declaration that the suit property legally belonged to Gathambo and that the same do revert to him to enable his family to distribute the same according to his final wishes in Nyeri CMCC No. 196 of 2018.

22. The court is further satisfied from the material on record that the Plaintiff's grievances before the succession court were pretty the same. The Plaintiff's grievances in the instant suit also remain pretty the same. The Plaintiff is aggrieved by the alleged fraudulent acquisition of the suit property by Hosea to the exclusion of the rest of the family members. That issue was clearly determined by the High

Court in the succession cause and it cannot be re-opened and litigated afresh before the Environment and Land Court. The issue of the alleged fraudulent or irregular acquisition of the suit property by Hosea is clearly *res judicata*.

23. The mere fact that the Plaintiff has been changing drafting styles in the framing of her cause of action over the years cannot preclude the instant suit from being *res judicata*. The addition of the 2nd and 3rd Defendants as parties in the instant suit does not sufficiently disguise the Plaintiff's grievances and her cause of action is still rooted in the alleged fraudulent acquisition of the suit property by Hosea. So, whether the Plaintiff seeks an order for revocation of grant; a declaration that the suit property was family land; or an order for rectification of the land register the matters and issues aggrieving the Plaintiff remain the same.

24. In the case of **ET v AG and Another Nairobi Petition No. 212 of 2012** Majanja J made the following pertinent pronouncement *on res judicata*:

“57. The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another Nairobi aHCCC No. 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over 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 court, then I do not see the use of the doctrine of *res judicata*...’ In my view the addition of the Attorney General and the other state agencies and the 7th Respondent are merely cosmetic changes which do not affect my conclusions. The common thread running through this and the previous suit is the ownership of the property and the allegations of fraud. These matters that have been settled by the judgment in the previous suit cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.”

25. The court does not agree with the Plaintiff's contention that the succession court had no jurisdiction to entertain the issue of the alleged fraudulent or unlawful acquisition of the suit property by Hosea. The material on record shows that it was the Plaintiff who filed the application for revocation of grant before the High Court. She cannot be allowed to change tune after determination of the application and contend that the succession court had no jurisdiction to deal with the issues she submitted to it for determination. The court takes the view that the succession court is competent to deal with all matters and issues incidental to adjudication of succession matters including the ownership of the properties the subject of succession proceedings. In the premises, the court is inclined to uphold the 1st Defendant's preliminary objection.

(b) Whether the Plaintiff's suit is incompetent and bad in law for lack of locus standi

26. The court has considered the material and submissions on record on this issue. The Defendants contended that the Plaintiff was non-suited because she did not have any letters of administration to the estate of the late Gathambo at the time of filing suit on 14th June, 2019. It was further contended that the limited grant *ad litem* subsequently obtained on 30th August, 2019 could not operate retrospectively so as to validate the incompetent suit. The 1st Defendant relied upon the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR and Hawa Shanko v Mohamed Uta Shanko [2018] eKLR** among others in support of that submission.

27. The Plaintiff, on the other hand, contended that she was unable to obtain a grant prior to filing the instant suit because the Chief Magistrate's court declined to issue her with a limited grant unless and until she had filed suit in the first place. The Plaintiff did not, however, cite any authority to support her contention that she could validly file a suit on behalf of the estate of a deceased person without first obtaining a grant of representation.

28. The court is persuaded by the 1st Defendant's submissions and the authorities cited that the Plaintiff's suit was incompetent from inception since the Plaintiff did not have any legal authority to sue on behalf of the estate of the late Gathambu on 14th June, 2019 when she filed the originating summons of even date. The subsequent issuance of a limited grant on 30th August, 2019 did not, and could not, cure the incompetency of the suit.

29. In the **Rajesh Prinjivan Chudasama** case (*supra*) the Court of Appeal held, *inter alia*, that:

“It is common ground that at the time of the said summons, the Respondent was not in possession of a grant of letters of administration. The Respondent acknowledges that he may have known of the existence of a will, but according to him he doubted the validity of the will. In his view, therefore, the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters

of administration in cases of intestate succession. In *Otieno v Ougo* (*supra*) this Court differently constituted rendered itself thus:

“...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

(c) Whether the Plaintiff is entitled to leave to amend the originating summons

30. The court is of the opinion that it is no longer necessary to consider and determine this issue since the court has already found that the Plaintiff's suit is *res judicata* and that it is incompetent from inception. It would not serve any useful purpose for the Plaintiff to amend a suit which is incompetent hence liable to be struck out. Accordingly, the Plaintiff is not entitled to leave to amend her originating summons dated and filed on 14th June, 2019.

(d) Who shall bear costs of the application and preliminary objection

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd**

[1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the suit. Accordingly, the 1st Defendant shall be awarded costs of the preliminary objection whereas all the Defendants shall be awarded costs of the application.

J. CONCLUSION AND DISPOSAL

32. The upshot of the foregoing is that the court finds merit in the 1st Defendant's notice of preliminary objection. However, the court finds no merit in the Plaintiffs application for leave to amend her suit. Accordingly, the court make the following orders for disposal of the preliminary objection and the application:

(a) *The 1st Defendant's notice of preliminary objection dated 16th July, 2019 is hereby upheld.*

(b) *The Plaintiff's notice of motion dated 18th February, 2021 is hereby disallowed.*

(c) *The Plaintiff's originating summons dated 14th June, 2019 is hereby struck out with costs for being incompetent and res judicata.*

(d) *The 1st Defendant is hereby awarded costs of the preliminary objection whereas all the Defendants are awarded costs of the application dated 18th February, 2021.*

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 28TH DAY OF JULY 2021.

In the presence of:

Ms Kariuki holding brief for Ms Muigai for the Plaintiff

Ms Z. Janmohamed for the 1st Defendant

No appearance for the Attorney General for the 2nd and 3rd Defendants

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE