



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 247 OF 2017

FORMERLY NAIROBI CIVIL SUIT NO. 1531 OF 2013 (OS)

**IN THE MATTER OF SECTION 27, 28 AND 159 OF THE
REGISTERED LANDS ACT CAP 300 LAWS OF KENYA (NOW REPEALED)**

AND

IN THE MATTER OF SECTION 80 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF TITLE LAND PARCEL NUMBER

KAKUZI/KIRIMIRI BLOCK 9/1023

BETWEEN

JOSEPH MIGWI MWANGI (*Suing as the Legal representative of*

JOHN MWANGI MIGWI (*Deceased*) PLAINTIFF

VERSUS

CHARLES MUIRURI MBURU 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, THIKA 2ND DEFENDANT

JUDGMENT

By an Amended Originating Summons dated 22nd July 2019, the Plaintiff sought for the following Orders against the Defendants;-

1. A Declaration that the entry on the Title Abstract of land Parcel No. Kakuzi/Kirimiri Block 9/1023, herein referred to as the "suit land" reflecting the name of Charles Muiruri Mburu was irregular, fraudulent and illegal ab initio.

2. For an order that such foresaid registration of the 1st Defendant as proprietor of the suit land having been fraudulent ab initio conferred no proprietary right on the Defendant vis a vis the suit land.

3. For an order that such registration of the 1st Defendant as proprietor of the suit land having been illegally procured be and is hereby revoked.

4. For an order directing the District Land registrar- Thika District, the 2nd Defendant herein do deregister the registration of the 1st Defendant as proprietor to the suit land in place thereof retain the suit land in the name of its original owner viz John Mwangi Migwi(Now deceased).

5. For an order injuncting the 1st Defendant by himself, his agents and/or servants from interfering with the Applicants peaceful possession of the suit land and/or transferring, selling or in any other way dealing with the suit land herein.

6. Costs of this Originating Summons and costs incidental thereto, be borne by the 1st Defendant.

In his Supporting Affidavit, **John Mwangi Migwi**, averred that he is the registered owner of the suit property having acquired the same for value from the government of Kenya in 1990. That around August 2007, to January 2008, he visited the Thika land registry and learnt that the 1st Defendant had unlawfully caused the transfer of the suit land through fraud and connivance with the 2nd Defendant. That the transfer was occasioned with the assistance of a forged identity card presented by the Defendants as his authentic National Identity Card.

That the Defendants jointly conspired to unlawfully disentitle him of his land. Further that the aforesaid fraud extended to the gazettelement by both Defendants of the alleged loss of his title deed to the suit property so as to illegally procure a title for purposes of facilitating the illegal transfer. That he reported the crime to the **Thika Police Station**, who regrettably took no prosecutorial or investigative steps, other than asking him to follow up with a Civil Claim. That he sued the Defendants in **CMCC No. 361 of 2008-Thika**, but the suit was dismissed on legal technicalities and he seeks that the fraudulent entry be cancelled. That he has at all times been the proper and legal owner.

The suit is opposed and the 1st Defendant **Charles Muiruri Mburu** swore a Replying Affidavit on 3rd October 2014, and averred that the Plaintiff's allegations of being the registered owner of the suit property are misconceived and devoid of any truth. That he is the rightful and registered owner of the suit property to the exclusion of all other persons including the Plaintiff. That all the allegations of fraud and illegalities preferred against him by the Plaintiff are false. Further, that the Plaintiff is merely seeking to revive this suit through the back door as the same was rightly dismissed in **Thika CMCC 361 of 2008**, for want of the prosecution. He averred that he has been advised by his Advocate on record that the matter had already been determined and therefore the same is **Res Judicata** and he therefore urged the Court to dismiss the claim.

The 1st Defendant filed a further Affidavit sworn on 22nd April 2015, and averred that sometimes in July 2007, he was informed by one **Alfonse Muthama**, that the suit land was being sold by one **John Mwangi Migwi**, who he presumes is the Plaintiff. That by an agreement dated 13th September 2007 and drawn by his Advocates on record, he purchased the suit property from the Plaintiff at a consideration of **Kshs.320,000/=** as agreed. That he paid the full purchase price and on 14th September 2007, he proceeded to the **Land Control Board at Kakuzi Division**, wherein the Plaintiff obtained the requisite consent to transfer the suit land to him. That he applied for the transfer of the suit property and he paid the requisite stamp duty charges and the transfer was effected successfully and he obtained the title deed and he is thus the legitimate owner of the suit property.

After close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness while the 1st Defendant also called one witness and closed his case

PLAINTIFF'S CASE

PW1 Joseph Migwi Mwangi testified that he was the son of **John Mwangi Migwi (Deceased)**, he produced the letters of Administration ad litem as Exhibit 1. That he represents his father's Estate. That his father had signed a witness statement dated 21st February 2018, which he adopted in Court as his evidence. He further produced the list of documents as Exhibit 1 and urged the Court to allow the prayers as sought in the Originating Summons.

That the land belonged to their father and he did not sell it in 2007. That he never told him that he sold the land. That there are no documents to show that his father sold the land. That his father's I.D Number is 2050528, and for the vendor ID number as per the Defendant is 25529587. That after investigations the I.D was found to belong to **Alice Muthoni Nganga**. That neither the I.D Card nor the signature on the transfer document belongs to his father.

DEFENCE CASE

DW1 Charles Muiruri Mburu adopted his witness statement and Defence as his evidence in Court. He produced the list of documents dated 4th April 2018 as Exhibit 1. That he bought the land from **John Mwangi Migwi** in 2007, as per the sale agreement produced in Court. That he entered into the sale agreement before Advocate **Karanja Kangiri** at Thika Arcade. That the said Sale agreement has **John Mwangi Migwi's I.D No as 25529587** and he did not confirm the correctness of the I.D.

Further that he acquired the title deed in January 2008, and it came into his hands in February 2008. Further that as per the Green Card, the **I.D Card** was not attached and it only has his **I.D card number**. That the vendors ID Card number is not in the title deed, but it was on the original title. That he did not investigate to find out who was the owner of the ID Card. That there was a case filed in Nairobi that was dismissed though he did not give evidence in Court.

That he did his due diligence before he purchased the land and the vendor was present when the sale agreement was drawn and he presented the I.D card to the Advocate. That he paid via **Bankers cheque** and the money went to **John Mwangi Migwi**. Further that **John Mwangi** filed case at the Thika Chief Magistrates' Court and the suit was dismissed for want of prosecution. That the Plaintiff is the one who perpetrated the fraud and that he is an innocent purchaser for value and should be allowed to retain the land.

Parties thereafter filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

1. Whether the suit is Res Judicata

2. Whether the Plaintiff is entitled to the order sought

1. Whether the suit is Res Judicata

It is the 1st Defendant's contention that the Plaintiff's suit herein is **Res Judicata** as the Plaintiff had filed a similar suit at the Thika Chief Magistrates Court being **CMCC 361 of 2008**, which was dismissed for want of prosecution. The Plaintiff has not refuted having filed the said suit nor has he refuted the same having been dismissed for want of prosecution. However, it is the Plaintiff's contention that the same was dismissed on technical grounds and that cannot be deemed to have had the matter heard and be determined finally. The substantive law on *res judicata* is found in **Section 7 of the Civil Procedure Act Cap 21** which provides 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, 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.”

Further in the case of *Kenya Commercial Bank LtdVs... Benjoh Amalgamated Ltd [2017] eKLR* the Court held that;

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or 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.

Therefore, it is not in doubt that the suit ought to have been **directly and substantially in issue in the former suit, between the same parties or parties under whom they or any of them claim and the same must have been finally determined. In the instant case, the Plaintiff has acknowledged that the issues in this suit and the former suit are the same as between the same parties, but he denied that the matter was finally determined.**

The Court of Appeal in the case of *Co-operative Bank of Kenya LimitedVs... Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR* the Court held as follows;-

As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1st Respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st Respondent could do was to invoke the appellate process and not filing a fresh suit.

Accordingly we find this appeal has merit and it is hereby allowed with costs against the Respondents.”

This Court is bound by the decision of the Court of Appeal and the Court of Appeal herein above having pronounced itself and holding that a matter having been **dismissed for want of prosecution**, could not be resuscitated through a fresh suit as doing so would offend the doctrine of **res judicata**, this Court therefore finds and holds that the instant suit is Res judicata to **Thika CMCC 361 of 2008**.

2. Whether the Plaintiff is entitled to the orders sought

Section 7 of the Civil Procedure Act Cap 21 bars this Court from determining a matter that is **res judicata**. This Court therefore has no jurisdiction to hear and determine the instant matter.

Having now carefully read and considered the pleadings by the parties, the evidence adduced, the written submissions and the relevant provisions of the law, this Court finds and holds that the matter is **res Judicata** and hence the Court has no jurisdiction to determine the

issues herein. Consequently, the Amended Originating Summons dated 22nd July 2019 is dismissed entirely with costs to the Defendants.

It is so ordered.

Dated, signed and Delivered at Thika this 24th day of September, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy