



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 22 OF 2020 (O.S)**

**FAITH WANJIRU NDAMBIRI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CYRUS MUCHIRA NDAMBIRI.....DEFENDANT/APPLICANT**

**RULING**

By a Notice of Motion dated 24<sup>th</sup> August 2020, the Defendant/Applicant is seeking the following orders:-

***(1) That the suit be struck off with costs for being res-judicata and an abuse of due process of the Court.***

***(2) Costs of the application be provided for.***

The Application is premised on grounds apparent on the face of the said application and the supporting affidavit of the Defendant/Applicant. The Plaintiff/Respondent filed a replying affidavit in opposition thereto sworn on 31<sup>st</sup> August 2020. When the application came up for hearing on 2<sup>nd</sup> December 2020, the parties agreed to canvass the same by affidavit evidence and written submissions.

**Summary of Facts**

The Applicant in his supportive affidavit deposed that the Plaintiff/ Respondent had filed another suit in Gichugu Law Courts being PMCC No. 10 of 2015 which was heard and determined on 21/06/2016. In the said Judgment, the Court ordered that the joint tenancy be severed and the land be partitioned into two portions for the Plaintiff and the Defendant to get one portion each. He was dissatisfied with the Judgment and he lodged an Appeal to the ELC Court Vide ELCA No. 10 of 2016. In the judgment delivered on 22<sup>nd</sup> May 2020, the High Court made a finding that Joint tenancy cannot be severed unless it's first converted into a tenancy in common under *Section 91 (7) of the Land Registration Act* by execution of the parties of the necessary instruments as provided under the Law.

He stated that instead of pressing the appeal for its Logical Conclusion, the Respondent/ Plaintiff filed the instant suit which is similar to the former suit seeking similar orders that the joint tenancy be severed.

In her replying affidavit, the Respondent/ Plaintiff stated that this suit is not res judicata as the orders being sought are different from the ones that were sought in Gichugu PMCC No. 10 of 2015. The Plaintiff/ Respondent further stated that she has suffered for long since whenever she plants crops, the Applicant sprays herbicide and they dry up and that she has never known peace as the Defendant/ Applicant is waiting for her to die so that he gets the entire Parcel of Land.

**DEFENDANT'S/ APPLICANT'S SUBMISSIONS**

The defendant/ Applicant through the firm of Maina Kagio & Co. Advocates submitted that both the Plaintiff and the defendant are joint owners of Land Parcel No. BARAGWE/THUMAITA/1289 and that the plaintiff had filed a suit against the defendant in Gichugu being PMCC No. 10 of 2015 where she sought among other prayers to sever the joint tenancy and Land registered between the parties as tenancy in common. The matter was heard and determined whereby the trial declined to grant the orders sought. The Plaintiff/ Respondent was aggrieved with the judgment by the trial Court and appealed to the High Court vide ELCA No. 10 of 2016. Upon hearing the appeal, the Court allowed the same and hereby set aside the judgment of the lower Court and Substituted with an Order dismissing the plaintiffs claim with costs to the Respondent.

The defendant/ Applicant further argued that the Plaintiff has now filed an instant suit seeking similar orders as had been sought in the previous case being PMCC No. 10 of 2015. The Applicant cited\* the following cases in support of the application:

(1) *E.T. Vs Attorney General & Another (2012) e KLR*

(2) *John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR.*

In conclusion, the Applicant submitted that this Court made a determination and pronounced itself on the issue of severity of a joint tenancy and stated that parties can only sever joint by executing an instrument in the prescribed form signifying that they agree to sever the joint ownership and unless that is done, there is no other lawful way of separating co-ownership of property.

### **PLAINTIFF/RESPONDENT'S WRITTEN SUBMISSIONS**

The Respondent through the firm of Wanjiru Waweru & Co. Advocates admitted that both the plaintiff had filed another suit at Gichugu PMCC No. 10 of 2015 in which she sought to sever joint tenancy in LR. No. BARAGWE/THUMAITA/1289 and after the trial Court declined to grant judgment in her favor she was aggrieved and filed an appeal in ELCA No. 10 of 2016 (Kerugoya) which Questioned the trial Court decision but no appeal was preferred against the judgment by the trial Court. The plaintiff/Respondent contends that this suit is not res judicata for the reason that the orders sought in Gichugu Case PMCC No. 10 of 2015 are different from the orders in the present suit.

### **LEGAL ANALYSIS**

The doctrine of res judicata is founded on **section 7 of the Civil Procedure Act Cap. 21 Laws**, of Kenya which states as follows:

*“No Court shall try any suit 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 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 Courts in a number of Cases have given their interpretation on the application of doctrine. In the case of **Henderson Vs Henderson (1843) 67 ERS 313, Res judicata** was described 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 a 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 point upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which property belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”*

The Plaintiff/Respondent in her submissions through the firm of Wanjiru Waweru & Co. Advocates admitted that there was a previous suit before the Gichugu Courts being PMCC No. 10 of 2015 where the parties and the subject matter are the same in the present suit. The only difference according to the plaintiff is the orders being sought. However, she admits that the parties and the subject matter in the two suits are the same. The learned Counsel argued that this suit is not res-judicata in that the orders sought in PMCC No. 10 of 2015 are different from the orders sought in the present suit.

In Conclusion, the learned Counsel submitted that PMCC No. 10 of 2015 was filed at a time where *Registered Land Act* had been repealed and *Section 91 (8) of the Land Registration Act* was effective. She cited the Case of *Moses Bii Vs Kericho District Land Registrar & Another (2015) e KLR.*

### **LEGAL ANALYSIS**

I have considered the Notice of Motion dated 24<sup>th</sup> August 2020 and the supporting affidavit. I have also looked at the response and the Submissions by the Parties through their Legal representatives. The Law pertaining to the doctrine of res judicata is captured under **Section 7 of the Civil Procedure Act Cap. 21 Laws of Kenya** which states as follows:

*“No Court shall try any suit 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 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 following facts are not in dispute:**

- (1) There is a former suit in Gichugu Law Courts being PMCC No. 10 of 2015.**
- (2) The former suit was between the same parties.**
- (3) The former suit involved the same subject matter as the present suit.**
- (4) The former suit was before a Court of competent jurisdiction.**
- (5) The former suit was heard and substantially determined.**

The rationale behind the doctrine of res judicata was aptly put in the case of **John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 others (2015) e KLR** where it was held:

*“The rationale behind res judicata is based on the public interest that there should be an end to Litigation coupled with the interest to **protect a party from facing repetitive Litigation over the same matter**. Res judicata ensures the economic use of Court’s Limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability.....and the rule of Law. Without res judicata, the very essence of the rule of Law would be in danger of unraveling uncontrollably.”*

Again in the case of **E.T. Vs Attorney General & Another (2012) e KLR Majanja J.** made the following observations regarding resjudicata:

*“The Courts must be vigilant to guard against Litigants evading the doctrine of resjudicata 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 in a form a new cause of action which has been resolved by a count of competent Jurisdiction.”*

Applying the principles in the applicable Law and the decided cases, I am satisfied that this suit is an attempt by the plaintiff to have a second bite at the cherry. The plaintiff has admitted that the prayers sought in this suit are totally different from the prayers sought in the former suit. It is clear from the principles of res judicata that a party requires to bring the claim in one whole and not to break into numerous causes of action to be brought by installments. Such a move would be uneconomical to the limited resources and timely determination of cases in our courts. It promotes finality and stability of decisions and reduces the possibility of inconsistency in judgments of Courts of concurrent jurisdiction.

#### **DISPOSITION**

In view of the matters aforesaid, I find the Notice of Motion dated 24<sup>th</sup> August 2020 merited and the same is allowed as prayed with costs to the Defendant/Respondent. It is so ordered.

***Ruling READ, DELIVERED and SIGNED in open Court at Kerugoya this 19<sup>th</sup> day of November, 2021.***

.....

**E. C. CHERONO.**

**ELC JUDGE**

In the presence of:-

1. Ms Wambui holding brief for Maina Kagio for the Applicant.
2. Respondent – present
3. Kabuta, Court clerk.