



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 44 OF 2020 OS (ELC E8/2020)

ERICK MURIITHI MOSES.....1ST PLAINTIFF

ROBERT MUTHEE NJOGU.....2ND PLAINTIFF

SHARON MUMBI NYAGA.....3RD PLAINTIFF

VERSUS

FAITH NJOKI WAMBOGO.....1ST DEFENDANT

MICHAEL NYAGA NTHIGA.....2ND DEFENDANT

THE LAND REGISTRAR EMBU.....3RD DEFENDANT

RULING

1. What is for determination before me is a preliminary objection dated 2.2.2021 and filed on 3.3.2021. The objection is filed by the 1st defendant and it targets the suit as filed. It is premised on three (3) grounds as follows:-

i) The claim and/or suit is res judicata in respect of Runyenjes PMCC No. 82 of 2015 which contravenes Section 7 of the Civil Procedure Act CAP 21 Laws of Kenya.

ii) This court lacks jurisdiction to hear and determine this matter as the subject matter of this suit being KAGAARI/KANJA/8735 was subject to Runyenjes PMCC NO. 82 OF 2015 which has since been concluded.

iii) The claim and/or suit is bad in law, lacks merit and incurably defective and should be dismissed with costs to the defendant.

2. The parties in the suit and the application are **ERICK MURIITHI MOSES, ROBERT MUTHEE NJOGU and SHARON MUMBI NYAGA** as the plaintiffs/applicants while **FAITH NJOKI WAMBOGO, MICHAEL NYAGA NTHIGA and THE LAND REGISTRAR EMBU** are the defendants/respondents.

3. In the Originating Summons, the plaintiff/applicants sought a declaration that they have a beneficial interest in land parcel No. Kagaari/Kanja/8735 and further sought for the Land Registrar Embu to be ordered to register them and the 1st defendant/respondent as joint proprietors of the suit parcel of land.

4. According to the plaintiff/applicants, they were born and raised on the suit parcel of land, which they claim was registered in their mother's name, one Judith Wambogo Njogu. They allege that the 1st plaintiff/applicant had put a caution on the suit parcel of land but despite this, the land was transferred in the 1st defendant/respondent's name without their knowledge. The transfer is said to have had the effect of disinheriting them from the suit parcel of land, where they claim to reside. In furtherance of the attempt to deny them their claim of beneficial interest, the 1st defendant/respondent is said to have exchanged the suit parcel with the 2nd defendant/respondent and as a result acquired land parcel No. Kagaari/Kanja/3508. Further claims were made, that the 1st defendant/respondent was in the process of disposing land parcel No. Kagaari/Kanja/3508 and they were therefore apprehensive that the 2nd defendant/respondent would evict them from the suit parcel of land.

RESPONSE

5. The 1st defendant/respondent opposed the suit by way of preliminary objection on grounds stated above and by way of replying affidavit. The 3rd defendant/respondent on his part opposed the suit by way of grounds of opposition where it was stated that the suit contravened the

doctrine of res judicata by virtue of the fact that the issues in the suit were substantially the same as those in Civil Case No. 82 of 2015 whose judgment was delivered on 9th August 2018. It was further claimed that the plaintiff/applicants lacked locus standi and could not claim beneficial interest over the parcel of land by virtue of the judgment delivered which gave title of the suit parcel of land to Michael Nyaga Nthiga.

SUBMISSIONS

6. The preliminary objection was canvassed by way of written submissions. The 1st defendant/respondent filed her submissions on 8.11.2021. It was submitted that the suit is res judicata and that the court lacked jurisdiction to hear and determine the suit as the subject matter was similar to that in Runyenjes PMCC No. 82 of 2015, which had been heard and determined.

7. According to the 1st defendant/respondent, the issue that the land was illegally transferred and exchanged with a third party was raised and dealt with in Runyenjes PMCC No. 82 of 2015 where the court is said to have held that the transfers were regular. It is argued that these issues have also been raised in the present suit. It is further contended that if the plaintiffs/applicants were aggrieved with the judgment, then they ought to have filed an appeal as opposed to the present suit as it was touching on the same subject matter.

8. The 1st defendant/respondent has reiterated that the suit is res judicata and has relied on Section 7 of the Civil Procedure Act in support of this. It is pleaded that the doctrine of res judicata may be pleaded by way of estoppel so that where judgment has been delivered future, further proceedings are estopped. Reliance was made on the case of **The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others** which outlined the elements to be satisfied for a suit to be res judicata and also expounded on the role of res judicata. Ultimately the court was said to lack jurisdiction as the subject matter of this suit was subject to Runyenjes PMCC No. 82 of 2015 and that it should proceed to down its tools. In support of this, the 1st defendant/respondent relied on the case of **Peter Gichuki Kangara Vs Independent Electoral and Boundaries Commission & 2 Others, C.A No. 23/2013 at Nyeri** which cited with approval the case of **Lillian 'S'(1989) KLRI**. The court was urged to allow the preliminary objection and dismiss the plaintiff/applicants suit.

9. The 3rd defendant/respondent filed its submissions on 10.9.2021. He correctly traced the law on res judicata to Section 7 of the Civil Procedure Rules and further averred that Section 28 of the Environment and Land Court Act barred the court from adjudicating on disputes over the same parties, relating to same issue and determined by a competent court. The 3rd defendant/respondent relied on the case of **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others Eklr** which outlined the elements to be satisfied for the doctrine of res judicata to be invoked.

10. According to the 3rd defendant/respondent the subject matter in both suits is similar and the parties are said to be the same. The parties were accused of seeking to open issues that were raised or ought to have been raised in the earlier proceedings in the already decided case and it was argued that they could not evade the doctrine of res judicata by merely adding more parties or more issues in a subsequent suit. To put this point across, the parties relied on the cases of **E.T.V Vs Attorney General & Another (2012) Eklr** and **Gurbachau Vs Yowani Ekor (1958) EA 450**. It was submitted that the doctrine 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 subject matter.

11. The court was said to lack jurisdiction as the issues raised were directly and substantially in issue in Civil Case No. 82 of 2015 where a competent court heard the matter to finality. It was held that the plaintiff/applicants had no beneficial interest in the suit by virtue of the determination in the Runyenjes case where the court held that the title belonged to the 2nd defendant/respondent.

12. The plaintiffs/applicants filed their submissions on 27.10.2021. They reiterated the prayers in the Originating Summons and gave a history of the suit. They relied on the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** to define what a preliminary objection was. Further reliance was made on the case of **D.T Dobie & Co. (Kenya) Ltd Vs Joseph Mbaria Muchina & Anor (1980) eKLR** where courts were urged to aim at sustaining a suit rather than terminating it by summary dismissal.

13. On whether the suit is res judicata, reliance was made on Section 7 of the Civil Procedure Act and the case of **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 others [2010] Eklr** where the court outlined the elements for res judicata. It was submitted that the subject matter in the present suit is Kagaari/Kanja/8735 where the plaintiffs/applicants are claiming beneficiary interest while in Runyenjes PMCC No. 82 of 2015 the subject matter is said to be Kagaari/Kanja/3508 where the plaintiff is said to have challenged the exchange agreement on account of fraud and sought nullification of the transaction.

14. The parties in both suits are said to be different with the plaintiffs in Runyenjes PMCC No. 82 of 2015 being Michael Nyagah Nthiga, the 2nd defendant and Robert Muthee Njogu, the 2nd plaintiff vis a vis the current parties in the present suit. In PMCC No. 82 of 2015 it is alleged that the 2nd defendant was the only plaintiff in the suit and that the 2nd plaintiff's name was dragged into the suit by virtue of him having been in occupation of the land. The doctrine of res judicata is said to be inapplicable as the parties in both suits are litigating on different issues. To support this they relied on the case of **C.K Bett Traders Limited & 2 Others V Kennedy Mwangi & Another [2021] Eklr**

15. On whether the court has jurisdiction over the matter, this was argued in the affirmative, that the matter is within the sphere of the Environment and Land Court as empowered by Article 162(2) of the Constitution and Section 13(1) of the Environment and Land Court Act 2011. The suit was further said not to be bad in law as the plaintiffs/applicants are claiming a beneficial interest in a share of land belonging to their mother. The court was urged to dismiss the preliminary objection and allow the matter to proceed on merit.

16. The 2nd defendant/respondent on his part filed written submissions on 5.11.2021. He too invoked the provisions of Section 7 of the Civil Procedure Act and further stated the prerequisites for res judicata as outlined in the case of **Uhuru Highway Development Limited Versus Central Bank of Kenya & 2 others [1996] eKLR**. It is his assertion that the issues in Runyenjes PMCC No. 82 of 2015 and the present suit are different, in that in the Runyenjes case his claim was on fraudulent transfer and anomaly on execution of the agreement for exchange of

land while in the present case the claim is on beneficial interest of the suit parcel of land. He therefore urged the court to dismiss the suit on this ground and in support of this relied on the case of **Kitale Chepkoror Farm Vs Peter Nasasa & 4 others [2019] eKLR**.

17. The parties in the Runyenjes case have been said to be different as those in the present suit. The court was said to have the requisite jurisdiction to determine the matter and further that the suit was not bad in law as some parties stood to suffer injustice if the case was not heard on merit. The court was urged to dismiss the preliminary objection and allow the case to proceed on merit. This party is reading from the same script as the plaintiffs.

ANALYSIS AND DETERMINATION

18. I have considered the objection as raised, the response made and the submissions by the parties. I have also looked at the suit as filed. A preliminary objection was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.** (1969) EA 696, where it was held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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.....“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.

19. There are three grounds raised in the preliminary objection, the first two are intertwined in that they focus on res judicata which is a pure point of law. The third limb is that the suit is bad in law, lacks merit and incurably defective. As reiterated in the Mukhisa case for a ground to suffice as a preliminary objection, then it ought to be one that raises a pure point of law. The third ground to me will require a keen scrutiny of the pleadings and evidence to be called to establish whether indeed the suit is defective and bad in law. That ground is therefore not one to be entertained in a preliminary objection.

20. On the first and second grounds, the 1st and 3rd respondents/defendant allege that the present suit is res judicata Runyenjes PMCC No. 82 of 2015, the issues in that suit have been said to be similar as those in the present suit and the only difference has been said to be an addition of parties in the suit.

21. The doctrine of res judicata has been held to act as a bar for courts to prosecute similar matters raising similar issues which have been determined by a competent court. The parties have correctly traced the law on res judicata to Section 7 of the Civil Procedure Act 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.”

22. The Supreme Court in the case of **Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others [2017] eKLR** outlined the elements for consideration for the doctrine of res judicata to be invoked. That is:

(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.”

23. The plaintiffs/applicants in the present suit are seeking beneficial interest in land parcel Kaagari/Kanja/8735 on grounds that the land belonged to their mother and that the land was irregularly transferred by the 1st respondent/defendant to the 2nd respondent/ defendant in a bid to disinherit the plaintiffs/applicants. In the suit, they have sued Faith Njoki Wambogo, who is said to have been bequeathed the land by their mother, Michael Nyaga Nthiga, the registered owner of the land by virtue of an exchange of land between himself and Faith Njoki Wambogo, and the Land Registrar, Embu.

24. This suit is said to be res judicata Runyenjes PMCC No. 82 of 2015 which was determined by the court with finality. The suit was instituted by Michael Nyaga Thiga (the 2nd respondent/ defendant in the present suit) and Robert Muthee Njogu (the 2nd plaintiff/applicant in the present suit). The suit was filed against Faith Njoki Wambogo (the 1st respondent/ defendant in the suit), Judith Wambogo Njogu, The Land Registrar Embu and the Hon. Attorney General. In the suit the parties sought orders for the land parcel no. Kagaari/Kanja/3508 to be restored to Michael Muthee, the plaintiff in that suit, and that land parcel Kagaari/Kanja/8735 be restored to the 2nd defendant, who is the applicants'/plaintiff's mother.

25. It is argued by the 1st and 3rd respondents/defendants that the subject matter in the suit is similar to that in the present suit and that the

parties and issues litigated upon are similar. The 3rd respondent/ defendant has, however, stated that even if the issues in both suits are not similar then such issues ought to have been raised in the previous suit in the Runyenjes case.

26. The applicants/plaintiffs on their part, together with the 2nd respondent/ defendant are of the view that the subject matter in the suit is not similar and that the parties were litigating on land parcel Kagaari/Kanja/3508 where they were challenging the fraudulent exchange of the land. To them, the issues are different and so are the parties to the suit.

27. I have perused the Judgment attached in the Runyenjes case, the subject matter in the suit were two parcels of land Kagaari/Kanja/8735 and Kagaari/Kanja/3508. The parties had sought for both suits to be restored to their respective owners and I do not agree with either the plaintiffs/applicants or the 2nd respondent/defendant that the subject matter was only suit parcel number Kagaari/Kanja/3508. It therefore follows that the subject matter is similar in both suits.

28. On whether the parties to the suit are similar, I have outlined parties in both suits above. In the Runyenjes case, all parties to the suit are parties in the present suit, with the exclusion of the Attorney-General and the 2nd defendant/respondent who is mother to the plaintiffs/applicants, who is said to now be deceased.

29. In the present suit, there is an addition of parties being the 1st and 3rd plaintiffs/applicants. However, I note that the 1st plaintiff/applicant (Erick Muriithi Moses) was a witness in the Runyenjes case and can therefore not be said not to have participated in the suit. To me, the parties are similar in this case as the 2nd plaintiff/applicant was acting on behalf of his family with the 1st plaintiff/applicant also testifying on behalf of his family, yet in the present case they have sued as siblings and are also litigating on behalf of their family. An addition of one or exclusion of another family member cannot be said to have brought a difference in the parties in the suit unless they are acting on a different capacity.

30. On whether the issues raised in both suits are similar. The plaintiffs/applicants and the 2nd defendant/respondent are of the view that in the Runyenjes case the issue for determination by the court was fraud where they were challenging the fraudulent exchange of land together with an anomaly on execution of the agreement for exchange of land while in the present case the claim is on beneficial interest.

31. I don't agree with the applicant and the 2nd defendant/respondent that the issue in the Runyenjes case was on fraudulent exchange of land to which restoration of the two parcels of land was sought. I also note that the 2nd plaintiff/applicant had sought for such restoration of land for reason that he had discovered that the effect of the transfer to the 1st defendant/respondent was to disinherit the 2nd plaintiff/applicant and his extended family, who lived on suit parcel Kaagari/Kanja/8735. This is as stated on the first paragraph of page 2 of the Judgment. But even assuming that the earlier case was different, couldn't the issue of beneficial interest be raised there? I think it could.

32. During the hearing, the 2nd plaintiff who is the 2nd applicant/plaintiff in the suit sought to rely on the case of the 1st plaintiff/applicant. The 1st applicant/plaintiff herein who was the 1st plaintiff's/applicant's witness in cross examination had stated that the land was family land which belonged to his mother and that they resided on it. I am of the view that the claim on beneficial interest by virtue of the plaintiffs/applicants being disinherited from land parcel Kaagari/Kanja/8735 was therefore raised and considered by the court in the Runyenjes case. I find that the issues therein are similar to those in the present suit.

33. In the case of **E.T. v Attorney General & another [2012] eKLR** the court, in cautioning courts from entertaining similar matters where the new causes of action were sought to seek the same remedy, stated as follows

“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 in a form a new cause of action which has been resolved by a court of competent jurisdiction.

34. Further in the case of **Omondi v National Bank of Kenya Limited and Others [2001] EA 177** which cited with approval the case of **Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)** the court stated as follows,

‘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’

35. I share the sentiments and reasoning of the above cited cases. The parties herein, in my view, appear to have brought this suit in the guise that the same is different from the Runyenjes case. More parties have been added to the suit and the cause of action tailored to appear as if it is different from the Runyenjes yet ultimately the parties are seeking a share of land parcel Kaagari/Kanja/8735. This, the court cannot allow.

36. In the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** the court in emphasizing the role of res judicata pronounced itself as follows:

“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 which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of

unraveling uncontrollably.”

37. I have already stated that this suit is res judicata, and as stated above, litigation must come to an end. The court further has been made aware of an appeal against the Runyenjes case, which is Embu ELCA NO. 18 of 2018 filed by the 2nd applicant. The appeal is said to be before this court. It is clear that the parties are litigating on the same title and if this suit is entertained then there is a possibility of conflicting orders being issued over the said subject matter of land parcel number Kagaari/Kigaa/8735. The appeal or the suit herein, whichever is determined last, can be rendered nugatory. To say the least, this suit cannot be entertained before this court as the court lacks jurisdiction by virtue of it being res judicata the suit in Runyenjes PMC No. 82 of 2015 which was determined by a competent court.

38. The preliminary objection has merits and the same is allowed. I note that some opposing parties in the suit are related and condemning parties to pay costs might strain the relationship further. I am therefore inclined not to award. The upshot therefore is that the suit before this court is legally unsustainable. The same is hereby dismissed. Each side to bear its own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF DECEMBER, 2021.

In the presence of M/s Mutegi for Mogaka for plaintiff/Applicant and in the absence of M/s Njuguna for respondent defendants.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

16.12.2021