



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 21 OF 2019

JOSEPH BOIYO BARASA.....PLAINTIFF

VERSUS

AGGREY KISIANG'ANI ROTICH.....1ST DEFENDANT

PATRICK NGEIYWA ROTICH.....2ND DEFENDANT

JOSHUA CHERIRET ROTICH.....3RD DEFENDANT

R U L I N G

Philip Barasa Kiptereza died on 6.10.1966 at the age of 38 years. On 19.3.2010 an application a grant of letters of administration ad colligenda bona was granted to Philip Barasa Kiptereza limited only of collecting and preserving the estate.

On 2.3.2011 the applicant filed originating summons under Sec 3 & 3A of the Civil Procedure Act and Order 37 & 1 C.P.A in the following terms:

LET MESSRS AGGREY KISANGANI ROTICH, PATRICK NGEIYWA ROTICH & JOSHUA CHERIET ROTICH all residents of Namwela within Bunogma County in the Republic of Kenya do within 15 days after service of this summons which is issued upon an application of the applicant aforesaid who claims as Heir (son) of the deceased with rights and an interest in the estate of the deceased, for determination of the following issues:-

- a) *Whether the deceased was the registered owner of title number MALAKISI/NORTH & CENTRAL NAMWELA/377 at the time of his demise on the 06/10/1966.*
- b) *Whether succession was ever done before title No. MALAKISI/NORTH & CENTRAL NAMWELA/377 was transferred from the deceased's name to third parties.*
- c) *The extend of the deceased's estate at his demise*
- d) *WHETHER the respondents are trespassers on the suit parcel.*
- e) *Whether there is an estate of the deceased capable of being distributed to his hers and beneficiaries.*
- f) *Whether the Applicant has any remedy in law against the Respondents and their agent, associates who conspired to cause transfer of the suit parcel from the deceased to third parties without regard to the law of succession.*
- g) *Whether the title number MALAKISI/NORTH & CENTRAL NAMWELA/377 should revert back to the deceased's name for purposes of succession.*
- h) *Who should be condemned to pay costs hereof.*

AND FOR REASONS:

1. *A declaration that the deceased at his demise left behind an estate capable of being distributed to his heirs and/or beneficiaries upon a succession cause process.*

2. *A declaration that the transfer of the title from the plaintiff's name to the 3rd parties were unoriginally issued and thus void ab initio.*
3. *A declaration that there is an estate of the deceased remaining and capable of being distributed after Land parcel NO. MALAKISI/NORTH & CENTRAL NAMWELA/377 is followed to the hands of 3rd parties ordered restituted.*
4. *A declaration that the transfer of the suit parcel to the 3rd parties was attendant to fraud and illegality.*
5. *A declaration that the respondents are trespassers on the title NO. MALAKISI/NORTH & CENTRAL NAMWELA/377.*
6. *An order that the Respondents be condemned to pay costs of this suit.*

The applicant filed a supporting affidavit where he deposed

- 2) *That the deceased herein who was my father passed away on the 6/10/1966 (hereto annexed and marked JBB- 1a &b are true copies of the certificate of death and limited grant.)*
- 3) *That at the time of the deceased's demise he was as the registered owner of land title number MALAKISI/NORTH & CENTRAL NAMWELA/377 (hereto annexed and marked JBB- II is a true copy of the register.*
- 4) *That at his demise our father is survived by myself and two daughters ALICE CHEMTAI BARASA and BEATRICE CHEMUKU BARASA (hereto annexed and marked JBB-III is a true copy of letter dated 4.8.2020 from the local provincial administration.*
- 5) *That my father passed away on 6.10.1966 and left behind MALAKISI NORTH & CENTRAL NAMWELA/377 as his only known asset.*
- 6) *That upon carrying out search at the Lands office, I discovered that the land is currently registered in the name of one SOFIA NAFULA JORAM (Hereto annexed and marked JJB-III is a true copy of certificate of search)*
- 7) *That later when I filed a suit against the said SOFIA NAFULA JORAM I later learnt that she also passed away. (hereto annexed and marked JBB-IV a&b are true copies of letter addressed to the Deputy Registrar dated 18/05/2010 and Notice of withdrawal of suit dated 17.8.2010)*
- 8) *That later on I also discovered that upon the demise of my father one JAFRED KIBOI KPTEREZA now deceased changed the name of my father into his to have the parcel registered into his name as can be seen from annexures herein above marked JBB-1)*
- 9) *That when I visited the suit parcel in early 2010 I discovered the same is now occupied by the Respondents herein and their families alleging that they purchased the parcel from SOFIA NAFULA JORAM. (Annexed and marked JBB-V is a letter dated 12/03.2010 from the area assistant chief)*
- 10) *That the change of name from my father to JAFRED KIBOI KIPTEREZA was without our blessings and unlawful and amounts to disinherit our family.*
- 11) *That the transfer of the parcel to SOFIA NAFULA JORAM was also unlawful and amounts to disinherit us.*

Joshua Cheritet Rotich the 3rd Respondent filed a Replying affidavit. He deposes that the land does not belong to the estate of Philip Baraza Kipteresa; that the same issue has been litigated in Kakamega HCC 184/1985 and Kisumu Court of Appeal Civil Appeal No. 92 of 2003 which dismissed the applicants claim and ordered to pay costs of Kshs 130,000 which he has not paid to date. This court heard the evidence of the applicant Joseph Boiyo Barasa and Respondent Joshua Joram Cheritet where they substantially reiterated the contents of their respective affidavits. By consent counsel for parties filed respective submissions.

From the evidence and submissions there is no doubt that the issue of Land Parcel No. Malakisi/North & Central Namwela/377 has been subject to litigation first in Kakamega HCC 184/1995 and an appeal from therefrom in Kisumu C.A No. 92/2003. The judgment in the respective of the two decision were annexed and tendered in evidence. Is this matter therefore res judicata?

The doctrine of res Judicata is actioned in Section 7 of the Civil Procedure Act which provides:

7. Res judicata *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.*

1) Explanation.- *The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.*

2) *Explanation.* —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

3) *Explanation.* — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

4) *Explanation.* —Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

5) *Explanation.* — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

6) *Explanation.* —Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The elements of the doctrine of Res Judicata which the party pleading it must establish are:

- a) *The suit or issue was directly and substantially in issue in the former suit*
- b) *That the former suit was between the same party 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.*

From a perusal of the Kakamega HCC 184/1985 the Sofia Nafula Joram the mother of Respondent was the plaintiff and Jared Kiboi Kptera was the defendant and the court Tanui J found for the plaintiff Joseph Boiyo Barasa & others appellant appealed against the order and Sofia Nafula was the Respondent and the subject matter was Malakisi/North Central Namwela/377, which appeal was dismissed.

The present application is on the same subject matter involving person claiming from the parties in the previous suit.

Where a plea of res judicata has been successfully made, the jurisdiction of the court to try the same issue is ousted by operation of the doctrine. In *NAIROBI COURT OF APPEAL, CIVIL APPEAL NO. 107 OF 2010, Kenya Commercial Bank Limited –vs- Benjoh Amalgated Limited and another*, the learned Judges stated inter alia that:

“...where a given matter becomes the subject of litigation, and of 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 in 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 contents, but which was not brought forward, only because they have been negligent. 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 parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.”

In the premises I find that this matter is res judicata and the Originating Summons dated 3.3.2011 is hereby dismissed with costs.

DATED AT BUNGOMA THIS 17TH DAY OF NOVEMBER, 2021.

S.N RIECHI

JUDGE