REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 108 OF 2019

WILSON MWIRIGI MANYARA ……..……..……1ST APPELLANT

M'IMANYARA M'MURITHI ……..2ND APPELLANT

VERSUS

MOFFAT GICHURU MANYARA ……..……RESPONDENT

JUDGEMENT

1. The Appellants are the defendants in the Nkubu case PM ELC No.15 of 2019 while the Respondent is the Plaintiff. The 2nd Appellant is the father to the 1st Appellant and the Respondent. Vide a plaint filed in the Nkubu court on 14.3.2019, the Respondent/Plaintiff sued his brother and father (the Appellants) herein where he sought the following orders:

i. An order directing that the Plaintiff be accorded his rightful share by the 2nd defendant in Abogeta/Upper Kithangari/2514 (the suit land)

ii. An order of permanent injunction barring the 1st defendant from stepping onto the share belonging to the plaintiff.

iii. General damages.

iv. Costs of the suit and interest thereof.

v. Any further or better relief that the court might deem necessary and appropriate to grant.

2. The plaint was filed contemporaneously with a Notice of Motion Application where the Plaintiff had sought an order of inhibition, inhibiting the defendants from selling, subdividing, transferring and undertaking any dealings on the suit land pending the hearing and determination of the application and the suit and an order barring the Land Registrar Meru from effecting any transfers in relation to the suit land.

3. The orders sought in the application were granted at the initial ex parte stage pending the hearing and determination of the application of which a ruling was delivered on 8.8.2019 whereby the application was allowed triggering this appeal.

4. The Memorandum of Appeal was filed on 5.9.2019 containing 6 grounds set out as follows:

I. THAT the Learned trial magistrate erred in law and fact in issuing restraining orders barring the 2nd Appellant from disposing part of his land as he so wishes whereas the same court rightly concluded that the suit land was registered under his name.

II. THAT the Learned trial magistrate erred in law and fact in inhibiting the 2nd Appellant from alienating his land as he so wishes on the grounds that he had not subdivided his land to the two sons in equal shares whereas he has the sole discretion to distribute his land in whatever share and names he so wishes.

III. THAT the Learned trial magistrate erred in law and fact in directing that the Respondents is entitled to a half share out of the suit land as his equitable right without putting into consideration that the 2nd Appellant has some other children who are entitled to a share of the said land.

IV. THAT the Learned trial magistrate erred in law and fact in issuing the Respondent's sought prayers while the suit was res-judicata as the issues set out to be determined in the matter had been exhaustively dealt with in Meru High Court ELC No. 54 of 2015 and Court of Appeal No. 151 of 2007.

V. THAT the Learned trial magistrate erred in law and fact by disregarding the judicial authorities which were tendered before the Court.

VI. THAT the judgement of the lower court is against the weight of the evidence and the same is bad in law.

5. This suit is very fresh, so is the lower court matter, where the case is at the infancy stage. Even directions on the hearing of the suit have not been taken. However, there is a need to expedite this matter as it is apparent that the dispute is rather emotive, while one of the parties, the 2nd appellant is very old.

6. When the ruling of the trial court was delivered on 8.8.2019, the appeal was lodged within good time on 5.9.19. The Appellants then filed before this court an application on 4.10.2019 for stay of execution of the subordinate court's ruling of 8.8. 2019. It is during the hearing of this application when it emerged that the Respondent had filed an application before the lower court to have the 1st Appellant (Wilson Mwirigi) summoned to appear before the trial court to show cause why he should not be committed to civil jail for contempt of court orders. Since the original lower court file had been transmitted to this court for purposes of this Appeal, the trial magistrate's court had opened a skeleton file in order to proceed with the application for contempt of court.

7. It is against this background that I delivered a ruling on 9.12.19 directing that this appeal be heard forthwith by way of oral or written submissions and that there be a stay of proceedings in Nkubu PM ELC 15 of 2019, hence this judgment. The counsels for the litigants opted to have the Appeal heard orally on the same date of 9.12.2019, though they were to file their list of authorities thereafter.

Appellants' submissions

8. In their submissions the Appellants have relied on the grounds set out in the Memorandum of Appeal and the annexures MM 1-3. The court was urged to particularly look at its own judgement in Meru ELC no 54 of 2015 which is annexure MM3. It was therefore argued that the lower court made an error by stopping the 2nd Appellant from subdividing the land. It was further submitted for the Appellants that the 2nd Appellant had indicated before the lower court that he is sharing out his land to all his children including the Respondent but the Respondent is not willing to accept the share he is being given as the Respondent wants 2 acres yet there are 6 sons.

9. In support of the Appellant's case, the following authorities were proffered:

(i) M'Imanyara M'Murithi vs Nkanata Murithi & Anor CA No. 151 of 2007.

(ii) Moffat Gichuru vs M'Imanyara M'Murithi & 2 Others Meru ELC No. 54 of 2015.

(iii) Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd CA No. 107 of 2010.

(iv) The Independent Electoral & Boundaries Commission CA No. 105 of 2017.

Submissions of the respondent

10. For the Respondent, the court was urged to look at the affidavit dated 5.11.19, filed in the lower court on 6.11.19, and the one dated 19.9.2019 filed on 20.9.2019 still in lower court and another dated 5.12.2019 filed in this court on 9.12.19. The Respondent contends that the matter in the lower court is different from the one filed before this court as the land was held in trust. It was submitted that the Respondent has been in occupation of the suit land since 1975 and has planted tea bushes amongst other developments, that when land is held in trust, it is for future the generations. It was also argued that the Respondent is fighting to have the two acres he has been occupying in the pleadings before the lower court whereby 1st Appellant had intimated to the court that they were ready to give the Respondent two acres , of which if that was to be the case, then there would be no dispute.

11. In support of the case for the Respondent, the following authorities were proffered:

(i) Obiero vs Opiyo (1972) EA 227.

(ii) Abdullahu Omar Shanno (2019) eKLR.

(iii) Mwangi & Another vs Mwangi, (1986) KLR 328.

(iv) Halsbury's Laws of England, 4th Edition, Volume 48.

(v) Nathaniel Ngure Kihiu v Housing Finance [2018] eKLR.

(vi) Saifudeen Abdulla Bhai & Hussein Abdulla Bhai v Zainabu Mwinyi (2014)eKLR.

Determination

12. This being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and make its own conclusions, **See-Selle & Another vs. Associated Motor Boat Co. Ltd (1968).**

13. Ordinarily, orders of inhibition are issued when the court is satisfied that there is a real danger of the subject matter being disposed off before the determination of the suit and if preservatory orders are not granted, the property would be alienated or disposed of. –See **Meru ELC No.24 of 2012 John Mugambi M'Mwambi vs Joseph Karuti Mikwa & Stephen Kithure Murimi.** In the present matter, it appears that the 2nd Appellant had embarked on the process of subdividing the suit land. The trial magistrate had also visited the scene where the court had observed that the Respondent is the one who was in occupation of the suit land. This far it can be said that the orders of inhibition were issued to preserve the substratum of the suit pending the hearing of the suit. However, I find that one issue does stand out for determination and this is whether the suit at Nkubu is Res-judicata to the Court of Appeal Case No. 151 of 2007 and Meru ELC No.54 of 2015.

RES-JUDICATA

14. I find that in paragraph 8 of the defense in the Nkubu matter, it is averred that the suit at Nkubu is Res-judicata to the Court of Appeal case 151/07 and Meru ELC No.54/15. In paragraph 22 of the Replying Affidavit of Wilson Mwirigi filed on 26.3.19, in response to the application filed on 14.3.19, again the Appellants stated that the lower court suit was Res- judicata to Meru ELC No.54 of 2015. In the ruling of 8.8.19, which is the subject of this Appeal, the trial magistrate did summarize defendants (appellants) case to the effect that the issue of res-judicata had been raised. However, the trial magistrate did not determine this issue at all in the ruling yet the aforementioned decisions (the court of appeal case and Meru ELC case) had been availed during the hearing of the application of 14.3.2019.

15. It was therefore erroneous for the trial magistrate to disregard the issue of Res-judicata which had been raised during the hearing of the application of 14.3.2019 and in the pleadings. This court has a duty to re-evaluate the aforementioned issue and determine the same accordingly.

16. Section 7 of the Civil Procedure Act 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 a court".***

17. In the case of **Michael Gachokii Gicheru vs. Joseph Karobia Gicheru, Kerugoya ELC No. 783 of 2013, Judge Olao** laid out the five essential elements that must exist before the claim of Res-judicata can successfully be raised and which elements are captured in Section 7 of the Civil Procedure Act. These are:

> **I. "The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue before the former suit.**
>
> **II. The former suit must have been between the same parties or parties under whom they claim.**
>
> **III. The parties must have litigated under the same title.**
>
> **IV. The court which decided the former suit must have been competent and lastly,**
>
> **V. The former suit must have been heard and finally decided by the court."**

Also see **Bernard Mugo Ndegwa vs. James Githae & 2 others (2010) Eklr.**

Court of Appeal Case No. 151 of 2007.

18. In light of the foregoing analysis, is the Court of Appeal Case No. 151/07 Res-judicata to the Nkubu matter? In the Court of Appeal case, the present 2nd Appellant was trying to wrestle the suit land from his brother Nkanata Murithi who had transferred the land to his son Jamlick Murithi. By then, the suit land was part of the larger parcel number Abogeta/Upper Kithangari/4. Both the Respondent herein and 1st Appellant were not in the picture as parties in the Court of Appeal case, though the Respondent herein was a witness in H.C.C.C. No.89 of 2001 (the case which led to the appeal No.151/07). It is quite apparent that in the Court of Appeal Case No. 151/07, the parties herein were or must have been on one side where they were trying to get the land from both Nkanata and Jamlick. The parties and the issues are different, hence the suit COA No.151/07 is not res-judicata to the Nkubu case.

Meru ELC No. 54/2015.

19. I delivered the judgement on 9.5.2018 in respect of the above mentioned case. The Respondent herein was the plaintiff where he had sued his father, brother and nephew respectively. What happened is that after the family of M'Imanyara M'Murithi (the 2nd appellant) succeeded in getting their share of the land from the hands of Nkanata and Jamlick in the court of appeal case no. 151 of 2007, the Respondent herein then filed the Meru ELC Case No.54/15 claiming entitlement to the suit land averring that he is the one who had always been in occupation of the said land. The history of the dispute is aptly captured in paragraph 2-6 of the Judgement in Meru ELC No.54 of 2015. The suit was

however dismissed.

20. I deem it necessary to produce an extract of the said decision as from paragraph 32 to the end as follows:

> ***(32)"This is a case of unmitigated greed and utter selfishness on the part of the Plaintiff. It is not lost to this court that 1st defendant is a very old and sickly man (as per courts observation during his testimony). His son DW 2 stated that the father was 90 years in 2017. It is not fathomable to this court that Plaintiff would trash a Court of Appeal decision, then drag his own aging father to court and also disregard the fact that he has 7 other siblings because he wants the suit land for himself to the exclusion of all other family members. (Emphasis added)***
>
> ***(33) Pursuant to provisions of Section 24 and 28 of the Land Registration Act; "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto".***
>
> ***(34). 1st defendant is recognized by this court as the absolute owner of the suit land. He is free to share out this land to his children and defendants and even Plaintiff (if he so wishes) without interference from the Plaintiff.***
>
> ***(35). My conclusion is that Plaintiff's claim is totally unacceptable and the same must fail. I proceed to give final orders as follows: Plaintiff's suit is hereby dismissed, Any orders of injunction/inhibition that may be in force are hereby discharged. As to costs, Plaintiff has not found favor before this court even if this is a family dispute. Plaintiff is hence condemned to pay costs of the suit." (Emphasis added).***

21. In the Nkubu case no. PM ELC 15 of 2019, the Respondent is claiming the suit land on the basis of having occupied the same since 1975. It is quite clear that the claim in the Nkubu court raises the same issues as the case Meru ELC No. 54 of 2015. What the Respondent does is to tweak and distort the claim here and there to avoid the doctrine of res-judicata. For instance, in the proceedings in Meru H.C.C No. 89 of 2001, the Respondent herein had testified as PW5 in the following manner:

> ***"It is my father who instructed me to live on the land (suit land). The reason for my father's decision is based on the fact that the land is ancestral land."***

22. However, in the Meru ELC No. 54/15, the Respondent had pleaded that he was invited to live on the land by his uncle (Nkanata M'Murithi) in 1975 but when Nkanata transferred the land to his son Jamlick, the Respondent sought advice from his father where the two (Respondent and 2nd Appellant – son and father) agreed that the father would claim the suit land as family land but hold it in trust for the Plaintiff.

23. In the case of **ET vs. Attorney general & Another (2012) eKLR**, it was held that;

> ***"the courts must always be vigilant to guard 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs. NBK & 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 Kubola J, (as he then was) in the case of Njanju vs Wambugu and Another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over 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 doctrine of res-judicata…."***

24. In the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 others (2017) eKLR** the court cited the case of the **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others Nairobi C.A No. 105 of 2017(2017) eKLR** where the Court of Appeal explained the role of the doctrine of Res-judicata as follows;

> ***"the rule or doctrine of Res-judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders, hoping, by a multiplicity of suits and fora to obtain at last, outcomes favorable to themselves. Without it, there would be no end to the litigation and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res-judicata thus rest in the public interest for swift, sure and certain justice".***

The court went on to state that:

> ***"My understanding of Res-judicata principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the court's valuable time if there was no tool for arresting such mischief…."***

25. Having lost in Meru ELC No. 54 of 2015, the Respondent's recourse lay in lodging an appeal and not in subjecting the dispute into metamorphosis before the Nkubu court. But again, the Respondent appears to hold disdain of decisions of superior courts and this is captured in paragraph 25 and 26 of the Judgement in ELC No. 54 of 2015 where the Respondent appeared to disagree with the holding in the Court of Appeal Case No 151 of 2007. In paragraph 27 of his further affidavit dated 3.4.2019 in support of his application of 14.3.2019 before the

trial court, the Respondent was averse to having decisions of superior courts paraded before him. Perhaps this explains why the Respondent had no qualms litigating all over again before the Nkubu court after he lost in Meru ELC No. 54 of 2015.

26. The upshot of my finding is that the Nkubu case No PM ELC 15 of 2019 is Res- Judicata to Meru ELC No. 54 of 2015. The suit at Nkubu PM ELC No 15 of 2019 is therefore incompetent and the same amounts to an abuse of the court's processes.

27. **Final Orders:**

1) This appeal is allowed.

2) The orders issued on 8.8 2019 are hereby set aside.

3) The Nkubu case PM ELC 15 of 2019 is hereby dismissed.

4) The Appellants are hereby awarded Costs in this suit and in the lower court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 16TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

C.P Mbaabu holding brief for Kirimi for respondent

1st appellant

HON. LUCY. N. MBUGUA

ELC JUDGE