



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC CASE NO. 43 OF 2019

M'MBIJIWE M'MBWI (LEGAL REPRESENTATIVE

OF IKUNYUA MBUI ALIAS M'IKUNYUA M'MBWI..... APPLICANT

VERSUS

LAND ADJUDICATION OFFICER MERU

CENTRAL..... 1ST RESPONDENT

DISTRICT LAND REGISTRAR MERU

CENTRAL2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

MUITA THIRIKWA 5TH RESPONDENT

JUDGMENT

1. The applicant filed a notice of motion dated 16/8/2019 brought under order XL and XXXVI rule 1 of the Civil Procedure Rules seeking orders as to whether LR NTIMA/IGOKI/892 was legally registered in the name of the respondent and if not, the 3rd and 4th respondents be compelled to rectify the adjudication register to reflect the name of the original owner Ikunyua Mbui.

2. The application was supported by the affidavit of M'Mbijiwe M'Mbwi (the applicant), who stated that the respondent has defrauded him of his ancestral land which their great grandfather entrusted to his brother Ikunyua Mbui in accordance with Kimeru customs during land demarcation. The respondents caused the fraud by way of cancellations of the names of the deceased Ikunyua Mbui from the original documents and registering the suit land in the name of the respondent.

3. The application was opposed by the grounds of opposition of the 1st – 3rd Respondents dated 25/11/2019, where it is contended that the application is an abuse of the court process as no cause of action known in law has been disclosed and no substantive orders are being sought against either of the parties. The applicant herein disentitles himself to any order for material non-disclosure of the nature and outcome of the suit **MERU HCCC No. 160 of 1994** and in any event the motion is res-judicata.

4. The suit was heard vide viva voce evidence where **PW1, M'Mbijiwe M'Mbwi** asked the court to give him back the suit land as he has no other place to live. That before bringing this case he had sued the respondent in another case but he does not know if a decision was made. He admitted that all the issues he has raised herein are the same ones he raised in that other suit. He also admitted that he was evicted in year 2011.

5. **DW1 Maita Thirikwa** told the court that he got the suit land in 1970 through adjudication process, but he exchanged land at lands office with one M'Ikunyua who was his neighbor. Subsequently there was a court case and the court ruled that the suit land is his. **DW2 George Thirikwa Muita** testified and told the court that he is the son of DW1 and they moved into the suit land in 1973-1974 when he was in class 3. His father told them that his land went to M'Mauro and M'Mauro's land went to them during demarcation.

6. I have carefully perused through the application, affidavits, submissions and the record in its entirety and the issue to be determined first and foremost is **whether the suit herein is res judicata?**

7. **Section 7 of the Civil Procedure Act** that provides as follows;

“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.”

8. In the case of **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others Nrb. CA 36 of 1996**, the court stated that;

“In order to rely on the defence of res judicata there must be:

(i.) a previous suit in which the matter was in issue; (ii.) The parties were the same or litigating under the same title. (iii.) A competent court heard the matter in issue;

(iv.) The issue has been raised once again in a fresh suit”

9. During the trial, a request was made by counsel for 1st- 3rd respondents to have the file **Meru HCCC No. 160 of 1991** availed and to be considered in the final determination of the matter. I have perused the same file and it is clear that the parties were similar to the parties herein, where the subject matter of the case was **Land parcel Ntima/Igoki/892**. In the end, judgement was delivered on 22.10.2010 in favour of the 4th respondent herein (Mwitia Thirikwa) who was declared as the rightful owner of the suit land. An order of eviction of the current applicant was also issued.

10. That being the case I find that this matter fulfills the ingredients of res judicata and is also an abuse of the court processes. Final orders are given as follows;

1) This suit is hereby dismissed.

2) A certified copy of the Judgment dated 22.10.2010 in Meru HCCC No. 160 of 1991 is to be placed in this Miscellaneous file no.43 of 2019.

3) A copy of this Judgment likewise is to be placed in file Meru HCCC No. 160 of 1991. Thereafter, the two files are to be severed and returned to the registry.

4) Applicant is condemned to pay the costs of this suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Applicant

Kiongo for 1st – 4th respondents

5th respondent

HON. LUCY. N. MBUGUA

ELC JUDGE