



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 191 OF 2017(OS)

SIMON NG'ANG'A WAMBUGU.....1st APPLICANT

MARY WANJIRU WAMBUGU.....2nd APPLICANT

-VERSUS-

SAMUEL MURIITHI MUMATHA.....RESPONDENT

RULING

1. Before me for determination is Notice of Preliminary Objection dated the 27th February 2019, filed on 28th February 2019 and brought by the Respondent herein who seeks for orders that the present suit be struck out for being res judicata Nyeri HCC 355 of 1996 wherein a decree dated the 13th August 2015 was issued.
2. The Application was disposed of by way of written submission where the Respondent submitted that the suit instituted against the Respondent was res judicata as it related to the issues that were determined in Nyeri HCC No.355 of 1996 and a Decree issued to that effect.
3. That the issues that had been dealt in Nyeri HCC No.355 of 1996 were similar to the issues at hand. That the previous suit had sought for adverse possession in regard to title No. Gikondi/Thimu/676 which was the subject in issue in the present suit.
4. That Nyeri HCC No.355 of 1996 was dismissed pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules. The Respondent submitted that a dismissal of a suit, amounted to a judgment as was held in the case of **Njue Ngai vs Ephanus Njiru Ngai & Another [2016] eKLR**.
5. That in the case of **Lucia Waithera Maina vs James Gakure Kamau & Another [2018] eKLR**, the Court had dismissed the suit that was res judicata, the matter in issue being similar to what was decided in an earlier instituted suit by the Plaintiff before a Court of competent jurisdiction, a holding that was also echoed in the case of **Mary Nyongesa Aloka vs Lazarus Sirengo Mukoyani [2018]eKLR**.
6. That the 2nd Applicant having stated that Wambugu Gatibi, who had instituted Nyeri HCC No.355 of 1996 was her husband and was now deceased, had not annexed any proof of Letters of Administration to the estate of Wambugu Gatibi, hence she lacked legal capacity to bring the present suit. The Respondent relied on the case of **Isaya Masira Momanyi vs Daniel Omwoyo & Another [2017] eKLR** to buttress their submissions.
7. That the present suit was an abuse of the Court process there having been a similar suit touching on the same subject matter that had been determined in Nyeri HCC 355 of 1996. They sought that their Application be granted and the suit be struck out.
8. In response and in opposition of the Preliminary Objection, the Applicant's submission was to the effect that the previous suit was dismissed for want of prosecution which did not create either an issue or cause of action and hence res judicata did not apply.
9. That in the case of **Pople (sic) vs Evans (1968)2 ALLER 743**, the Court had held that a dismissal of action for want of prosecution was no bar to new action, that it amounted to nothing as it was not a final determination of the issue at hand and this also obtained even where the dismissal was by consent if there was no compromise of the cause of action.
10. They sought that the Preliminary Objection be dismissed.

Determination.

11. There have been no dispute that the current suit is a dispute between the same parties on a matter that was litigated upon in the previous suit which stands dismissed for want of prosecution, and has not been sought to be reinstated, I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** where a Preliminary Objection per Law J.A. was stated to be:-

“So far as I am aware, a preliminary objection consists of a 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. In this proceedings, it is the Defendant/Applicant’s case inter alia that this suit should be dismissed with costs as the same was res judicata Nyeri HCC 355 of 1996 and an abuse of the Court process.

13. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 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”

14. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

15. In order therefore to decide as to whether this case is *res judicata*, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. what issues were really determined in the previous case;
- ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction

16. Having considered and reviewed the pleadings and submissions by Counsel for the parties, it is not in dispute, that there exists a similar matter in the Nyeri HCC 355 of 1996 which **matter had been dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, on the 13th August 2015.**

17. Looking at the circumstance of the present suit, as well as the previous suit, what this Court is tasked to determine is whether the dismissal for **want of prosecution of Nyeri HCC No. 355 of 1996 pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules was a final determination of the Court and therefore** constituted Res judicata in the present suit.

18. The Court of Appeal in **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR** held as follows;

As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1st Respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st Respondent could do was to invoke the appellate process and not filling a fresh suit.

Accordingly we find this appeal has merit and it is hereby allowed with costs against the Respondents.

19. The Court of Appeal herein above having pronounced itself that a matter having been dismissed for want of prosecution could not be resuscitated through a fresh suit as doing so would offend the doctrine of res judicata and further that since the said finding is binding to his Court, I therefore find that the present suit is res judicata Nyeri HCC 355 of 1996 and proceed to dismiss the same with costs to the Respondent.

Dated and delivered at Nyeri this 8th day of May 2020.

M.C. OUNDO

ENVIRONMENT

&

LAND

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JUDGE