



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC NO.66 OF 2017

(FORMERLY NKR 230 OF 2013)

JOHNSON K. GICHIGI.....PLAINTIFF

V E R S U S –

FRANCIS M. KANGURE.....DEFENDANT

R U L I N G

1. The genesis of this application is a suit initiated by the plaintiff, vide a Plaint dated the 16th January, 2013 and filed on the 13th March, 2013. Thereafter he subsequently filed a list of documents dated the 20th March, 2013.
2. On his part, the defendant filed his memorandum of appearance on the 5th June, 2013 and thereafter, filed his statement of defence on the 20th June 2013.
3. On the 28th January 2014, the defendants filed their supplementary list of witness statements and list of issues both dated the 24th January 2014.
4. Parties appeared before *Lady Justice Lucy Waitaha* on the 17th July, 2014 for mention to confirm whether they had complied whereby they informed the court that by consent, they had agreed that they would file a supplementary list of witnesses within 14 days if need be.
5. Pre-trial hearing was thus set for the 18th December, 2014 on which day none of the parties was present.
6. On 1st July, 2015, the court was informed that the parties had complied and prayed for a hearing date.
7. The court noted that although parties had complied and were ready for the hearing, yet the defence had raised the issue of *Res Judicata* in their defence; that needed to be tested first before the suit could be heard.
8. Hon. Justice Sila Munyao sitting at ELC Nakuru hence directed the defence to file the necessary application.
9. The defence complied and their application was filed on the 5th September 2016. Parties were then given 14 days to file their submissions and a mention date set for the 15th November 2016 for highlighting.
10. On that day, the 15th November 2016 the parties appeared before Hon. Kitur (DR) and informed him that the plaintiff had not yet filed his submissions. They then procured the 6th March, 2017 as a date to confirm whether the plaintiff had filed his submissions.
11. In the meantime, the Environment Land Court was established in Nyahururu wherein the file was transferred.
12. On the 6th March 2017, Counsel for plaintiff appeared before me and informed the court that the matter was coming up for hearing on a Preliminary Objection that had been raised by the defendant. There was confirmation that both parties had filed their submissions as directed.
13. The court fixed the 14th March 2017 as a date for hearing of the Preliminary Objection.
14. On that day, both parties informed the court that they would not highlight viva voce on their submissions but that the court should rely on the same and deliver its verdict.

15. I have perused the submissions filed herein and shall analyze the same as follows;

16. The plaintiff filed their plaint on the 13th March, 2013 and after parties had complied with Order 11 of the Criminal Procedure Rules, the defendant filed an application dated 5th September 2016 by way of Notice of Motion in which they sought *inter-alia*.

a) That the plaintiff's suit was *res judicata* by reason of the consent order and consequential decree in Nyahururu PMCC No.108 of 2011.

b) That consequently, the plaintiff's suit be dismissed with costs.

c) That the costs of the application be paid by the plaintiff/respondent.

17. The application was based on the grounds contained in the Supporting Affidavit of one **Francis Alugo Kangure** the Defendant/Applicant herein viz:-

a) That the Defendant/Applicant filed a suit by way of Counterclaim against the Plaintiff/Respondent in **Nyahururu PMCC No.108 of 2011 – Francis Mugo Kangure –vs- Johnson Kinyua Gichigi and 2 others**, relating to and involving the suit land herein, being land parcel **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367**.

b) That the Defendant/Applicant's said suit by way of Counterclaim was compromised vide a written consent dated 16th November, 2012, the consent order thereof and a consequential decree issued in terms of the said consent.

c) That the said written consent, the consent order thereof and the consequential decree have never been varied and or set aside the same are still in force.

d) That all issues between the Plaintiff/Respondent and the Defendant/Applicant over the use and occupation of the land title to the suit land were heard and finally determined through the said written consent, the consent order thereof and the consequential decree.

e) That consequently, the plaintiff's suit for declaration of title to the suit land, vacant possession and the cancellation of title and mesne profits is *res-judicata* and an abuse of the court process and the same should be dismissed with costs.

18. The brief history of the matter at hand is that the Plaintiff/Respondent herein filed a plaint dated the 28th May 2011 at the Nyahururu PMCC No.108 of 2011 against the Defendant/Applicant who subsequently filed a counter claim against him. The subject suit in the matter happened to be Land Parcel **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367** herein referred to as the suit land.

19. In the said plaint, the Plaintiff/Respondent lay claim as the proprietor of the said suit subject having had petitioned for the estate of the late **Watetu Gachigi** who died on the 17th August, 1975 and who had been allocated the suit land by Wiyumiririe Farmers' Co-operative Society.

20. In the plaint the Plaintiff/Respondent alleged that after the death of **Watetu Gachigi**, the Defendant/Applicant, without any legal or lawful authority had caused the suit land to be registered to his name fraudulently and un-procedurally, wherein after he had been in possession of the said suit land since 2008 without authority, thus denying him mesne profits at the rate of Kshs.10,000/= per year since 2008.

21. The Plaintiff/Respondent hence sought Judgment against the Defendant/Applicant for a declaration that he was the legal and absolute proprietor of **LR.LAIKIPIA/NGOBIT/SUPUKO/BLOCK 2/1367** and as such he was entitled to vacant possession. He also claimed for mesne profit of Kshs.10,000/= per annum from 2008.

22. The Defendant/Applicant in his amended statement of defence and counterclaim filed on the 6th September, 2016 denied the allegation that the Plaintiff/Respondent was the proprietor of the suit land stating that he had been the registered proprietor of the suit land on 15th February 2008 and had been issued a title deed until on the 14th April 2011 when his registration and title to the suit land was illegally and unlawfully cancelled by the District Land Registrar, Laikipia and the Plaintiff/Respondent registered as the proprietor therein.

23. He placed the Plaintiff/Respondent to strict proof thereof that he had petitioned for the estate of **Watetu Gachigi**.

24. He denied any registration of the suit land based on fraud or illegality and stated that he had bought the suit land from one **Anna Wachuka Waiganjo** for valuable consideration wherein he had taken possession of the same thereafter.

25. The Defendant/Applicant further averred that the Land Registrar had no powers to cancel his title to the suit land without a court order and as such his title had never been rectified and or cancelled by the court of law.

26. That he had never surrendered his title to the Land Registrar Laikipia or to the plaintiff for cancellation thus after he took possession of the suit land in 2008, he owed the Plaintiff/Respondent no mesne profit at the rate of Kshs.10,000/= per annum.

27. The Defendant/Applicant claimed for Judgment against the Plaintiff/Respondent that a declaration of cancellation of his title as the absolute proprietor of the suit land by the 2nd defendant by the Counter Claim was unlawful, illegal, null and void.

28. A declaration by the Plaintiff/Respondent as the absolute proprietor of the suit land in his place was unlawful, illegal, null and void and sought an order from court setting aside both cancellation of his Title Deed to the suit and registration of the Plaintiff/Respondent as the proprietor of the suit land.

29. He also sought for an order to re-instate him as the absolute proprietor of the suit land and his Title Deed.

30. Subsequently, parties compromised the suit vide a written consent dated the 16th November, 2012 which consent was filed in court on the 19th November, 2012 and endorsed on the same day as the order of the court. A decree was subsequently issued on the 3rd December, 2012.

31. The order of the court following the endorsement of the consent between the Plaintiff/Respondent and the Defendant/Applicant by counterclaim was as follows:

a) That the plaintiff's (main) suit against the defendant be and is hereby withdrawn.

b) That the defendant's counterclaim against the Plaintiff/ 1st defendant by counterclaim be and is hereby compromised in accordance with the terms contained in paragraph 3, 4, 5 and 6 below:

I would like to reproduce the said paragraphs for ease of reference:

“3. The defendant denied that the plaintiff is and was at all material times the proprietor of ALL THAT parcel of land known and described as L.R.NO.LAIKIPIA/NGOBIT/SUPUKO BLOCK 2/1367 (WIUMIRIRIE) (hereinafter referred to as “the suit land”) as alleged at paragraph 3 of the amended plaint and the plaintiff is put to strict proof thereof.

4. The defendant denies that the plaintiff is entitled to quiet possession and enjoyment of all rights and privileges belonging or appurtenant to the suit land as alleged in paragraph 3 of the amended plaint and the plaintiff is put to strict proof thereof.

5. The defendant was at all material times the registered proprietor of the suit land until 14.04.2011, when the defendant's registration and Title to the suit land was illegally and unlawfully cancelled by the District Land Registrar, Laikipia and the plaintiff unlawfully and illegally registered as proprietor of the suit land in place of the defendant.

6. The defendant avers that as the registered absolute proprietor of the suit land, the defendant was entitled to quiet possession and enjoyment of the suit land, without interference from anybody, including the plaintiff.

c) That the register of Land Parcel **No.LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367** be and is hereby rectified in the following terms:

Entries Number 5, 6 and 7

Entries Number 2, 3 and 4 be reinstated

d) That a mandatory injunction be and (sic) is hereby issued compelling the Plaintiff/1st defendant by Counter Claim together with members of his family, his proxies, licenses, employees, servants and or agents to vacate land parcel **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367**.

e) That a permanent injunction be and is hereby issued restraining the Plaintiff/1st defendant by Counter Claim by himself, members of his family, his proxies, licenses, employees, servants and or agents from entering into, occupying, residing on, disposing of, alienating, committing acts of waste or in any other manner interfering with or dealing in Land Parcel **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367**.

f) That costs of the main suit and of the counter claim be awarded to the Defendant/Plaintiff by counterclaim and the said costs and hereby assessed at Kshs.40,000/=.

32. In essence thereof, the Defendant/Applicant's registration as the proprietor of the said suit land was reinstated.

33. Following the adoption endorsement of the consent, and a decree issued on the 3rd December, 2012, the plaintiff/respondent amended his plaint dated 2nd July, 2013, now as the legal representative of the estate of **Watetu Gachigi** and filed the same on the 3rd July, 2013 wherein he prayed for the following reliefs:

a) A declaration that the Estate of **Watetu Gachigi** is the legal and absolute proprietor of L.R. No. **LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367** and thus entitled to its vacant possession;

b) An order cancelling all entries entered after entry number 1(one) of 30th August, 1988 on the register of L.R. **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367** and in particular entries number 2, 3 and 4;

c) Mesne profits from 208 at the rate of Kshs.10,000/= per annum up to the defendant will give vacant possession of L.R. **No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367**;

d) Costs of this suit with interest;

e) Any other or further relief that the court may deem fit and just to grant.

Having analyzed the issues before me and the issues arising in Nyahururu PMCC No. 108 of 2011, I find that the issues for determination is **whether the suit is res judicata** as presented by the defendant /Applicant in his application dated the 5th September, 2016.

34. Section 7 of the Civil Procedure Act is clear to the effect 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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) 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.

Explanation. —(3) 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.

Explanation. —(4) 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.

Explanation. —(5) 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.

Explanation. —(6) 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.

Section 7 of the Civil Procedure Act embodies the doctrine of res judicata or the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. This is to preserve the effect of the first judgment.

35. Res judicata does not merely prevent future judgments from contradicting earlier ones, but also prevents multiplicity of judgments. A prevailing plaintiff is thus estopped from recovering damages from the defendant twice for the same injury.

36. In the absence of such a rule there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses. The principle of Res Judicata is based on the need of giving a finality to the judicial decisions. What it says is that once a res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvas the matter again.

37. Although generally speaking the principles are well spelt out, it is important to consider the facts of each case in order to determine if a suit which has been the subject of litigation before has become res judicata. If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following by consent of the litigating parties.

38. It is not disputed either that in Nyahururu PMCC No. 108 of 2011 the Defendant/ Applicant and the Plaintiff / Respondent herein entered into a consent which consent was filed in court of competent jurisdiction and endorsed as the order of the court on the 3rd December 2012 which in essence confirmed the registration and reinstatement of the Defendant /applicant as the proprietor of the suit land. (now being contested)These issues cannot be re-litigated.

39. After perusal of the application and submissions before me, I note that ELC No. 66 of 2017 formally ELC No. 230 of 2013 is basically between the same parties, addressing the same issues over the same subject matter that are directly and substantially in issue in Nyahururu PMCC No. 108 of 2011 which was heard and finally decided by a court of competent jurisdiction.

40. Although the Plaintiff / Respondent in their submission to the application have pleaded new issues to the effect that the transfer of the suit land from the Government of Kenya to Ann Wachuka Waigango did not feature in the consent and neither did the fraudulent transfer of the suit land from Ann Wachuka Waigango to the Defendant/ Applicant feature and as such it could not be said that the issues were substantially the same in both cases.

In the case of *Hoystead and Others v Taxation Commissioner, (1925) All ER Rep 56 at p 62* the court held that:-

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact;Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted ...”

41. The Plaintiff / Respondent in their submission and while attempting to displace the doctrine of Res Judicata pointed out that the parties in Nyahururu PMCC No. 108 of 2011 and the instant suit were not the same while this could be the case yet this court finds that a suit does not cease to be *res judicata* because a new party has been added or removed to the suit that had been previously decided upon. Guidance is drawn from the decided case of *Omondi & Another -vs- National Bank of Kenya Ltd and 2 others* where it was held that:-

“Parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit.”

42. Finally the court will now look at the issue of entry of a consent between parties to a suit viz a vie after evidence has been called to prove or disprove a fact.

43. In the case of *Livingstone Kunini Ntutu v County Council of Narok & 2 others [2015] eKLR*, The 1st respondent’s advocate tried to draw a distinction between a consent judgment entered into between the parties disposing of a suit and a judgment delivered by a court. In his view, since the alleged unconstitutionality and illegality in the said consent was occasioned by the parties and their respective advocates and not by the trial judge, it was in order for the court to review the judgment.

The court of Appeal did not agree.

44. In *KENYA COMMERCIAL BANK v MUIRI COFFEE LIMITED & 3 OTHERS [2013] eKLR* the court held that in an application for review, it does not matter that the judgment was by consent and not on merit after trial. In their view, therefore, the matters in controversy in the suit became *res judicata* upon entry of the consent judgment. The 1st respondent was thus estopped from renegeing on the consent and attempting to found a new cause of action.

45. In the case of *Kamunge & Others Vs. Pioneer General Assurance Society Ltd [1977] EA 263 at pg. 265*” the court of Appeal stated as follows on the issue of *res judicata*.

“It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.”

46. The court of Appeal in the case of *Pop-in (Kenya) Ltd and 3 others vs. Habib Bank, A.G. Zurich C.A No. 80 of 1988* held that a matter will be *res-judicata* not only on points upon which the court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation.

47. In this case, as pointed out earlier on, the parties herein did enter into a consent which in essence confirmed the registration and reinstatement of the Defendant /applicant as the proprietor of the suit land. This in effect in my view meant that parties accepted the validity of the counterclaim and are therefore estopped from renegeing on that consent and their re-litigation on these issue which is manifestly *res judicata* and must therefore be laid to rest.

48. The court finds that Nyahururu ELC. NO.66 of 2017 formally ELC 230 of 2013 is *res judicata* and the learned Defendant/applicant’s preliminary objection dated 5th September 2016 is hereby allowed in its entirety with the result that Nyahururu ELC . NO.66 of 2017 formally ELC 230 of 2013 be and is hereby dismissed with costs to the Defendant/applicant’s herein.

Dated and delivered at Nyahururu this 8th day of May 2017.

M.C. OUNDO

JUDGE OF ELC NYAHURURU