



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 15 OF 2020**

**WINFRED ESTHER WANGARI MUTUGI.....PLAINTIFF**

**VERSUS**

**MARGARET WANGECHI KAHOYA.....1<sup>ST</sup> DEFENDANT**

**MARTIN KAHOYA MUTUGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The applicant/plaintiff Winfred Esther Wangari Mutugi filed the Notice of Motion dated 7<sup>th</sup> May 2020 seeking the following orders:

**(1) Spent.**

**(2) An order of inhibition do issue against the title of L.R. No. MWERUA/KAGIO/2041 (or the resultant sub-division being L.R. Numbers MWERUA/KAGIO/8576 and 8577) pending the hearing and determination of this application.**

**(3) An order of inhibition do issue against the title of L.R. No. MWERUA/KAGIO/2041 (or the resultant sub-division being L.R. Number MWERUA/KAGIO/8576 and 8577) pending the hearing and determination of the suit.**

**(4) Costs of the application be provided for.**

The application is premised on grounds apparent on the face of the said application and her supporting affidavit sworn on 7<sup>th</sup> May 2020. The applicant has annexed numerous documents to the supporting affidavit in further support of the application. The respondents filed a replying affidavit and a Notice of Preliminary Objection sworn and dated 25<sup>th</sup> May 2020 and 21<sup>st</sup> May 2020 respectively.

When the application came up for inter-parties hearing on 4<sup>th</sup> June 2020, the parties through their counsels agreed by consent to dispose of the same by affidavit evidence and written submissions.

**APPLICANT'S CASE**

The applicant deponed that his father is known as Festus Mutugi Njamumo and his paternal grandfather is Romano Njamumo Gikunju. Both have since passed on. He stated that his paternal grandfather had several properties including land parcel No. MWERUA/KAGIO/2041 which is the suit property. He stated that when his paternal grandfather died, his wife who is also his paternal grandmother, Esther Romano Njamumo filed succession proceedings in respect of the deceased's Estate. The applicant further deponed that since his father had died at the time of filing of the succession cause, the entitlement of his father being the suit land was given to and registered in the name of his paternal grandmother to hold in trust for the family of his late father. He stated that the 1<sup>st</sup> defendant had developed some friendship with his father out of which the 2<sup>nd</sup> defendant was born. He deponed that despite knowledge of his existence, the suit land was discreetly and secretly transferred to the 1<sup>st</sup> defendant to hold in trust for the 2<sup>nd</sup> defendant. He annexed a copy of the green card as **W.E.W.M – 1**. The applicant further deponed that when he came to learn of the said transfer, he sought the advice of the then District officer (D.O.) who referred him to the Land Disputes Tribunal. He stated that he filed a reference at the said tribunal whereby he named his paternal grandmother the late Esther Romano Njamumo and Margaret Wangechi Kahoya, the 1<sup>st</sup> defendant herein as respondents. He stated that upon hearing both sides, the tribunal gave an award that the suit land be shared equally by him and the 2<sup>nd</sup> defendant who are the children of his father. The alleged award was later filed at Baricho Court being Baricho LDT No. 8 of 2007 and that the award was adopted as the judgment of the Court. The applicant further deponed that pursuant to the said decree, the suit land was sub-divided into parcels No. MWERUA/KAGIO/8576 and 8577 each measuring 0.33 Hectares. He stated that when the land was surveyed on the ground, the first defendant filed ELCA No. 7 of 2017 (Kerugoya) and on 30<sup>th</sup> April 2020, the Court held that the Tribunal did not have jurisdiction to deal with titles to land and therefore set aside

the award and the subsequent decree.

## RESPONDENTS CASE

The 1<sup>st</sup> respondent with the authority of the 2<sup>nd</sup> respondent deponed and stated that the land parcel No. MWERUA/KAGIO/2041 was part of the estate of the late Romano Njamumo Gikunju and not family land as alleged by the plaintiff/applicant. She deponed that after the death of the deceased, a Succession Cause No. 53 of 2000 (Kerugoya) was filed against the Estate of the deceased and the Estate was distributed by the Administratrix Esther Romano Njamumo as set out in the schedule as shown in a copy of the confirmed grant dated 9<sup>th</sup> January 2001 which was annexed to the affidavit as **MWK 1**.

The 1<sup>st</sup> respondent also deponed that from the copy of the grant, it is clear that the plaintiff/applicant is a beneficiary of the Estate of the deceased which included numerous parcels of land, plots, motor vehicles, shares in petrol stations and other business entities including banks and bank accounts. She stated that the Estate was distributed and shared to the beneficiaries 19 years ago and that the administratrix who is the surviving wife of the deceased, Esther Romano Njamumo inherited the whole share of L.R. MWERUA/KAGIO/2041 for her absolute use as the owner. The 1<sup>st</sup> respondent stated that the applicant who was a beneficiary of the Estate inherited shares in Kerugoya Service Station. She further deponed that later and out of her own volition, the said Esther Romao transferred the suit land to her on 1<sup>st</sup> August 2006 as a gift to hold in trust for Martin Kahoya Mutugi who was a minor by then, but entitled to inherit the Estate of the deceased by virtue of being a grandchild of Romano Njamumo Gikunju and a son of Festus Mutugi Njamumo. She stated that as a result, no trust can be implied or presumed since this was distribution of land in a Succession Cause No. 53 of 2000 having been concluded and that this Court having dealt with this matter in ELCA No. 7 of 2017 and issued a judgment on 30<sup>th</sup> April 2020. In the Notice of Preliminary Objection dated 21<sup>st</sup> May 2020, the Respondent set out the following grounds:-

### **(A) RES-JUDICATA**

(1) THAT the issue relating to entitlement and ownership of L.R. MWERUA/KAGIO/2041 and/or any of its sub-divisions was dealt with by the Succession Court and by this Court in Kerugoya ELCA No. 7 of 2017. These proceedings therefore violate the provisions of *Section 7 of the Civil Procedure Act Cap. 21 Laws of Kenya (L.O.K)*.

### **(B) LACK OF JURISDICTION**

(2) THAT the Honourable Court lacks jurisdiction to entertain this matter having been dealt with by the Succession Court and this Court in ELCA No. 7 of 2017.

(3) That the proceedings are vexatious, do not lie and should be dismissed with costs.

## LEGAL ANALYSIS

It is trite law that where the jurisdiction of a Court is raised, the Court must stop further evidence and determine whether it is seized with jurisdiction before taking further proceedings. That was the holding in the case of **OWNERS OF THE VESSEL "LILLIAN 'S" VS CALTEX OIL (KENYA) LTD (1989) K.L.R 1** where it was stated thus:-

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

The Respondents in their Notice of Preliminary Objection dated 21<sup>st</sup> May 2020 raised three grounds which this Court must establish before continuation of proceedings.

### WHETHER THIS SUIT IS RES-JUDICATA

The respondents have averred that the issue relating to the suit property L.R. No. MWERUA/KAGIO/2041 and/or any of its sub-divisions was dealt with by the Succession Court in Succession Cause No. 53 of 2000 (Kerugoya) and also by this Court in ELCA No. 7 of 2017 (Kerugoya). The respondents have not annexed a copy of the proceedings and judgment of this Court in ELCA No. 7 of 2017. However, a copy has been annexed by the plaintiff/applicant in his list of documents Item No. 6. From the judgment and/or decree in ELCA No. 7 of 2017, it is clear that the matter in issue in this suit which is the ownership of the suit property was also directly and substantially in issue in the said case between the same parties. **Section 7 of the Civil Procedure Act** states 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".***

The plaintiff in this case was the Respondent in the former suit being ELCA No. 7 of 2017 while the defendant was the Appellant. The respondent did not raise a cross-appeal on the issues of trust that he is now raising in the present suit. The plaintiff ought to have raised all issues in respect of the suit property in the former suit. She cannot be allowed by law to bring issues in instalments through subsequent suit(s). the doctrine of res-judicata was succinctly put in the English case of **HENDERSON VS HENDERSON (1843 – 60) All E.R 378**

where it was observed thus:-

**“..... where a given matter becomes the subject of litigation in, or 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 under 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 contest, but which was not brought forward only because they have, from negligence, 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 the parties to form an opinion and pronounce a judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.**

The principles for res-judicata were set out by the Court of Appeal in the **case of THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION VS MAINA KIAI & 5 OTHERS C.A. CIVIL APPLICATION NO. 105 OF 2017 (NAIROBI) (2017) e K.L.R.**, where it was held:

**“Thus, for the bar of res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:-**

- (a) The suit or issue was directly and substantially in issue in the former suit.**
- (b) The former suit was between the same parties 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 formally heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.**

I agree with the reasoning of the superior Court in the above decision. The issue of ownership of the suit property was an issue before the Court in ELCA No. 7 of 2017. The issue was between the same parties and the same was heard and finally determined. The plaintiff cannot therefore re-open the very same issue as litigation must come to and.

#### **WHETHER THE COURT LACKS JURISDICTION TO ENTERTAIN THIS MATTER?**

The respondents have annexed a copy of certificate of a grant in Succession Cause No. 53 of 2000 (Kerugoya) where the plaintiff herein was a beneficiary in respect of Kerugoya Service Station. She did not raise any objection when the defendant was given the suit property land parcel No. MWERUA/KAGIO/2041 in the same succession cause. The suit land parcel No. MWERUA/KAGIO/2041 was a subject of a succession cause which was heard and finally determined. This Court therefore lacks jurisdiction to handle a matter which was heard and finally determined in a succession cause.

In the case of **JUDITH GATHONI WILLY VS GEORGE KIHARA MUCHUKI & 2 OTHERS CIVIL APPEAL No. 277 of 2004 (2010) e K.L.R.**, the Court of Appeal upheld the High Court decision to uphold a Preliminary Objection as the matter raised in the new suit was canvassed in a succession cause where the grant was already confirmed. The Court also held that if the applicant had a claim, he ought to have lodged it in the existing succession cause.

I am satisfied from the analysis above that the two issues raised by the defendants/respondents by way of a Preliminary Objection are well taken and the Notice of Preliminary Objection is therefore upheld. Suffice to add that the cases cited by counsel for the plaintiff/applicant are persuasive. In particular, the decision by my brother **Justice Karanja** (as he then was) in the High Court Case No. 101 of 2006 (Embu) is not an authority as the decision is by a Court of concurrent jurisdiction. Secondly, the said decision is also distinguishable in the sense that the issue which the plaintiff had referred to the Ndia Division Land Disputes Tribunal No. 9 of 2007 which was subsequently adopted by Baricho Resident Magistrate Court on LDT No. 8 of 2007 are issues that were a subject of a Succession Cause No. 53 of 2000 (Kerugoya) which was heard and finally determined upon the issuance of a certificate of grant on 9<sup>th</sup> January 2001. The Land Disputes lacked jurisdiction as the issues had been heard by a Succession Court which was seized with jurisdiction.

#### **CONCLUSION**

In view of all the matters above stated, the Preliminary Objection dated 21<sup>st</sup> May 2020 is upheld. Consequently, this suit and the proceedings herein are a nullity and the same is hereby struck out with costs. The Notice of Motion dated 7<sup>th</sup> May 2020 is dismissed with costs to the respondents. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 10<sup>th</sup> day of July, 2020.**

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Maina Kagio Advocate for the Plaintiff
2. Mbogo – Court clerk.