



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 182 OF 2013**

**JUSTUS NJERU GIDEON.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN NJERU MURUGU.....SUBSTITUTED DEFENDANT**

**(SUBSTITUTED IN PLACE OF LEAH RUGURU PETER AS ADMINISTRATOR OF  
THE LATE PETER NYAGA MUCHUNGURI)**

**GAKUNDU FARMERS CO-OPERATIVE SOCIETY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff filed this suit on 19<sup>th</sup> July 2012 seeking orders that the Land Registrar Embu do cancel the sub-division of the parcel No. NDANDORI/KIRIARI/35 (herein the suit land). The basis of the claim was that the plaintiff having purchased five (5) acres out of the suit land from one MATHEW NJAGI MACHARIA and consent having been given by the Land Control Board vide agenda

No. 31/70 and the suit land having been divided into two portions being NGANDORI/KIRIARI/1763 and 1764 each measuring five acres, one PETER NYAGA subsequently obtained consent to sub-divide the same suit land into NGANDORI/KIRIARA/1947 and 1946. Land parcel No. NGANDORI/KIRIARA/1946 was later transferred to CYRUS GITUAI and later to the 2<sup>nd</sup> defendant while parcel No. NGANDORI/KIRIARI/1947 was sub-divided into parcels No. 3503, 3504, 3506, 3507, 3508, 3509 and 3510 which are in the names of PETER NYAGA who proceeded to demolish plaintiff's house and evicted him from the parcel No. NGANDORI/KIRIARI/1763.

Both defendants filed their defences with the 1<sup>st</sup> defendant denying the existence of the suit land adding that even if the plaintiff purchased five (5) acres from it, he did not purchase it from her late husband PETER NYAGA.

The 2<sup>nd</sup> defendant on its part pleaded that parcel No. NGANDORI/KIRIARI/1946 was registered in the names of CYRUS GITUAI in 1988 who had purchased it from the previous owner for

valuable consideration and the 2<sup>nd</sup> defendant acquired the same parcel in 1989 by way of exchange with parcel No. NGANDORI/KIRIARI/2050 which it transferred to the said CYRUS GITUAI. It is also pleaded that at the time, the plaintiff was not in occupation of the said land.

On 3<sup>rd</sup> June 2015, JUSTUS NJERU GEDION (the plaintiff/applicant herein) filed this application citing the provisions of **Order 1 Rule 10 and Order 24 Rule 4 and 7 of the Civil Procedure Rules** seeking

orders that JOHN NJERU MURUGU be substituted in place of the 1<sup>st</sup> defendant and that this suit be revived. The same is supported by his affidavit in which he depones, inter alia, that the said 1<sup>st</sup> defendant died on 30<sup>th</sup> December 2012 and the said JOHN NJERU MURUGU obtained a grant of letters of administration in respect of the Estate on 27<sup>th</sup> January 2015 in Succession Cause No. 223 of 2011.

That application is opposed and in his replying affidavit, the

intended substitute JOHN NJERU MURUGU has deponed that the application is bad in law and defective and the delay in bringing the same is in-ordinate. Further, he has deponed that this suit is Res-judicata in view of Nairobi High Court Civil Appeal No. 88 of 1976 and a Preliminary Objection would be raised at the earliest opportunity. And in a further replying affidavit, the said JOHN NJERU MURUGU deponed that there was also EMBU RESIDENT MAGISTRATE'S COURT CASE NO. 29 OF 1976 which led to HIGH COURT CIVIL APPEAL CASE NO. 88 OF 1976 and in which the plaintiff was a party and the same subject matter was in dispute. This Court should therefore put to an end this litigation which is more than three (3) decades old in our Courts.

That Preliminary Objection is the subject of this ruling and I have considered it together with the parties' affidavits, the annexures thereto and counsels submissions.

My view of this matter is that even before I consider the issue

as to whether or not the suit is res-judicata, I must first deal with the issue whether or not the same can be revived and the deceased 1<sup>st</sup> defendant be substituted with JOHN NJERU MURUGU. That is because, unless the suit is revived and the substitution done, there would be no suit before me and consequently, in the absence of a suit this Court cannot purport to investigate whether the same is res-judicata.

On the issue of substitution of the deceased 1<sup>st</sup> defendant, it is evident that she died on 30<sup>th</sup> December 2012. She had been sued as the administrator of the Estate of her late husband PETER NYAGA MUCHUNGURI who died on 1<sup>st</sup> February 2001. The said JOHN NJERU MURUGU was therefore granted letters of administration in respect of his Estate on 27<sup>th</sup> January 2015 in Embu High Court Succession Cause No. 223 of 2011. The plaintiff has deponed that the beneficiaries of the 1<sup>st</sup> defendant's Estate had refused to file succession until he served them with citations a copy of which is annexed.

**Under Order 24 Rule 491) of the Civil Procedure Rules**, where a defendant dies and a cause of action survives, the Court, on application, shall order the legal representative of the deceased defendant to be made a party to the suit. That application has to be made within one year of the death of the deceased defendant otherwise the suit abates. However, the plaintiff can apply for the revival of the abated suit if he can show that he was prevented by "**sufficient cause**" from continuing the suit – see **Order 24 Rule 7 (2) of the Civil Procedure Rules**. The deceased 1<sup>st</sup> defendant died on 30<sup>th</sup> December 2012 and the plaintiff has deponed that the beneficiaries had refused to take out letters of administration in respect of the Estate until he moved the High Court in Embu Succession Cause No. 223 of 2011 and the grant was issued to the said JOHN NJERU MURUGU on 27<sup>th</sup> January 2015. This application was thereafter filed on 2<sup>nd</sup> June 2015. That, in my view, is a sufficient cause to warrant the revival of this suit and also the substitution of the said JOHN NJERU MURUGU in place of the deceased 1<sup>st</sup> defendant.

I therefore find that the Notice of Motion filed herein on 3<sup>rd</sup> July 2015 seeking the revival of the suit and the substitution of the deceased 1<sup>st</sup> defendant with JOHN NJERU MURUGU to be meritorious and I allow it with no order as to costs.

I shall now deal with the Preliminary Objection that this suit is res-judicata.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following terms:-

***“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”***

It is the 1<sup>st</sup> defendant’s case that this suit is res-judicata in view of the following two previous cases:-

- 1. EMBU RESIDENT MAGISTRATE’S COURT CASE NO. 29 OF 1976.**
- 2. NAIROBI HIGH COURT CIVIL APPEAL CASE NO. 88 OF 1976**

Ms Thungu for the plaintiff has submitted that res-judicata cannot apply because the issue in NAIROBI HIGH COURT CIVIL APPEAL CASE NO. 88 OF 1976 related to the eviction of the defendant who is the plaintiff in this suit from parcel of land No. NGANDORI/KIRIARI/1946 while this suit deals with the claim for cancellation of sub-divisions of land parcel No. NGANDORI/KIRIARI/35 i.e. the suit land. To determine whether or not this suit is res-judicata, I have looked at the decree and judgment in the two previous suits i.e EMBU RESIDENT MAGISTRATE’S COURT CASE NO. 29 OF 1976 and NAIROBI HIGH COURT CIVIL APPEAL CASE NO. 88 OF 1976 which I shall refer to herein as the Embu and Nairobi cases respectively. I am satisfied from the decree and judgment that the Embu and Nairobi cases involved the plaintiff herein (as defendant) and PETER NYAGA MUCHUNGURI whose Estate is represented by the 1<sup>st</sup> defendant herein. While the decree in both the Embu and Nairobi cases relate to the eviction of the plaintiff herein from land parcel No. NGANDORI/KIRIARI/1946, it is clear from my reading of the two judgments in both cases that the issue of the Land Control Board consent that led to the sub-division of the parcel No. NGANDORI/KIRIARI/35 was canvassed and a decision made thereon. In the Embu case, J.L.A Osiemo Ag. Resident Magistrate (as he then was) addressed that issue in his judgment delivered on 8<sup>th</sup> September 1976 as follows after making a finding that the Embu Land Control Board gave two consents:-

***“Here is a Land Control Board known as Embu North Land Control Board which sat and gave the consent on the same piece of land NGANDORI/KIRIARI/35 belonging to one NJAGI MACHARIA. In the first place consent was given to one NJIRU who was given 5 acres and he paid Ksh. 4013/50. This was in 1971. He was given vacant possession of his piece of land built his home there and had developed it since 1971. He paid Ksh. 400/= for the sub-division and registration and was issued with official receipt No. 9367501 but for un-known reason the Land office officials did not carry out their duty. The second consent was given to one Peter Nyaga Muchunguri who was given 2.43 hectares and paid Ksh. 13.000/=. The second consent was given around 8<sup>th</sup> January 1976. Now the said Peter Nyaga Muchunguri has filed this suit to evict Njiru Gideon from his home where he lived since 1971. Now the question is how valid are these two consents. The Court is of the opinion that the Embu North Land Control Board gave the second consent due to concealment of material facts in the application form”***

J.L.A Osiemo (Ag. Resident Magistrate as the then was) then proceeded to make the following orders:-

***“I declare the purported second consent given by the Embu North Land Control Board dated 8<sup>th</sup> January 1976 in connection to application I.C.R 10/76 dated 30<sup>th</sup> December 1975 a nullity and so order”***

The Court then dismissed a claim seeking the eviction of the plaintiff herein (the defendant in the Embu case) from his home which he had put up on the portion of land purchased from the suit land.

The matter went on appeal which was heard in the Nairobi case before A.H. Simpson J. (as he then was) who in allowing the appeal and ordering the eviction of the plaintiff (Respondent herein) also addressed himself on the issue of the consent in the following words:-

***“Mr. Rugaita, appearing for the appellant argued a number of grounds of appeal with clarity and fluency. The respondent who was un-represented could only narrate the facts. My sympathy lay with the respondent as obviously did that of the magistrate. He found that the second consent of the Land Board was due to concealment of material facts and he declared that consent a nullity. This he was not empowered to do (see Section 8 of the Land Control Act – Cap 302”***

The Judge went on to add as follows:-

***“Even if the consent could properly be nullified, the Land in question has already been registered in the name of the appellant Mr. Rugaita referring to Section 27 of the Registered Land Act Cap 300 submitted correctly, I think, that the appellant was now vested in absolute ownership and he was therefore entitled to an eviction order”***

It is therefore clear from the judgments in both the Embu and Nairobi cases that the issues regarding the two consents issued by the Embu North Land Control Board that led to the sub-division of the suit land were previously canvassed in those two cases and decisions made on them both in the Magistrate’s Court and the High Court. It is that same issue that the plaintiff seeks to litigate in this suit almost forty (40) years from that date on 28<sup>th</sup> July 1978 when A.H. Simpson J. (as he then was) delivered his judgment in NAIROBI HIGH COURT CIVIL APPEAL NO. 88 OF 1976. That cannot be permitted by the doctrine of res-judicata whose main object is to bar the multiplicity of suits by parties or those acting under them over the same subject matter and thereby guarantee a finality to litigation.

As indicated above, Ms Thungu for the plaintiff made a spirited submission that the Courts in the Embu and Nairobi cases only dealt with the issue of eviction while this case relates to the cancellation of the sub-division of the parcel No. NGANDORI/KIRIARI/35 using a null consent. I have already found and quoted from the proceedings in both the Embu and Nairobi cases that the issue of the two consents was addressed by both Courts. Res-judicata also covers matters that should have been brought up in previous litigation between the parties. In ***HENDERSON VS HENDERSON (1843-60) ALL E.R 378*** which has been followed in our jurisdiction, the Court held as follows:-

***“..... where a given matter becomes the subject of litigation in, and 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 properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time”*** emphasis mine

See also ***GREENHALGH VS MALLARD 1974 2 ALL ER 255***. In our jurisdiction the Court of Appeal in ***POP-IN KENYA LTD VS HABIB BANK C.A CIVIL APPEAL NO. 80 of 1988 (NBI)*** stated that parties must bring before the Court, exercising due diligence, all the points that they could take and that points not taken then cannot be taken

again as that would amount to an abuse of the process of the Court.

Even assuming, which I have already found is not correct, that the Courts in the Embu and Nairobi cases did not deal with the issue now raised in this suit, that issue which revolves around the consents issued by the Embu North Land Control Board could have been raised in the previous cases and in the circumstances, the plea of res-judicata is well founded and cannot be resisted.

In the circumstances therefore, this Court finds that this suit is caught up by the provisions of ***Section 7 of the Civil Procedure Act*** for being res-judicata.

The same is accordingly struck out with costs to the substituted 1<sup>st</sup> defendant.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**

COURT: Ruling delivered, dated and signed in open Court this 4<sup>th</sup> December, 2015

Mr. Miano for Ms Thungu for Plaintiff present

Ms Kiragu for Mr. Mugambi Njeru for 1<sup>st</sup> Defendant present

Mr. Kathungu for 2<sup>nd</sup> Defendant – absent.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**