



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

**AT NAIROBI**

**ENVIRONMENT AND LAND CASE NO. 411 OF 2013**

**LOISE MUMBI GACHINGA.....1<sup>ST</sup> PLAINTIFF**

**BERNARD NGANGA GACHINGA.....2<sup>ND</sup> PLANTIFF**

**-VERSUS-**

**STEPHEN KIIRU MUGO.....1<sup>ST</sup> DEFENDANT**

**ALICE WAIRIMU NGIGI.....2<sup>ND</sup> DEFENDANT**

**RULING:**

The Defendants/Applicants have brought this Notice of Motion dated 23/4/2013 under **Section 7 of the Civil Procedure Act Cap 21** and **Rule 6 of the Civil Procedure Rules 2010** for orders that the Plaintiff dated and filed on 20<sup>th</sup> March 2013 be struck out. That cost of this application be provided for.

The application was premised on these grounds.

- i. *That the Plaintiff and suit are res-judicata having previously been filed in HCCC suit No. 824 of 1981.*
- ii. *That the Plaintiff's claim is thus expressly barred by statute.*
- iii. *The Plaintiff failed to lodge an appeal against the decision of the court in HCCC No. 824 of 1981.*
- iv. *That the said Plaintiff as well as the suit is therefore an abuse of the Court process.*

The application was also supported by the annexed affidavit of **Stephen Kiiru Mugo** in which he averred that the Plaintiff and administrators of the estate of late **Gathunga Ichura** have failed to disclose that a similar suit was filed against their father at the High Court of Nairobi, HCC No. 824/1981 by their mother, the late **Salome Wairimu Mugo** seeking similar orders. Further, that the said suit was finalized in favour of **Salome Wairimu's** wherein the Plaintiff's father was ordered to vacate the suit property as per **annexture SKM1**.

Apparently, the Plaintiff's father did not appeal or seek review of the said ruling thus barring any further litigation on the same issues either between themselves or any other person holding equal representations. The deponent further averred that the suit relating to the same suit property between persons holding equal rights pursuant to the letters of Administration and raising similar issues and prayers cannot be

litigated upon as it is res-judicata.

Therefore the Ruling that ordered the removal of the Plaintiffs' father from the suit property brought a closure on the litigation of the same issues on the suit property between the Plaintiffs' and the defendants and this court was not open to the Plaintiff to bring a fresh suit based on the same facts.

It was also deponed that the court would be acting in vain since the title does not exist having been subdivided with the issuance of new individual titles to persons not party to this suit. This was evident by annexures SKM2, copy of green card.

The application was vehemently opposed by **Loise Mumbi Gachinga**, one of the Plaintiff herein.

She admitted that indeed one **Salome Wairimu Mugo** had filed a suit against her late husband's seeking inter-alia orders of eviction of her family from the suit land in **HCCC No. 824 of 1981** as per annexure LMG1. She further stated that the suit that **Salome Wairimu Mugo** in **HCCC No. 824 of 1981** had filed against her late husband was heard ex-parte. However, the Respondent's husband moved to court to have the orders issued ex parte set aside as per LMG3.

That the said matter was therefore not heard and determined on merit and it is therefore not res-judicata as alleged by the Defendants. That the matter has not been conclusively dealt with and so cannot form the basis upon which the current application to strike out the suit can lie. The Plaintiffs/Respondents prayed for dismissal of the Defendants application.

The parties herein filled their written submissions which I have considered.

In their submissions, the Defendants retaliated that the subject matter herein was litigated in HCCC No. 824 of 1981 and it involved the same parties and so it is res-judicata. That this suit is an abuse of the court process since the claim was brought to an end 32 years ago. The Defendants further submitted that the orders sought relate to non-existent titles which do not exist having undergone subdivision and registered in the names of persons not party to this suit.

The Plaintiffs'/Respondents also put in their written submissions. They denied that the instant suit is res-judicata. It was submitted that the applicant needed to establish that,

- i. ***The matters in issue are identical.***
- ii. ***The title is the same***
- iii. ***There is concurrence of jurisdiction.***
- iv. ***Finality of the previous decision.***

The Plaintiffs submitted that the proceedings in **HCC 824/1981** were taken ex-parte and judgement was entered in favour of the Defendants. However the Plaintiffs family herein sought to have said ex parte proceeding set aside which was done as per **annexure LMG3**.

The Plaintiffs further submitted that for res-judicata to arise the issue must have been heard and decided on merits. This was the position held in the case of **Samuel Kiiru Gitau Vs John kamau Gitau, Nairobi HCCC No. 1249/98**, where J. Visram held that:-

***“ For a matter to be res-judicata it must be one on which the court had previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been heard and finally decided”. Notwithstanding that the former suit was disposed of by a decree or award”.***

The Plaintiffs/Respondents prayed for dismissal of the applicants' application dated 23/4/2013. Section 7 of the Civil Procedure Act deals with the issue of res-judicata . It states as follows:-

***“No court shall by 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 their claim, litigating under the same title, in a court competent try my 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 defendants herein claimed that the suit herein is res-judicata as the same subject matter was litigated in HCC 824/1981 where the suit was decided in favour of one **Salome Wairimu Mugo**. There is annexure SW1 to that effect. However, the Plaintiffs / Respondents have attached **LMG 3** which is an order of the court that set aside the Judgement entered on 20<sup>th</sup> June, 1981 and the Defendants was allowed to file his defence within 10 days from the date of taxation. The Defendants /Applicants did not dispute that fact.

The whole proceedings in HCCC No 824 /1981 were not attached to the Defendants/Applicants application and this court cannot hold with certainty that the said suit was heard and finalized. In the case of **Abok James Odera Vs John Patrick Machira Civil Application No. 49 of 2001**, J, Keiwua held that to rely on a 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 again in a fresh suit.***

I have considered the parties in HCC 824 /1981 and I have noted that they are different to the parties herein. Again in the case of **Caneland Ltd Civil App.No. 20 of 2000** the Court of Appeal held that:-

***“For res-judicata to arise the issue must have been heard and decided on merit otherwise the plea cannot be sustained “.***

As I noted earlier, I did not have the benefit of going through the whole proceedings in HCCC 824 /1981. I do not know if the matter was heard and decided on merit. It is trite law that res-judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits. ( See the **Tea Gee Electrics and Plastics Co.Ltd Vs Kenya Industrial Estate Limited, Civil Appeal No. 333 of 2001**).

Having considered the reasons for and against the instant application, I find that the applicant has not established that this suit is res-judicata and that it should be struck out. As was held in the case of **D.T Dobie & Co.Ltd Vs Muchina ,**

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing reasonable cause of action or being otherwise an abuse of the process of the court”.***

The applicants have also failed to demonstrate that this case is an abuse of the process of court. For the above reasons, the court declines to allow the applicants/Defendants’ application dated 23/4/2012. The same is dismissed with costs to the Plaintiffs/Respondents.

Dated, Signed and delivered this **14<sup>th</sup> day of February, 2014**

**L. N. GACHERU**

NVI.  
0.

Before L N Gacheru Judge

Court Clerk Zipporah

Mr Gakaria for Plaintiffs/Respondents

Mr Mbichire for Defendants/Applicants/Absent

**L .N. GACHERU**

10045.

0.

Ruling read in open court in the presence of Mr Gakaria for Plaintiffs / Respondents and absence of Mr. Mbichire for Defendants/Applicants.

**L N GACHERU**

NVI.

0.

**Mr. Gakaria:** May we take a mention date for directions on our earlier application dated 3/06/2013.

**L N GACHERU**

10045.

Mention date to be taken in the registry or Plaintiffs to fix the application for hearing and serve the respondents with the hearing notice.

**L .N. GACHERU**

NVI.