



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 783 OF 2013

MICHAEL GACHOKI GICHERU PLAINTIFF

VERSUS

JOSEPH KAROBIA GICHERU DEFENDANT

RULING

By his plaint filed herein on 30th October, 2013, the plaintiff who is a brother to the defendant pleaded that the defendant though registered as the proprietor of the parcel of land known as L.R No. INOI/THAITA/160 measuring 5 acres holds the same in trust for himself and the plaintiff since the said land belonged to their late father. The plaintiff therefore sought a declaration that the defendant holds the said land in trust for both of them and an order that the plaintiff is entitled to 2 acres out of the same.

Simultaneously with the filing of this suit, the plaintiff/defendant moved the Court by way of a Notice of Motion under **Order 40 Rule 1 and 2 of the Civil Procedure Rules** seeking injunctive orders to restrain the defendant, his agents, servants and or employees from selling, disposing, transferring, charging, leasing, sub-dividing or in any way interfering with the said land pending the hearing of this suit.

The defendant/respondent's reaction was to file a Preliminary Objection in which he argued that the entire suit and application are bad in law and the suit is time barred. He also filed a Replying affidavit denying that the land in question belonged to their late father adding that this dispute has been litigated all the way to the Court of Appeal.

When counsels for the parties appeared before me on 18th February, 2014, it was argued that submissions be filed on the Preliminary Objection. Both parties have done so and that is the subject of this ruling.

It is the submissions of the defendant that this suit is statute barred as it ought to have been brought before the expiry of 12 years from the time the cause of action arose and this suit having been filed some 24 years later is out of time. The issue of res-judicata is also raised since the dispute between these same parties was the subject of Court of Appeal Civil Appeal No. 161 of 2011 at Nyeri.

On issue of the suit being time barred, the plaintiff in his pleadings in paragraph 5 states as follows:-

“The defendant holds L.R NO. INOI/THAITA/160 in trust for himself and the plaintiff as the same belonged to them (sic) late father prior to the land demarcation process”

The plaintiff goes further in paragraph 6 to plead that the defendant has always been unwilling to sub-divide the land and give him two (2) acres out of the five (5) acres. From those pleadings, the plaintiff is clearly seeking to recover from the defendant trust property and is alleging that there is a breach of trust by the defendant who is converting the land subject matter of this suit for his own use. **Section 20 (1) of the Limitation of Actions Act** reads as follows:-

“None of the periods of Limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action.

(a) In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use”

Sub-section 2 of the same section reads as follows:-

“Subject to Sub-section (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period or limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date of which the right of action occurred

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”.

In my view, having looked at **Section 20 (1) and (2) of the Limitation of Actions Act** as well as the pleadings herein, this suit falls under **Section 20 (1) of the Limitation of Actions Act** for which there is no period of limitation. See also the case of **STEPHENS AND SIX OTHERS VS STEPHENS AND ANOTHER 1987 K.L.R 125** where the Court of Appeal held that the period of limitation prescribed in the **Limitation of Actions Act Section 20 (1) (b)** does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use. Whether in fact the plaintiff herein will be able to establish that he is the beneficiary of any trust or that the defendant has converted trust property into his own use is of course a matter for trial to be proved by the evidence that will be adduced by the parties. As for now, the Court can only go by the pleadings and it is clear to me that being a claim for breach of trust, this claim is not therefore time barred. The Preliminary Objection is dismissed.

I have also considered whether this suit is res-judicata in view of the fact that there have been previous litigation by the same parties right from the Kirinyaga Land Disputes Tribunal and finally in the Court of Appeal at Nyeri in Civil Appeal No. 161 of 2011.

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”.

From the above, it is clear that five essential elements must exist before a claim of res-judicata can successfully be raised and these are:-

1. ***The matter directly and substantially in issue in the subsequent suit must be***

the same matter which was directly and substantially in issue in the former suit

2. *The former suit must have been between the same parties or parties under whom they claim*
3. *The parties must have litigated under the same title*
4. *The Court which decided the former suit must have been competent, and lastly,*
5. *The former suit must have been heard and finally decided by the Court*

As stated above, the parties' dispute over the land subject of the case was heard by the Kirinyaga Central Division Land Dispute Tribunal which ordered that the plaintiff be given 2 acres out of that land and the defendant to retain 3 acres. The Tribunal found that the defendant was a trustee. The defendant appealed to the Appeals Tribunal for Central Province which dismissed the appeal. A further appeal to the High Court was dismissed but the Court of Appeal set aside the decision of both the High Court and the Tribunals on ground of lack of jurisdiction on the part of the Land Disputes Tribunal and Appeals Committee.

It follows therefore that the determinations by both the Kirinyaga Land Disputes Tribunal and the Appeals Committee at Nyeri cannot be raised to sustain a claim of res-judicata because both Tribunals had no jurisdiction to determine an issue relating to registered land and also an issue of trust which were central in the dispute between the two parties. It is now settled that the Land Dispute Tribunal had no jurisdiction to determine issues relating to title to land – see **JOHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER KISUMU CIVIL APPEAL NO. 250 OF 2002.** Therefore what transpired before both the Kirinyaga Central Division Land Disputes Tribunal and the Appeals Committee at Nyeri cannot be invoked to sustain a claim for res-judicata as both bodies had no jurisdiction to determine the dispute between the parties.

And with regard to the proceedings both in the High Court and Court of Appeal, the issues that were raised there were whether in fact the Kirinyaga Central Division Land Disputes Tribunal and the Appeals Committee at Nyeri had the requisite jurisdiction over the dispute. The two Courts did not “**hear**” and “**finally**” determine the dispute which is a requirement before res-judicata can apply. It therefore follows from the above that this suit is not res-judicata.

From the foregoing, is it clear that this suit is neither time barred nor res-judicata.

The Preliminary Objection by the defendant is accordingly dismissed with costs.

B.N. OLAO

JUDGE

10TH OCTOBER, 2014

10/10/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Chomba for the Plaintiff – present

Mr. Wachira for Munene for Defendant – present

COURT: Ruling delivered this 10th day of October, 2014 in open Court

Mr. Chomba for Plaintiff present

Mr. Wachira for Munene for Defendant present

B.N. OLAO

JUDGE

10TH OCTOBER, 2014