



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 448 of 2004**

**JOSEPH KARANJA MUKUNA.....PLAINTIFF**

**VERSUS**

**GABRIEL MBURU MAINA.....DEFENDANT**

**RULING ON PRELIMINARY OBJECTION**

This Civil Suit No. 448 of 2004 (“this suit”) was filed by way of Plaint dated 3<sup>rd</sup> May 2004 and filed on the same date in which the Plaintiff therein, one JOSEPH KARANJA MUKUNA sued three defendants namely GABRIEL MBURU MAINA, WANGECHI GICHEHA and MARK OYOO. In the said Plaint, he stated that he is the registered proprietor of L. R. No. LOC 16/Kigoro/1029 (“the suit property”) and that the Defendants on 26<sup>th</sup> April 2004 without any colour of right or lawful justification invaded the suit property and hived off 6 acres therefrom. The Plaintiff further stated that on 29<sup>th</sup> May 2004, the 2<sup>nd</sup> Defendant buried the body of her late husband one JOHN GICHEHA GACHEGE on the suit property. He prayed for judgment to be entered against the Defendants for *inter alia*,

- a) A declaration that the Defendants are trespassers on the suit property.
- b) A permanent injunction against the Defendants their agents and servants from trespassing, disposing or otherwise interfering with the Plaintiff’s peaceful possession of the suit property.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Notice of Preliminary Objection dated 20<sup>th</sup> February 2012 on the ground that the suit offends Section 7 of the Civil Procedure Act since this matter is *Res Judicata* having been adjudicated in D. O. Case No. 47 of 2000 from which no appeal arose. They prayed for the case to be dismissed on that ground with costs.

The Notice of Preliminary objection was supported by the supporting Affidavit of WANGECHI GICHEHA, the 2<sup>nd</sup> Defendant, in which she averred as follows:-

- THAT she has a long litigation history with the Plaintiff beginning with D. O. Case No. 47 of 2000 (the “Other Suit”) wherein the same Plaintiff JOSEPH KARANJA MUKUNA has sued her late husband JOHN GICHEHA GACHEGE as a defendant and she substituted him upon his demise.
- THAT the actions the Defendants in this suit are alleged to have been committed were facilitated by the Decree and Orders emanating from the Other Suit.
- THAT this Court delivered a ruling on 2<sup>nd</sup> July 2004 in this suit in which it found that indeed there were related proceedings to which no appeal was filed.

- THAT the Decree in the other suit which is still a valid Court Decree clearly stated that the 2<sup>nd</sup> Defendant's late husband JOHN GICHEHA GACHEGE should get 6 acres hived out of the Suit Property and there is no pending appeal.
- THAT in fact the said Decree was effected a long time ago and the 6 acres hived out of the Suit Property was transferred to the 2<sup>nd</sup> Defendant as evidenced by the attached copy of the Title Deed.
- THAT the Plaintiff filed an application to set aside the Decree in the other suit and the application was dismissed on 12<sup>th</sup> March, 2000.

In response hereto, the Plaintiff filed his Replying Affidavit dated 28<sup>th</sup> June, 2012 in which he averred as follows:-

- THAT it was true that the 2<sup>nd</sup> Defendant's late husband JOHN GICHEHA GACHEGE was awarded 6 acres out of the Suit Property but that the Respondents cannot derive any right of interest therefrom for the following reasons.

- i. The Decree Holder is deceased and no letters of Administration have been taken out of his estate so the Respondents cannot purport to gain any rights of interest out of his estate.
- ii. The condition precedent to executing the Decree in the other other suit as set down by Hon. Mr. Justice Aganyanya was never fulfilled by the Decree Holder before he died.
- iii. The Decree in the other suit is more than one year old and cannot be executed without following the procedure set out by the law.

In response, the 2<sup>nd</sup> Defendant swore a further Affidavit on 24<sup>th</sup> January 2013 in which she stated as follows:-

- THAT this suit is *res judicata* because there already exists a Decree dated 13<sup>th</sup> November 2000.
- THAT the Plaintiff in this suit never appealed against the Decree on the other suit.
- THAT in satisfaction of the Decree in the other suit 6 acres hived out of the suit property was transferred to Defendant and his beneficiaries a long time ago.

Both the Plaintiff and the Defendants in this suit filed their written submissions which I have read and given consideration to.

Let us turn attention the doctrine of *Res Judicata*, specifically the circumstances under which *res judicata* arises. Section 7 of the Civil Procedure Act provides 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”**

This is to say that for the operation of the doctrine of *res judicata*, the following broad minimum conditions have to be satisfied:-

- a) There has to be a former suit or issue decided by a competent court;
- b) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

c) The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

Let us now turn attention to this suit and draw up a comparison between this suit and the other suit to ascertain whether the three conditions list above are satisfied:-

a) Was there a former suit or issue decided by a competent court? I find that the answer to this question is in the affirmative. There is admission by all parties to this suit that Judgment was entered in the Other Suit by the Honourable Mr. Justice Aganyanya.

b) Was the matter in dispute in the former suit between the parties directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar? Indeed, the subject matter of this suit, which is the 6 acres hived out of the suit Property and transferred to the 2<sup>nd</sup> Defendant in satisfaction of a decree is exactly the same subject matter litigated upon in the Other Suit. Clearly therefore, this Second condition is met.

c) Are the parties in the former suit the same parties or parties under whom they or any of them claim, litigating under the same title? It is a known fact that the Plaintiff in this suit and the other suit are one and the same person. Further, the 2<sup>nd</sup> Defendant in this suit claims under the former defendant in the Other Suit, he having been her husband before he died. Accordingly, I also find that this condition has been satisfied.

In short, the three conditions set out above have all been met and therefore this suit is indeed *res judicata*.

In this respect, I would do no better than to quote the case of *Edwin Thuo v. Attorney General and another Nairobi Petition No. 212 of 2012 (unreported)* where the court stated:-

***“The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff is in the second suit trying to bring before the Court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”***

In the light of the foregoing, I find that this suit is indeed *res judicata* and is an abuse of the Court process. This suit is hereby struck out with costs to the Respondents.

**SIGNED AND DELIVERED AT NAIROBI ON THE 10<sup>TH</sup> DAY OF MAY 2013**

**MARY M. GITUMBI**

**JUDGE**