



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 11 OF 2018

NAOMI NJERI GAKURU.....APPELLANT

-VERSUS-

JOHN GITHAIGA MACHARIA ...RESPONDENT

Being an Appeal against the Ruling of Hon Ekhubi B M Senior Resident Magistrate at Othaya Magistrate's Court ELC No. 1 of 2018 delivered on the 10th August 2018)

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard by *Hon Ekhubi B M, Senior Resident Magistrate in the Magistrate's Court at Othaya in Environment and Land Case No. 1 of 2018* where the learned trial Magistrate, dismissed the Appellant's suit on a Preliminary Objection for being Res Judicata Nyeri ELC No. 227 of 2013.
2. The Appellant, a laywoman, being dissatisfied with the Ruling of the trial Magistrate filed the present Appeal on the grounds raised in her Memorandum to wit;
 - i. That the learned trial Magistrate erred in law in upholding that the suit was res judicata by failing to appreciate that the previous suit had not determined the issue in dispute on merit.
 - ii. The learned trial Magistrate erred by failing to appreciate that the Appellant had acquired the legal capacity to institute the suit.
 - iii. The learned trial Magistrate erred in law by though (sic) appreciating the principles of res judicata, the circumstance of the suit of social principles were not applicable and the issue in dispute could only be determined by hearing evidence.
3. The Appellant thus sought that the Appeal be allowed and for orders that the suit to be heard.
4. The Court issued its directions on 15th July 2020 to the effect that the Appeal be disposed of by way of written submissions wherein only the Appellant complied, the Respondent having had refused to receive service.
5. The Appellant's written submissions dated 13th August 2020 were to the effect that the suit was dismissed by the learned Magistrate in a Ruling delivered on 10th August 2018 on a Preliminary Objection filed by the Respondent for reasons that it was Res Judicata by virtue of a Judgment that had been delivered on 28th October 2016 in Nyeri ELC No. 227 of 2013 when the matter was dismissed because she had not obtained Letters of Administration and therefore had no legal capacity on the issue of marriage.
6. That subsequently she had obtained Letters of Administration on 15th February 2018 in Othaya Senior Resident Magistrates Court Cause No. of 2018 prior to filing the impugned suit and now had capacity to sue so as to enable the Court to determine the matters in dispute.
7. That the trial Magistrate had erred by upholding the Preliminary Objection while relying on a Mombasa Case No 1730 of 2013 whose origin was not known to her, in dismissing her suit.
8. Since there was no response from the Respondent, the Court shall decide the matter based on the Appellant's uncontroverted written submissions and the Memorandum of Appeal.

Determination.

9. I have considered the record, the Ruling by the trial Magistrate, the written submissions by the Appellant as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence. (*See Seascales Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*).

10. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

11. By a Plaint dated 20th February 2018, the Appellant herein sought for;

- i. A declaration that the registration of the Defendant/Respondent as the proprietor of LR Chinga/Kagongo/745 was in trust for the deceased
- ii. An order that LR Chinga/Kagongo/745 be transferred to plaintiff/Appellant for herself and the deceased's children
- iii. Costs of the suit to be provided for and any other better relief that the Court may deem fit.

12. Subsequently and before the matter could be heard the Respondent herein filed his Notice of Preliminary Objection dated 11th May 2018 raising an objection to the effect that the suit amounted to an abuse of the Court process and was a waste of judicial time and the same should be struck out with costs for reasons that the Appellant had not come to Court with clean hands as the dispute raised in the suit had already been heard and settled by a Court of competent jurisdiction thus making the subsequent suit res judicata.

13. From a look at the impugned Ruling dated and signed on the 10th of August 2018 by the Senior Resident Magistrate *Hon Ekhubi B M*, there is a glaring error on its heading to the effect that the same relates to Senior Resident Magistrates Court at **Mombasa** in the Magistrate Civil Suit No. **1730 of 2013**. I have however noted the contents of the Ruling relate to the suit filed by the Appellant in Nyeri ELC case No. 227 of 2013 as well as in the subsequent suit in Othaya ELC No. 1 of 2018.

14. I have also gained sight of the Judgment delivered by my brother judge in Nyeri ELC No. 227 of 2013 to which the Appellant had sued the Respondent claiming that since she had been married to his deceased brother, Robinson Kairu Gichu under kikuyu customary law, the Respondent, who held the suit parcel of land No. LR Chinga/Kagongo/745 in trust for his brother ought to transfer the same to her now that he was deceased.

15. In his verdict the Hon Judge had found that the Appellant had no locus standi to file the suit against the Respondent as she had not obtained a grant. The Court further found that the Appellant had also not proved her marriage to the deceased and was therefore not a legal representative of his estate. The Appellant's suit was dismissed with no orders as to costs. It was thus based on this Court's finding, that trial learned Magistrate's formed the basis of the Ruling of the 10th August 2018.

16. I find the matters that stand out for determination herein being twofold.

- i. Whether there is a serious or arguable Appeal on the issue of the error in the heading the body.
- ii. Whether the trial learned Magistrate erred in law in upholding that the subsequent suit was res judicata *Nyeri ELC No. 227 of 2013*

17. On the first issue for determination, the Court finds that Section 99 of the Civil Procedure Act states as follows:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

18. Section 100 of the Civil Procedure Act on the other hand, provides:-

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

19. The Court of Appeal in the case of **Leonard Mambo Kuria v Ann Wanjiru Mambo [2017] eKLR** held as follows:

The purpose of amendment is to **“determine the real question or issue raised by or depending on the proceeding” and it can be done**“at any time” which must mean from the time the suit is filed to final disposition.

20. At all relevant times, the Ruling contained an error in the heading being the Station and the Case Number however the body of it made references to both the parties as stated in the heading and the relevant suit thereto throughout. It was expressly stated to be in respect of the Preliminary Objection dated the 11th May 2018 between the Appellant and the Respondent herein and the orders given. I therefore find that with that clarification of the procedure in obiter dicta, that there is no serious or arguable Appeal on the issue of the error in the heading of the Ruling.

21. On the second issue as to whether the trial learned Magistrate erred in law in holding that the subsequent suit was Res Judicata *Nyeri*

ELC No. 227 of 2013, the Court finds that a Preliminary Objection according to the decided case by the Court of Appeal in **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. In the impugned Ruling, it had been the Respondent’s case inter alia that the subsequent suit being Othaya ELC No. 1 of 2018 should be dismissed with costs as the same was Res Judicata by virtue of the proceedings in the Nyeri ELC No. 227 of 2013.

23. The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”

24. The test in determining whether a matter is *Res Judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

25. The facts surrounding the proceedings in the Nyeri ELC No. 227 of 2013 are as stated at para 16-17 of this judgment herein above. Pursuant to the dismissal of the suit on the basis that that the Appellant had no locus standi to file the suit against the Respondent as she had not obtained a grant and further that she had also not proved her marriage to the deceased and was therefore not a legal representative of his estate, the Appellant herein filed another suit being *Othaya* ELC No. 1 of 2018 seeking for:

- i. A declaration that the registration of the Defendant/Respondent as the proprietor of LR Chinga/Kagongo/745 was in trust for the deceased
- ii. An order that LR Chinga/Kagongo/745 be transferred to Plaintiff/Appellant for herself and the deceased’s children

26. Having looked at the above suits, it is not lost to the mind that the matters pleaded in the subsequent case have either been the subject of previous suit or the same have been decided. Sections 6 and 7 of the Civil Procedure Act, CAP 21, Laws of Kenya bars the filing of a suit where the matter is also the subject of a previously filed suit which is still subsisting, or the subject matter in the suit has been decided before. Having no doubt in my mind that the matters herein were decided in Nyeri ELC No. 227 of 2013, it is clear that the subsequent suit being Othaya ELC No. 1 of 2018 is Res judicata Nyeri ELC No. 227 of 2013.

27. I find that the issues in the previous suit being Nyeri ELC No. 227 of 2013 were substantially the same in the subsequent suit being *Othaya* ELC No. 1 of 2018, and which were determined and covered by the decision in the previous case.

28. I also find that parties in the present case, who are similar are estopped from litigating pursuant to the provisions of Section 7 of the Civil Procedure Act.

29. Finally, I find that the previous case was determined by a Court of competent jurisdiction.

30. The Appellant herein did not challenge the decision in Nyeri ELC No. 227 of 2013 on Appeal and therefore trial of the present suit would amount to sitting on Appeal which is not the case in the circumstance.

31. Reliance is placed on the case of **E.T vs Attorney General & Another (2012) eKLR** where it was held that:

“The Courts must always be vigilant to guard 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 in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction.

32. In the case of *Omondi vs National Bank of Kenya Limited and Others (2001) EA 177* the Court held that,

‘Parties cannot evade the doctrine of Res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to Court, then I do not see the use of the doctrine of Res judicata.....’

33. The upshot of the foregoing is that matters in this case were conclusively decided vide Nyeri ELC No. 227 of 2013 and therefore the present case is Res judicata and an abuse of the Court process. I uphold the ruling of learned Magistrate dated the 10th August 2018 and proceed to dismiss this Appeal with no costs.

Dated and delivered at Nakuru this 11th day of December 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE