



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 342 OF 2015

{FORMERLY EMBU H.C.C.C NO. 21 OF 2008 (OS)}

PERIS NDAGARA W/O KAUMBUTHU (Deceased).....1ST PLAINTIFF

MURIUKI S/O KAUMBUTHU.....2ND PLAINTIFF

PETER MURIITHI.....3RD PLAINTIFF

ANDREW IRERI NJERU.....4TH PLAINTIFF

VERSUS

JOSEPH NJIRU S/O MBOGO.....1ST DEFENDANT

JAMES NYAGA S/O MBOGO.....2ND DEFENDANT

MOSES NJIRU S/O MBOGO.....3RD DEFENDANT

NJOMO MBOGOKA THARANGUCHU.....4TH DEFENDANT

SALESIO KINYUA NYAGA.....5TH DEFENDANT

PATRICIA MUTITU W/O HARUN KANYUA.....6TH DEFENDANT

RULING

1. By an originating summons dated 26th February 2008 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap 22), Order XXXVI Rules 3 Cap 21 of the former Civil Procedure Rules**, the Plaintiffs sought the following orders against the 1st to 8th Defendants;

- a. That the 1st, 2nd, 3rd, 4th and 5th Plaintiffs be registered as proprietors in the land presently occupied by them in land reference number Kagaari/Kigaa/404 attached true copy of the register hereto. (sic)
- b. That an order be made to this honorable court to grant the award which was read in open court on 8th day of February 1984 at Nairobi HCCC No. 1253 of 1975 (OS). (sic)
- c. An order be made to the Land Registrar Embu that the 1st, 2nd, 3rd, 4th and 5th Plaintiffs be registered as proprietors of the said parcel of land number Kagaari/Kagaari/404. (sic)
- d. An order be made to this honourable court, that the name of Mbogo Katharanguchu (deceased) be cancelled from the land register as trustee. (sic).
- e. An order be made to this honourable court that the names of Nyaga Mbogo, Joseph Njiru s/o Mbogo, James Nyaga Mbogo, Njomo Moses Njiru Mbogo, Salesio Kinyua Nyaga and Patricia Mutitu Kanyua who is the wife of Harun to be cancelled from the land register which was obtained through fraud misrepresentation and concealment of vital facts by one Nyaga Mbogo and 7 others. (sic)

f. An order be made to this honourable court that the grant confirmed on 15th day of July 2004 at Nyeri High Court probate and administration cause No 5 be revoked according to **Succession Act Cap 141 section 76 Laws of Kenya.** (sic)

g. An order be made to this honourable court, that the first Applicant to be the rightful person to file a cause search as succession (sic).

h. That cost of the application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the 1st and 2nd Plaintiffs and their families had been in continuous and uninterrupted occupation of Title No. Kagaari/Kigaa/404 (hereinafter the *suit property*) for 54 years.

3. The said motion was supported by an affidavit sworn by Andrew Ileri on 26th February 2008 on behalf of all the Plaintiffs. It was stated that the 1st Plaintiff was the widow of the late Kaumbuthu Mwarita (hereinafter *Kaumbuthu*) who was said to be the cousin of the late Mbogo Katharanguchu (hereinafter *Mbogo*). It was claimed that Mbogo was registered as proprietor of the suit property under African Customary law on behalf of the family of Kaumbuthu who died before the period of land demarcation and adjudication. The supporting affidavit further stated that the family of Kaumbuthu had all along been in occupation of the suit property and that no one else had occupied the same.

4. It was further stated that the 2nd Defendant, a son of Mbogo, had fraudulently obtained a grant of letters of administration in *Nyeri P & A Cause No. 5 of 1979* with respect to the suit property. The Plaintiffs consequently wanted the grant which was confirmed on 15th July 2004 by the High Court at Nyeri revoked under the **Law of Succession Act (Cap 160)**.

5. The 2nd Defendant filed a replying affidavit sworn on 10th July 2008 in opposition to the Plaintiffs' said originating summons. It was contended that the originating summons was *sub-judice, res-judicata* and a gross abuse of the court process. It was stated that there were previous and current suits pending in various courts between the same parties over the same subject matter. Some of the cases cited were *Nairobi HCCC No. 1253 of 1975 (O.S); Embu SPMCC No. 424 of 1992; Nyeri High Court P & A No. 5 of 1979; Embu HCC Misc Application No. 54A of 2000, and Embu CMCC No 187 of 2006.*

6. The record shows that the Plaintiffs' said originating summons was substantially amended on 16th April 2018. The said amendment reduced the number of Plaintiffs from six (6) to four (4) and the number of Defendants from eight (8) to six (6). The amendment also discarded the first seven (7) orders sought in the original originating summons. The only prayer which appears to have been left is a declaration that the 1st and 2nd Plaintiffs are entitled to be registered as proprietors of the suit property on account of adverse possession. The prayer for costs was, of course, left intact.

7. By a notice of preliminary objection dated 22nd June 2018, the Defendants challenged the originating summons as amended on the ground of being *res judicata*. It was contended that the Plaintiffs had violated the doctrine of *res judicata* by filing the instant suit whereas they had previously filed *Nairobi HCCC No. 1253 of 1975* (now *Embu ELC No. 57 of 2017*) which was conclusively determined by the court. It was further contended that the suit was vexatious and an abuse of the court process.

8. When the said notice of preliminary objection was listed for hearing on 20th September 2018, it was agreed by the parties that the same be canvassed through written submissions and the ruling was scheduled for 21st February 2019. The record shows that the Defendants filed their submissions on 20th September 2018 whereas the Plaintiffs filed theirs on 19th September 2018, that is, one day before the Defendants filed theirs.

9. The court has considered the Defendants' submissions as well as the Plaintiffs' submission on the notice of preliminary objection dated 22nd June 2018. The gist of the Defendants' objection is that the matters raised in the instant suit were also directly and substantially in issue in a previously instituted suit which was determined by a court of competent jurisdiction. The previous suit is *Nairobi HCCC No. 1253 of 1975 (OS)* between Ndagara s/o Kaumbuthu & Muriuki w/o Kuambuthu (as Plaintiffs) and Mbogo Katharanguchu (as Defendant).

10. It was submitted that the subject matter in said suit was the suit property and the dispute was fully ventilated before the High Court which rendered its judgement on 9th April 1987. It was, therefore, submitted that litigation ought to come to an end. The Defendants' advocate cited several cases in support of his preliminary objection including **Kamunye & Others Vs The Pioneer General Assurance Society Ltd [1971] EA 263** and **John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport & Others [2015] 2 EA 236**.

11. The Plaintiffs did not deny the existence of previous litigation between the parties over the same subject matter but reiterated that the late Mbogo was registered as proprietor of the suit property in trust for the family of Kaumbuthu. It was further submitted that the Defendants illegally or fraudulently acquired the suit property through succession proceedings in *Nyeri P & A Cause No. 5 of 1979*. It was submitted that a forged will was used in the said proceedings in order for the Defendants to acquire the suit property.

12. Apart from the judgement, the parties did not exhibit copies of the pleadings and proceedings in *Nairobi HCCC No. 1253 of 1975 (OS)*. The court had to call for the file from the registry and peruse it. The file is currently registered as *Embu ELC No. 57 of 2017*. The original parties therein are Ndagara w/o Kaumbuthu and Muriuki s/o Kaumbuthu (as Applicants) and Mbogo Katharanguchu (as Respondent). The record also shows that 5 out of the 6 Defendants in the instant suit were joined therein as "aggrieved parties."

13. The said file indicates that an originating summons dated 24th June 1975 was filed under **section 38 (1) of the Limitation of Actions Act (Cap 22) and Rules 1 & 3D of the former Civil Procedure Rules** seeking an order for the Applicants to be registered as proprietors in common in equal shares of the suit property on account of adverse possession. Mbogo was the registered proprietor of the suit property at the material time.

14. There were 2 affidavits in support of the said originating summons which were filed. They were sworn by the 1st and 2nd Applicants respectively. The 1st Applicant, Ndagara w/o Kaumbuthu in her affidavit sworn on 29th July 1975 stated she was the widow of the late Kaumbuthu who was the cousin of Mbogo. She further stated that Mbogo was registered as proprietor of the suit property in trust for Kaumbuthu's family under Embu Customary Law. She further stated that at all material times, she was in possession of the suit property even before land demarcation and adjudication was done.

15. The 2nd Applicant's supporting affidavit was similarly sworn on 29th July 1975 and it supported his mother's case. He stated that the Respondent was his uncle and that his mother had been in possession of the suit property since he was a young boy. He further stated that his mother had informed him that the suit property was theirs.

16. The record further shows that the Respondent filed a replying affidavit in opposition to the said originating summons. He denied being related to the Applicants in any way and stated that they belonged to different sub-clans or houses. He denied having been registered as proprietor of the suit property as a personal representative of Kaumbuthu or in trust for his family. He asserted absolute ownership of the suit property and stated that he had allowed the 1st Applicant to reside on a small portion of the suit property as a mere licensee. He did that out of compassion for her wretched and pitiful condition at the material time, so he claimed.

17. It would appear that before the said suit could be heard, the original Respondent (Mbogo) died and the Applicants filed an application to join his several sons as parties to the suit. It is not altogether clear if the application was allowed. However, it would appear that when the originating summons was set down for hearing on 9th April 1987 the suit proceeded *ex-parte* in the absence of the Respondent. Judgement was accordingly entered in favour of the Applicants as prayed in their originating summons dated 24th June 1975 by the Hon Justice Schofield. That judgement was delivered on 9th April 1987.

18. The doctrine of *res judicata* is covered by **section 7 of the Civil Procedure Act (Cap 21)** which states 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.”

19. It is apparent from the information within the knowledge of the court that the subject matter of the instant suit and the previous suit is the same i.e. *Title No. Kagaari/Kigaa/404*. The two Applicants in the previous suit have sued as the 1st and 2nd Plaintiffs in the instant suit, although 2 more Plaintiffs have been added. The Defendants in the instant suit are the ones who apparently inherited the suit property from Mbogo through succession proceedings under **the Law of Succession Act (Cap 160)**.

20. The court also notes that the question of adverse possession on which the instant originating summons is based was also directly and substantially in issue in the previous suit. There is no doubt that the previous suit was heard and decided with finality by a court of competent jurisdiction vide the judgement dated 9th April 1987. The material in the court's possession indicates that the Applicants in the previous suit did not take steps to enforce the decree until 2011 when they extracted the decree and had it registered at the Lands Office. By that time, the decree was already statute-barred under **section 4 of the Limitation of Actions Act (Cap 22)**.

21. In the case of **Kamunye & Others Vs The Pioneer General Assurance Society Ltd [1971] EA 263** at page 265 the test for *res judicata* was summarized as follows;

“The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time. Greenhalgh Vs Mallard, [1947] 2 All E.R 255. The subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply *Jadva Karsan Vs Harnam Singh Bhogal (1953), 20 E.A.C.A 74,*”

22. The court is satisfied that in the circumstances of this suit, the Plaintiffs are trying to re-litigate the issues and matters which were settled by the judgement of the High Court dated 9th April 1987 in *Nairobi HCCC No. 1253 of 1975 (OS)*. The inclusion of additional Plaintiffs and additional Defendants does not preclude the instant suit from being *res judicata*. All the issues and matters relating to adverse possession were adjudicated with finality in favour of the 1st and 2nd Plaintiffs herein.

23. If the Plaintiffs believe that the Defendants obtained the suit property illegally and fraudulently in *Nyeri High Court P & A Cause No. 5 of 1979*, that issue cannot be ventilated in the instant originating summons for adverse possession. That would be a matter for the succession court to consider and determine. The court has seen a copy of an order dated 22nd March 2010 by which the Succession Court at Nyeri dismissed, for non-attendance, an application dated 4th February 2010 by which the 2nd Plaintiff was seeking revocation of the grant under **section 76 of the Law of Succession Act (Cap 160)**. It is not clear if the matter was pursued any further.

24. The court, therefore, agrees with the Defendants' submissions that they ought not to be vexed again over the same cause of action and that litigation ought to come to an end. The court also agrees that the instant suit is essentially an abuse of the court process.

25. In the case of **John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport and Infrastructure & Others (supra)** the Court of Appeal summarized the rationale of the doctrine of *res-judicata* as follows;

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgements by reducing the possibility of inconsistency in judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature.”

26. Before concluding the ruling, the court would like to point out its concern regarding the role of Andrew Njeru Ileri, the 4th Plaintiff, in these proceedings. The court has noted that although he swore the affidavit in support of the originating summons, his interest in the suit remains a mystery. He is not seeking any reliefs in his favour. He is not claiming any legal or equitable interest in the suit property. The amended originating summons simply seeks to have the 1st and 2nd Plaintiffs registered as proprietors of the suit property on account of adverse possession.

27. The record shows that he has been the driver of the entire litigation and the plethora of applications filed herein. He has been acting as the legal advisor and “advocate” for the Kaumbuthu’s in the process of which he has tremendously misled them. He has put them into needless expense by filling incompetent pleadings, applications and affidavits. The “amended” affidavit filed in support of the amended originating summons was a serious legal misadventure.

28. The court is aware that costs of an action are at the discretion of the court. However, the general rule is that costs shall follow the event. See section 27 of the Civil Procedure Act (Cap 21). The court is of the view that it would be unfair to penalize the 1st – 3rd Plaintiffs in costs whereas the 4th Plaintiff is the one who appears to be the mover of the proceedings. The court shall, therefore, make an order for the 4th Plaintiff, Andrew Ileri Njeru, to solely bear the costs of the suit personally. The family of the late Kaumbuthu shall not be liable to pay or assist him in the payment of costs.

29. The upshot of the foregoing is that the court finds merit in the Defendants’ notice of preliminary objection dated 22nd June 2018. The same is accordingly allowed with the consequence that the Plaintiffs’ amended originating summons dated 13th April 2018 and filed on 16th April 2018 is hereby struck out with costs to be borne solely by the 4th Plaintiff, Andrew Ileri Njeru.

30. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of FEBRUARY, 2019.

In the presence of the 2nd and 3rd Plaintiffs in person, Ms Muthama holding brief for Mr. Morris Njage for the Respondents and in the absence of the 1st and 4th Plaintiffs.

Court clerk Mr. Muinde

Y.M. ANGIMA

JUDGE

21.02.19