



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO 163 OF 2017

DOROTHY WACERA MACHARIA.....PLAINTIFF/RESPONDENT

VS

MBOI KAMITI FARMERS COMPANY LTD1ST DEFENDANT /RESPONDENT

AFRIMAC NUT COMPANY LTD2ND DEFENDANT/APPLICANT

THE LAND REGISTRAR, MURANGA.....3RD DEFENDANT/RESPONDENT

RULING

1. This is a ruling in respect to the Preliminary Objection as filed by the 2nd Defendant dated 16/7/2018 on grounds that: -
 - a. That the Plaintiff has no locus standi to bring this suit and is non-suited as against the 2nd Defendant
 - b. By virtue of the judgment as delivered in Murang'a Chief Magistrate's Court case Number 159 of 2014, the Plaintiff claim in this matter is rendered res judicata.
 - c. The Plaintiff's suit and claim is fatally defective, incompetent, frivolous, vexatious and is an abuse of the due process the law and Court.
 - d. Having removed the Principal Defendant in this proceedings Patrick Gachanja Mutira (deceased) and with no substitution of such Defendant with his legal representative, the claim and suit by the Plaintiff remains untenable and not maintainable in law.
2. The 2nd Defendant filed its submissions thereto in which he submits that the Plaintiff's claim and the suit herein is res-judicata for the reason that there was a previous suit **CMCC No. 159 of 2014-Patrick Gachanja Mutira vs. Dorothy Wacera Macharia** whose judgment is included in the Plaintiff's list of documents. That the Defendant in that former case is the Plaintiff in the instant suit whilst the Plaintiff therein is the vendor who sold the suit land to the 2nd Defendant herein. That the subject matter in both suits is the ownership of land parcel number NGINDA/SAMAR BLOCK1/316.
3. That the Court in that former suit did make a verdict thereon that the Plaintiff in that suit was the absolute owner of the suit property, ordered for the removal of the caution lodged by the Defendant and awarded costs to the Plaintiff.
4. The 2nd Defendant thus contends that the issue of ownership of the suit land was fully determined in that former suit and a final verdict of the Court of a competent jurisdiction was delivered thereof. The 2nd Defendant further faults the Plaintiff herein for ignoring that judgment of the Court which she did not prefer any appeal to and avers that the instant suit amounts to inviting the Court to make a second judgment on an issue that has already received competent judicial determination thus the Plaintiff's claim herein is frivolous and vexatious and the Plaintiff is guilty of abuse of Court process.
5. That the 2nd Defendant herein purchased the suit land from the Plaintiff in the former suit therefore he was a bona fide purchaser who acquired good title and suspects mischief against the Plaintiff herein for failing to enjoin that vendor in the present suit in order to conceal from the Court the existence of that former judgment.
6. Lastly the 2nd Defendant highlights the fact that the said Plaintiff in the former suit was sued herein as the 1st Defendant who was later removed for reasons that he had died but was never substituted and thus the claim against him has since abated. That the claim against that said 1st Defendant would not have succeeded based on that decision of the lower Court.

7. The Plaintiff in opposition dismisses the Preliminary Objection as an afterthought, is devoid of merit and ought to be dismissed. That the suit herein has been before the Environment and Land Court in Nyeri and later transferred to this Court and proceedings have been ongoing in the matter since the year 2015. That injunction orders were issued herein after the honourable Judge found the suit herein to be merited and thereafter Counsels for the parties herein with that of the 2nd Defendant included entered a consent on 24/09/2019. That the objection has been overtaken by events since the initial 1st Defendant has since been substituted by the m/s Mboi Kamiti Limited and the objection has been brought too late in the day as the matter herein has already gone through pre-trial and been set down for hearing.

8. That the suit herein is not res-judicata because the 2nd Defendant herein was not a party to the former suit and that former suit was only for removal of the caution lodged on the title. The Plaintiff notes that the instant suit has been pending in Court for the last 4 years and the 2nd Defendant never intimated its intention to raise the Preliminary Objection, believes that the Preliminary Objection is meant to delay the fair trial of the suit. It enjoins the Court to exercise its discretion to sustain the suit other than dismiss it preliminarily.

9. The plea of *re judicata* is provided for in section 7 of the Civil Procedure Act (CPA) which reads:

“No Court shall try any suit 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 in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

10. Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;

- a. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.
- b. The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.
- c. Such parties must have been litigating under the same title in the former suit.
- d. The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

11. The definition of a Preliminary Objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

“So far as I’m 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.”

12. I have analysed the previous suit cited as the basis of this application, which is **CMCC No. 159 of 2014-Patrick Gachanja Mutira vs. Dorothy Wacera Macharia** and the cause of action in that suit was the removal of a caution that had been lodged by the Defendant now Plaintiff in this case. The cause of action in the instant suit is fraud. The title of the 3rd Defendant is being challenged on account of an illegality/fraud. I find that the matter was not directly and substantially the same. The question of fraud was not heard nor determined in the previous suit.

13. The Plaintiff in this case was the Defendant in the previous case. In the current case there are other parties that were not parties in the previous case. The matters touching on the claim may require investigation on how the land was transferred from the 1st Defendant to the current registered owner.

14. In respect to the issue of whether or not the Plaintiff has locus to bring the suit against the 2nd Defendant, it is entirely the prerogative of the Plaintiff to elect who to sue. In this case it has elected to challenge its title on grounds of illegality and fraud. These are issues that are best left for the trial Court.

15. The Court has been urged that the claim and the suit by the Plaintiff is untenable and not maintainable on the basis that the principal Defendant namely Patrick Gachanja Mutira deceased has not been substituted with his legal representative. The Applicant has not shown how the suit becomes untenable for lack of substitution of the said Patrick Mutira. It is the cardinal duty of this Court to sustain a suit rather than dismiss it so that it can be heard on its merits.

16. For the foregoing reasons I am inclined to dismiss the Preliminary Objection with costs as it is devoid of merit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 2ND DAY OF MAY 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Mwinzi HB for Njoroge for the Plaintiff

1st Defendant – Absent

Thige HB for Kirubi for the 2nd Defendant

3rd Defendant – Absent

Grace and Njeri, Court Assistants