



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC. CASE NO. 467 OF 2017

STEPHEN NJUGUNA MWANDA.....PLAINTIFF

VERSUS

PETER MWICIGI MWENDA.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 12th July, 2012, the Plaintiff averred that on 11th August, 1993, he bought land parcel number Chania/Kanyoni/2214 for value from Josephine Nyambura Kamau (*deceased*) and that when he went to effect registration of the suit land in his name, he found the same had been fraudulently registered in favour of the Defendant.
2. The Plaintiff averred that before the suit that he filed in Thika CMCC No. 644 of 2001 was dismissed for want of jurisdiction, he had managed to reverse the irregular and fraudulent Transfer of the suit property occasioned by the Defendant and that the Defendant has fraudulently transferred the suit land to a third party.
3. The Plaintiff is praying for a declaration that the suit land belongs to him; a permanent injunction restraining the Defendant or anyone else from transferring the suit land and for general damages together with costs.
4. In his Defence, the Defendant averred that the Plaintiff filed Thika CMCC No. 644 of 2001; that on 31st May, 2012, Thika CMCC No. 644 of 2001 was dismissed and that the current suit is *res judicata*.
5. The Defendant finally averred that he is the proprietor of the suit land; that he was issued with a Title Deed in respect of the suit land on 13th October, 1999 after purchasing the land from one Josephine Nyambura Kamau and that the suit should be dismissed with costs.
6. The suit proceeded by way of oral evidence. The Plaintiff, PW1, informed the court that he purchased parcel of land known as Chania/Kanyoni/2214 (*the suit land*) from Josephine Nyambura Kamau on 11th August, 1993; that he took possession of the suit land in 1993 and that he sued the Defendant in the lower court when he discovered that the Defendant had fraudulently registered the land in his favour. It was the evidence of the Plaintiff that the lower court file kept on disappearing and that the said suit was eventually dismissed for want of jurisdiction.
7. In cross-examination, PW1 informed the court that at the time he purchased the land from Josephine Nyambura, the suit land was not in her name; that the suit land was in the name of Josephine's father (*deceased*) and that the Agreement showed that the land he was buying was Chania/Kanyoni/1195.
8. According to PW1, parcel number Chania/Kanyoni/1195 stipulated in the Agreement was cancelled and replaced with parcel number 2214 (*the suit property*) and that he sued Josephine when she reneged on the Agreement.
9. PW1 informed the court that he sued the Defendant in Thika CMCC No. 644 of 2001, which suit was dismissed; that he filed an Appeal in respect to the dismissed suit being Appeal No. 407 of 2014 and that the said Appeal was also dismissed.
10. The Defendant, DW1, informed the court that he purchased parcel of land known as Chania/Kanyoni/2214 (*the suit land*) from Josephine Nyambura Kamau (*deceased*); that he was issued with a Title Deed for the said land on 13th October, 1999 and that when the Plaintiff attempted to Transfer the suit land to himself, the court reversed the said action.
11. In his submissions, the Plaintiff's advocate submitted that the Defendant did not produce any evidence to show that he purchased the suit land from the late Josephine and that in any event, it is the Plaintiff who is the registered proprietor of the suit land.

12. The Defendant's advocate submitted that the Plaintiff filed the present suit after his suit in Thika CMCC No. 644 of 2001 was dismissed; that this suit is *res judicata* and that the Plaintiff did not respond to the issue of the suit being *res judicata*.

13. Both the Plaintiff and the Defendant are claiming that they bought parcel of land known as Chania/Kanyoni/2214 for value from Josephine Nyambura Kamau. Although both the Plaintiff and the Defendant are agreeable that the Plaintiff sued the Defendant in respect of the same suit land in Thika CMCC No. 644 of 2001, the Plaintiff has denied that this suit is *res judicata*. This court shall therefore determine if indeed this suit is *res judicata* first.

14. The original file in Thika CMCC No. 644 of 2001 was placed before this court. The Plaintiff in Thika CMCC No. 644 of 2001 shows that the Plaintiff herein sued the Defendant in which he accused the Defendant for having fraudulently transferred parcel of land known as Chania/Kanyoni/2214 to himself. In the prayers, the Plaintiff sought for an order of the court directing the Defendant to transfer to him the suit land. The Plaintiff's claim in Thika CMCC No. 644 of 2001 is the same as the claim in the current suit.

15. The Plaintiff has admitted in his pleadings and evidence that Thika CMCC No. 644 of 2001 was dismissed by the court. Indeed, it was the evidence of the Plaintiff that he filed an Appeal against the dismissal order, which Appeal was also dismissed by the High Court.

16. Although the lower court record seems to have been interfered with, the Defendant produced in evidence the extracted order of the court in Thika CMCC No. 644 of 2001 dated 31st May, 2012. In the said order, the lower court, after hearing the Application by the Defendant dated 29th March, 2012, made the following orders:

"2. That the Transfer of L.R. No. Chania/Kanyoni/2214 to the Plaintiff Stephen Njuguna Mwanda or any other subsequent transaction by the Plaintiff be and is hereby declared unlawful, illegal and the same be cancelled.

3. That the status of L.R. No. Chania/Kanyoni/2214 be restored to the Applicant Peter Mwigigi Mwangi as the registered owner of the same.

4. That this suit be and is hereby dismissed.

5. That the Plaintiff/Respondent do pay the costs."

17. The Plaintiff admitted that after the above orders were made, he filed an Appeal in the High Court, which Appeal was dismissed. That being the case, the order of the court in Thika CMCC No. 644 of 2001 settling the issue of ownership of the suit land has never been set aside

18. 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."

19. As was held in the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport & Infrastructure & 3 others (2015) eKLR***, the rationale behind the doctrine of *res judicata* is based on the public policy that there should be an end to litigation coupled with the interest to protect a party from repetitive litigation over the same matter. The court further held that *res judicata* ensures the economic use of the court's limited resources and timely termination of cases.

20. The lower court having heard and finally decided the issue of ownership of the suit land between the Plaintiff and the Defendant, I find and hold that the current suit is *res judicata*.

21. On that ground alone, I dismiss the Plaintiff's suit with costs.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT THIKA THIS 28TH DAY OF JUNE, 2019.

L. GACHERU

JUDGE