



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND CASE NO. 15 OF 2018 (O.S)

TERESIA WANGECI MUGO.....1ST PLAINTIFF/APPLICANT

JEMIMAH WANJIRU MUGO.....2ND PLAINTIFF/APPLICANT

VERSUS

LUCY WACUKA NJUGUNA.....DEFENDANT/RESPONDENT

RULING

This is a ruling arising from the defendant's Notice of Preliminary Objection contained in her grounds of opposition dated 6th April 2018. In her objection, the defendant has argued that the entire suit filed in this Court is res-judicata vide Embu High Court Civil Case No. 37 of 2003 and Kerugoya P.M.C.C No. 90 of 2001 between the plaintiffs and others Versus Miano Njore. In order to put into perspective the Preliminary Objection, *Section 7 Civil Procedure Act* 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”.

In order for the doctrine of res-judicata to crystallize, three conditions must be satisfied as follows:

- (1) That there is a former suit or proceedings in which the same parties in the subsequent suit litigated.***
- (2) That the matter in issue is directly or substantially in issue in the former suit.***
- (3) That a Court of competent jurisdiction has heard it and finally decided the matter in controversy.***

From the pleadings and the submissions by the parties, it is apparent that there is a former suit or proceedings in which the same parties in the subsequent suit litigated being HCCC No.37 of 2010 (Embu). The parties in that case were Teresia Wangeci Mugo & Jemima Wanjiru Mugo Vs Miano Njore whereas in PMCC No. 90 of 2001 (Kerugoya), the parties were Miano Njore Vs Mugo Njore, Teresia Wangeci Mugo, Jemima Wanjiru Mugo & Peter Muthii Mugo.

The parties in the instant suit are Teresia Wangeci Mugo & Jemimah Wanjiru Mugo Vs Lucy Wacuka Njuguna. Lucy Wacuka Njuguna purported to have bought the suit property from Miano Njore and was not a party to the previous suits.

As regards the second principle, whether the matter in question is directly or substantially in issue in the former suit can be discerned from the prayers being sought. In HCCC No. 37 of 2010, the applicants were seeking a declaratory order that they have become entitled by virtue of adverse possession of L.R. No. Mutira/Kathare/23 which was sub-divided into Mutira/Kathare/842, 843 and 844 by virtue of trust. In the current suit, the applicants are seeking ownership of the suit property L.R. No. Mutira/Kathare/842 by virtue of adverse possession. On the last principle whether a Court of competent jurisdiction had heard and finally determined the matter in controversy, it is apparent that HCCC No. 37 of 2010 (Embu) is yet to be heard and determined. As regards to PMCC No. 90 of 2001, the same was heard and finalized whereby the Court held that the defendant held the land in dispute in trust for himself and his brother, the plaintiff. The defendant appealed to the High Court in Embu HCCC No. 30 of 2003 and the appeal was struck out for being incompetent and unsustainable. Instead of filing a proper appeal or appealing to the Higher Court if dissatisfied with the judgment of the Judge, the two appellants on 4th March 2010 instituted another suit being HCCC No. 37 of 2010 (Embu) seeking to be declared to have become entitled to the same property by way of adverse possession. It was in my view within the plaintiffs' right to bring their claim by way of a counter-claim in the former suit being PMCC No.90 of 2001 than file the subsequent suit in HCCC No. 37 of 2010. The alternative was for the plaintiffs in that suit to pursue the appeal which struck out. It was not available for the plaintiffs to file another suit after their appeal was struck out. The plaintiffs also filed the instant suit seeking similar reliefs while their former suit HCCC No. 37 of 2010 (Embu) is still pending determination. While adjudicating a

similar matter, **A.G. Ringera J.** (as he then was) *in the case of George W.M. Omondi & Another Vs National Bank of Kenya Ltd & 2 others (2001) e K.L.R* held as follows:

“And so I must deal with the issue of whether the suit is res-judicata. In that regard, I accept the submissions by counsel for the defendants that the doctrine of res-judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations whether either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res-judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in instalments”.

I cannot agree with the holding of the learned Judge. The plaintiffs in the instant suit were also plaintiffs in HCCC No. 37 of 2010 (Embu) which is still pending. The same plaintiffs were part of defendants in PMCC No. 90 of 2001 (Kerugoya) which after they lost in the judgment were dissatisfied and appealed but the appeal was struck out. Instead of filing a proper appeal, they filed HCCC No. 37 of 2010 and the instant suit seeking similar orders. The plaintiffs cannot be allowed to go on forever re-litigating the same issues with the same opponent (s) before Courts of competent jurisdiction. Litigation must come to an end. Again, in the case of ***Henderson Vs Henderson (1843) 67 E.R 313***, the Court held as follows:

“..... Where a given matter becomes the subject of litigation in and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except) under special circumstances) permit the same parties to open the same subject of litigation in aspect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time”.

The plaintiffs claim for adverse possession is a claim that was required to have been brought forward for determination when original claimant namely Miano Njore filed the former suit against the present plaintiffs in PMCC No. 90 of 2001 (Kerugoya). Though the matter was not between the same parties in this suit, the subject matter was the same which is L.R. No. Mutira/Kathare/842. The Court which heard and determined that issue is a Court of competent jurisdiction and the plaintiffs in this case did not pursue their right of appeal exhaustively. It is not now available for them to re-litigate over the same issues that ought to have been determined in the former suit. I agree with counsel for the defence Mr. Kiguru Kahiga that rationale behind the doctrine of res-judicata is to ensure that litigation come to an end coupled with the interest to protect a party from facing repetitive litigation over the same subject matter over and over again.

The upshot of my finding is that the Preliminary Objection is merited and the same is hereby upheld with the result that the entire suit herein is res-judicata vide HCCC No. 30 of 2003 (Embu) and PMCC No. 90 of 2001 (Kerugoya). The plaintiffs shall bear the costs of this suit plus interest thereon from today.

READ and SIGNED in open Court at Kerugoya this 28th day of June 2019.

E.C. CHERONO

JUDGE

28TH JUNE, 2019

In the presence of:

1. M/S Nzekele holding brief for Mr. Kahigah for Defendant
2. Court clerk – Mbogo
3. Plaintiff/Advocate – absent