



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 986 OF 1997

FREDRICK NJOROGE.....1ST PLAINTIFF/RESPONDENT

PETER GACHERU.....2ND PLAINTIFF/RESPONDENT

STEPHEN NGANGA NJOROGE.....3RD PLAINTIFF/RESPONDENT

VERSUS

FRANCIS MAINGI NJOROGE.....1ST DEFENDANT/APPLICANT

MARY WAIRIMU KARUIGI.....2ND DEFENDANT/RAPPLICANT

RULING

1. This is the notice of motion dated 18th March 2015 brought under order 2 rule 15 (d), order 51 rule 1 of the Civil Procedure Rules 2010, section 1A, 1B, 3, 3A and 7 of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks:-

(a) That the plaintiffs' suit against the defendant be struck out for being res judicata and/or abuse of the court process and/or overtaken by events.

(b) That the defendants costs for this application and of the suit be borne by the plaintiffs.

3. The grounds are on the face of the application and are:-

1. That the subject suit is res judicata against the defendants given that land parcel number KIAMBAA/WAGUTHU 226 the subject matter of this suit as per the amended plaint filed on 10th May 2002 is no longer in existence the resultant parcels having been distributed in High Court Succession Cause Number 1699 of 2000 on 30th March 2004 vide consent orders for confirmation of grant pursuant to an application dated 25th February 2004 by the 3rd plaintiff/petitioner therein.

2. That the issue of ownership of Kiambaa/Waguthu/1604 and Kiambaa Waguthu/1612 by the 2nd defendant being some of the resultant parcels of Kiambaa Waguthu 226 is also res judicata in view of the court orders issued in Kiambu SPM Land Case Number 47 of 2000 Nairobi and High Court Civil Appeal Number 7 of 2001 and the said orders of 30th March 2004 in Nairobi High Court Succession Cause No. 1699 of 2000.

3. That the 2nd defendant has since transferred the said parcels to the third parties.

4. That the continued existence of the suit against the defendants/applicants herein amounts to an abuse of the court process.

5. That the suit is overtaken by event and should be struck out.

6. That it is in the interest of justice that the suit be struck out as litigation has to come to an end.

4. The application is supported by the affidavit of Francis Maingi Njoroge and Mary Wairimu Kairugi, the defendant/applicants herein sworn

on the 18th March 2015.

5. The application is opposed. There is a replying affidavit sworn by Stephen Ng'ang'a Njoroge the 3rd plaintiff/respondent herein sworn on the 8th May 2015.

6. On the 16th September 2015, the court directed that the application be canvassed by way of written submissions.

7. It is the defendants'/applicants' submissions that the plaintiffs' suit are res judicata and/or an abuse of the court process and/or overtaken by events. That the issues were dealt with in HCC Succession Cause No.1699 of 2000 in which the 3rd plaintiff who was the petitioner therein consented to the following orders:-

“The land referred to as LR NO. Kiambaa/Waguthu/226 in paragraph 6 of the P&A did not exist as at the time of the deceased's death and does not now exist and the same be and is hereby removed from the list of assets.”

8. By acknowledging that the land was not available for distribution as it no longer belonged to the deceased, the plaintiffs cannot at this juncture require the court through the amended plaint to declare that the sub division was fraudulent. The 3rd plaintiff subsequently filed an application for confirmation of grant dated 25th February 2004, in the said succession cause in which he identified the shares of all the beneficiaries entitled to the resultant parcels of Kiambaa/Waguthu/226. The plaintiffs having acknowledged that the mother title had been subdivided, are estopped from re-opening the issues of distributing the resultant parcels of the deceased's said parcel of land which they admitted was not open for distribution in the succession cause.

9. They have put forward the cases of **Margaret Mumbi Kagiri vs Kagiri Wamairwe [2007] eKLR; Pop In Kenya Limited & 3 others vs Habib Bank AG Zurich; Godfrey Nyingi Mwati & 2 Others vs Milka Ntambura Magu & 3 Others [2006] eKLR; Geoffrey Mundia Kabethi vs Peter Wanjohi Njogu & Another [2013] eKLR.**

10. It is the plaintiffs'/respondents' submissions that a party who raises the issue of res judicata ought to demonstrate each of the elements as set out in Section 7 of the Civil Procedure Act. The defendants/applicants have failed to do so. Whereas the land parcel no. Kiambaa/Waguthu/226 was by consent in Nairobi HC Succession Cause No. 1699/2000 removed as one of the assets of Njoroge Karwege (deceased) on 24th September 2003, it is not true that the issue of the fraudulent sub-division of the land parcel and subsequent fraudulent transfer of land parcel nos. Kiambaa/Waguthu/1602, 1603, 1609, 1611, 1604, 1612 to the defendants was adjudicated with finality in High Court Succession Cause No. 1699 of 2000.

11. The issues in the instant suit are not barred by res judicata. The sale of the said parcels of land was a calculated move to defeat the plaintiffs' claim to the said parcels of land hence their sale and transfer should be subject to the judgment or decree this honourable court may eventually issue in this suit under the doctrine of lis pendens. They have put forward the case of **Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another Nairobi Civil Appeal No. 44 of 2014.**

12. The defendants/applicants have not established sufficient and concrete grounds upon which this honourable court can issue the orders sought. They pray that the application be dismissed with costs to the plaintiffs.

13. I have considered the notice of motion, the affidavit in support. I have considered the replying affidavit, the written submissions of counsel and the authorities cited.

The issue for determination is whether the application is merited.

14. Section 7 of the Civil Procedure Act 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”.

15. It is the defendants'/applicants' contention that in the High Court Succession Cause No. 1699 of 2000 the following consent was recorded by the parties:-

“The land referred to as LR NO. Kiambaa/Waguthu/226 in paragraph 6 of the P&A did not exist as at the time of the deceased's death and does not now exist and the same be and is hereby removed from the list of assets.”

16. I have gone through the amended plaint dated 14th January 2002. Prayer c (c) seeks:-

“An order directing land parcel No. Kiambaa/Waguthu/226 be sub-divided according to the written wishes of the deceased”.

This contradicts the terms of the consent recorded in High Court Succession Cause 1699 of 2000. High Court Succession Cause was mainly for distribution of the Estate of the deceased.

17. In that cause the plaintiffs' acknowledged that Land Parcel Number Kiambaa/Waguthu/226 did not exist at the time of the deceased's

death. I agree with the defendants/applicants submissions that the plaintiffs having acknowledged that the mother title had been sub-divided and having identified the parcels to be distributed to the respective beneficiaries, the plaintiffs are estopped from re-opening the issue of distributing the resultant parcels of the deceased's said parcel which they admitted was not open for distribution in the succession cause.

18. The plaintiffs/respondents claim that the said land parcel Kiambaa/Waguthu/226 was sub-divided after the deceased's death cannot be true. In the case of **Pop in Kenya Limited & 3 others vs Habib Bank AG Zurich** it was held thus:

“The plea of res judicata applies not only to points upon which the court was required by parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have been brought forward at the time”.

19. I am of the view that existence of land parcel known as Kiambaa/Waguthu/226 was an issue of High Court Succession Cause No. 1699 of 2000. The same is a subject of these proceedings.

20. All in all, I find merit in this application and grant the orders sought namely:-

(a) That the plaintiffs' suit against the defendants be and is hereby struck out for being res judicata and for abuse of the court process and/or overtaken by events.

(b) As this is a dispute between family members I make no orders as to costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 27TH day of JUNE 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for Plaintiffs

.....Advocate for Defendants

.....Court Assistant