



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 30 OF 2018

LUCY WANJIRU MURIMI.....1ST PLAINTIFF

HARRIS KARURI GITHINJI.....2ND PLAINTIFF

MARK ELIUD MURIMI.....3RD PLAINTIFF

VERSUS

JOSEPHINE WAIRIMU GITHINJI.....DEFENDANT

JUDGMENT

INTRODUCTION

This suit was instituted by the plaintiffs vide a plaint dated 8th June 2012 seeking the following orders:

- 1. A declaration that the plaintiffs are the owners of land parcel number KIINE/SAGANA/2321.***
- 2. Mesne profits.***
- 3. An order of eviction against the defendant, her agents and/or servants from land parcel No. KIINE/SAGANA/2321.***
- 4. Costs of the suit.***

The defendant filed a defence and counter-claim dated 9th February 2018. The plaintiffs also filed a reply to the defendants defence and counter-claim dated 20th August 2018.

PLAINTIFFS CASE

The plaintiff stated on oath that she is the registered owner of the suit property L.R. No. KIINE/SAGANA/2321 which is a sub-division of land parcel No. KIINE/SAGANA/1831 which was registered in the name of one Cyrus Githinji Karuri (deceased).

The plaintiff further stated that the sub-division of the said land was done in the life time of the said Cyrus Githinji Karuri (deceased) who was husband and father to the plaintiffs respectively. The plaintiff also contend that no iota of evidence has been availed by the defendant on the allegation of fraud. To the contrary, the plaintiff stated that the same allegations of fraud have been raised by the defendant in previous cases between the same parties before Courts of competent jurisdiction who rendered themselves on the same. They argued that this case is Res-judicata in that the defendant had instituted Petition No. 407/2014 (Kerugoya) where Justice B.N. Olao (as he then was) dismissed the same with costs.

The plaintiffs also stated that pursuant to the judgment of this Court, a decree was subsequently issued on 15th December 2017. The plaintiff contends that a cursory look at the evidence adduced and the proceedings in the previous case above mentioned clearly indicates that the issues being raised in this case are the very same issues that have been handled by different Courts and in particular PMCC Succession Cause No. 65 of 2003, HCCA No. 25 of 2004 (Nyeri), C.A No. 16 of 2013 (Nyeri) and Petition No. 4 of 2014 all of which were heard and delivered in their favour.

DEFENDANT'S CASE

The defendant on her part testified also on oath and stated that land parcel No. KIINE/SAGANA/2321 is where her matrimonial home is situated which they built with her husband in 1974 or thereabout. Her husband passed on in the year 2003. She got married to her late husband in 1956 or thereabout. She stated that she was not involved in the distribution of the Estate of her late husband. She said that the plaintiff used to work in her house as a casual labourer. She wants the case dismissed and judgment entered in accordance with the counter-claim.

On cross-examination, the defendant stated that she was removed from her matrimonial home and her husband lived with the 1st plaintiff. She recalled filing a succession cause in the year 2003. The defendant stated that the 1st plaintiff later moved to the High Court to challenge the grant. She also went to the Court of Appeal. She also admitted having a case before this Honourable Court and Justice B.N. Olao dismissed the same on grounds of being res-judicata.

LEGAL ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their submissions. I have also taken into consideration the applicable law. The suit property has been the subject of numerous Court cases, the first being Succession Cause No. 65 of 2003 (Kerugoya). In that cause, the defendant was issued with a grant of letters of administration of the Estate of Cyrus Githinji Karuri (deceased) on 18th August 2003 which was to be confirmed after six (6) months. The 1st plaintiff subsequently filed an application to remove the suit properties being parcels No. KIINE/SAGANA/2321, 2322, 2323, 2324, 2325 and KIINE/SAGANA/388/229 from the list of deceased's assets. After hearing the application inter-partes, the trial Court allowed the application and observed that the certificate of official search show that land parcel No. KIINE/SAGANA/2322 was registered in the name of Cyrus Githinji Karuri in trust of Kennedy Harris Karuri (minor) while land parcel No. KIINE/SAGANA/2323 was registered in the name of Cyrus Githinji Karuri to hold in trust for Mark Eliud Murimi Githinji (minor).

Upon allowing the said application and removing the two parcels of land from the list of assets from the Estate of the late Cyrus Githinji Karuri, the defendant herein was aggrieved by the Court's decision and lodged an Appeal in HCCA No. 25/2004 (Nyeri). In that Appeal, the defendant sought to stay execution of the orders made on 6th February 2004 pending the hearing and final determination of the Appeal. The second prayer was seeking maintenance of the status quo as of 30th September 2003 pending the hearing and determination of that Appeal. The Appeal was heard and the same dismissed by Hon. Mr. Justice J.M. Khamoni on 30th July 2004. The defendant was not satisfied and moved to the Court of Appeal in C.A No. 16 of 2013 (Nyeri). Since she failed to appeal within the stipulated period, she sought to appeal out of time under Rule 41 of the Court of Appeal rules. That application was again dismissed by Hon. Lady Justice M.K. Koome J.A. on 10th October 2013.

The defendant was again aggrieved by that decision and commenced a new cause of action by way of a Petition No. 4 of 2014 (Kerugoya). In that petition, the defendant had sought a raft of prayers touching the suit property. In a reasoned judgment delivered on 10th November 2017, Hon. Mr. Justice B.N. Olao dismissed the same with costs.

From the chronology of the legal battles in the corridors of justice filed in numerous law suits, it is clear beyond peradventure that the suit property parcel number KIINE/SAGANA/2321 belongs to the plaintiffs. I find from the evidence adduced that the plaintiffs have proved their case on a balance of probabilities. Consequently, the plaintiffs claim is allowed as prayed.

As regards the defendant's counter-claim, I find that the same has not been proved on the required standard. In the contrary, the counter-claim is guilty of res-judicata **under Section 7 of the Civil Procedure Act** which reads as follow:

“7. 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”.

The defendant in this case had attempted to include the suit property among the Estate of the late Cyrus Githinji Karuri. Upon realization of her attempt, the 1st plaintiff moved to Court where the orders to include the same were set aside. She moved to the highest Court to have those orders set aside but all her applications were dismissed. Having failed upset the orders of the Magistrate Court in Succession Cause No. 65/2003 (Kerugoya) in the High Court and the Court of Appeal and also in ELC Petition No. 4 of 2014, the defendant cannot be allowed to re-litigate on the same issue between the party(ies) forever.

In the case of the ***Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others C.A No. 105 of 2017 (2017) e K.L.R***, the Court of Appeal held:

“Thus, for the bar of res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in dis- injunctive but conjunctive terms:

- (a) The suit or issue was directly and substantially in issue in the former suit.***
- (b) That former suit was between the same parties or parties under whom they or any of them claim.***
- (c) Those parties were litigating under the same title.***
- (d) The issue was heard and finally determined in the former suit.***

(e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.

The Court explained the role of the doctrine thus:

“The rule or doctrine of res-judicata serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and flora, to obtain at last outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res-judicata thus rest in the public interest for swift, sure and certain justice”.

I find this to be a sound principle of the doctrine of res-judicata which is binding on me. In the final analysis, I enter judgment for the plaintiff in the following terms:

- (1) A declaration that the plaintiffs are the legal owners of land parcel No. KIINE/SAGANA/2321.*
- (2) An order of eviction against the defendant, her agents and/or servants from land parcel No. KIINE/SAGANA/2321.*
- (3) The defendant to bear the costs of this suit and the dismissal of the counter-claim.*
- (4) I make no order as to mesne profits.*

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF OCTOBER, 2019.

E.C. CHERONO

ELC JUDGE

18TH OCTOBER, 2019

In the presence of:

- 1. Ms Kiragu for Plaintiff*
- 2. Mr. Kariuki for Defendant*
- 3. Mbogo – Court clerk*