REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 38 OF 2016

JOYCE KANINI SHADRACK.....1ST PLAINTIFF

DAMARIS CIUKUTHII SHADRACK.....2ND PLAINTIFF

VERSUS

JANE WAMUNYU.....DEFENDANT

JUDGMENT

By a plaint dated 14th March 2016, the plaintiffs sought from the defendant the following orders:

(1) This Court do issue eviction orders against the defendant as she has refused to vacate the land MWEA/NGUCWI/618 and O.C.S Wanguru Police Station do provide security during the exercise.

(2) Costs and interest.

In a statement of defence dated 27th April 2016, the defendant denies the plaintiffs claim and sought to have the same dismissed with costs.

PLAINTIFFS CASE

The plaintiff testified on oath and stated that the original plaintiff Joyce Kanini Shadrack (deceased) was her mother and that he was granted leave to substitute her vide a Notice of Motion dated 1st February 2019 which was allowed on 21st March 2019. He was referred to the statement of his mother Damaris Ciukuthii Shadrack filed on 21st March 2016 which he adopted in his evidence. According to the plaintiff, the suit property L.R. No. MWEA/NGUCWI/618 measuring 3 acres is registered in the name of Shadrack Githinji Njaruirii who is his later father. After he passed on on 21st January 2000, her mother Joyce Kanini Shadrack and her step-mother Damaris Ciukuthii Shadrack were appointed as the legal administrator of his estate. The plaintiff's mother Joyce Kanini Shadrack passed away on 1st February 2018 and in Succession Cause No. 100 of 2018 (Baricho) where upon he was issued with letters of administration for her Estate. He stated that the person who lives in the suit property is Joyce Kanini Shadrack and Jane Wamunyu who is the defendant. He stated that when his late father applied to be allocated the suit property, there were numerous squatters including the defendant who has refused to move out. They were given notice to vacate but she refused to move out. He stated that the defendant has put up a house on the suit property. He said that he filed another case in Wanguru Law Courts and the defendant was ordered to vacate from the suit property but she has refused. He was referred the list of documents filed by the original plaintiff dated 16/6/2016. These are six items being:

(1) Letters of administration and certificates of confirmation of grant being HCC Succession Cause No. 499/2009 (Embu).

(2) Certificates of search for land parcel No. MWEA/NGUCWI/618.

(3) Decree in Wanguru SRM CC No. 160/2010

(4) Memorandum of Appeal in ELCA No. 101/2011.

(5) Ruling in HC Misc. Application No. 199/2013 (Embu).

(6) Letters of administration of grant in Succession Cause No. 100 of 2018 (Baricho).

DEFENDANT'S CASE

The defendant testified on oath and stated that she lives in quarry Kimuri with her family. She has four children. She stated that she had a lawyer known as Magee who refused to act for her in the case. She stated that she occupies one acre of the suit land where she has planted maize and beans. She has built a three roomed permanent house which she connected water and solar. She produced some documents issued by the defunct County Council of Kirinyaga. She also produced an extract of minutes of the Kirinyaga County Council dated 27/2/1996.

ISSUES FOR DETERMINATION

The plaintiff framed the following six issues for determination as follows:

(1) What size of the plaintiff's land parcel No. MWEA/NGUCWI/618 the defendant occupies?

(2) Whether Kirinyaga County Council had capacity to allocate part of the plaintiff's land to the defendant and validity of such allocation?

(3) Whether this suit is res-judicata in view of Wanguru SRM CC No. 160 of 2010, Kerugoya C.A. No. 30/2013, Embu Civil Application No. 199/2013?

(4) Whether the defendant has acquired the plaintiff's land by adverse possession?

(5) Whether the plaintiffs are entitled to the prayers sought?

(6) Who should pay costs of the suit?

LEGAL ANALYSIS

I have considered the evidence adduced by the parties and applicable law. I now resolve the dispute by evaluating the evidence based on the six issues as framed by the plaintiff as follows:

(1) What size of the plaintiffs land parcel No. MWEA/NGUCWI/618 the defendant occupies?

The plaintiff in paragraph 9 of the plaint averred that when she moved into the suit land, she found squatters staying on the land but they all left except the defendant who refused to move out and occupies less than one acre where she has built a house without their consent. The plaintiff also averred that sometimes in the year 2004 or thereabouts, the defendant's son one Mugo passed away and they obtained a Court order to restrain the defendant from burying him on the suit land. The plaintiff also stated that they also objected the defendant from being supplied with piped water by Mwienderi Self Help Water Project. The parties did not call any surveyor to determine what portion of the suit land the defendant is occupying. Since the issue did not come out either from the pleadings or evidence by the parties, I find it as a non-issue for determination in this case.

(2) Whether Kirinyaga County Council had capacity to allocate part of the plaintiff's land to the defendant and validity of such allocation?

The plaintiff has not produced any letter allocating him the suit land. The plaintiff has not also produced title documents to the suit land. The only document of ownership produced by the plaintiff is a certificate of official search dated 30th November 2000. This suit was instituted on 21st March 2016. The plaintiff did not obtain a current certificate of official search at the time of filing suit to determine who exactly is the registered owner. It is not known why the plaintiff did not produce the original title deed or a certified copy thereof as proof of ownership of the suit land. The nature of title in the suit property is absolute. It is not clear whether the property was acquired by the plaintiff from Kirinyaga County Council. In the absence of documents how the plaintiff acquired the suit property, it is not possible for this Court to determine whether or not Kirinyaga County Council had capacity to allocate part of the suit land to the defendant or not.

(3) Whether this suit is res-judicata in view of Wanguru SRM CC No. 160 of 2010, Kerugoya ELCA No. 30/2013 and Civil Application No. 199/2013 (Embu)?

The plaintiff in the plaint herein have admitted that they had filed another case in Wanguru Law Courts being SRM CC No. 160/2010 and obtained a decree where the defendant lodged an appeal being ELCA No. 30/2013 (Kerugoya). The plaintiffs admitted that they had also filed a Miscellaneous Application No. 199/2013 (Embu) where they sought leave to commence contempt proceedings against the defendant which was struck off.

Res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** which reads as follows:

> ***"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".***

It can be discerned from the above that before a party raises the issue of res-judicata, the following grounds must be proved:

(1) The issue in dispute in the former suit between the parties must be directly and substantially in issue between the parties in the suit where the doctrine of Res-judicata is pleaded.

(2) The former suit must be between the same parties, or those under whom they or any of them claim litigating under the same title.

(3) The former suit must have been heard.

(4) The Court or Tribunal which determined the former suit must have been competent.

From the pleadings and the Exhibits produced by the parties, it is not in dispute that the suit property has been the subject of several previous litigations being SRM CC No. 160/2010 (Wanguru), ELCA No. 30/2013 (Kerugoya) and Misc. Application No. 199/2013 (Embu). It is also not in dispute that SRM CC No. 160/2010 (Wanguru) has been heard and finally decided by a Court of competent jurisdiction. The defendant was dissatisfied and appealed to the ELCA (Kerugoya) in ELCA No. 30/2013 which is still pending. It is not also in dispute that the former suit was between the same parties or those under whom they or any of them claim litigating under the same title. In the case of ***Omondi Vs National Bank of Kenya Limited & others (2001) E.A. 177***, the Court said:

"Parties cannot evade the doctrine of res- judicata by merely adding other parties or causes of action in a subsequent suit".

Again in the Tanzanian Court of Appeal, Case of ***LOTTA VS TANAKI & OTHERS (2003) 2 E.A. 556,*** the Court held thus:

"Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit ……

A person does not have to be formally enjoined in a suit but he will be deemed to claim under the person litigating on the basis of common interest in the subject matter of the suit".

I agree entirely with the decision of the learned Judge. The plaintiff in this case had submitted himself to a competent jurisdiction in SRMCC No. 160/2010 (Wanguru) where he sued the defendant over the same subject matter. The matter was heard to finality and the Court rendered itself and the defendant who was dissatisfied appealed to the ELC (Kerugoya) in ELCA No. 30/2013 which is still pending. The plaintiff even went to the High Court in Meru seeking to enforce those orders obtained in SRM CC No. 160/2010 (Wanguru) which application was struck out. The actions by the plaintiff in moving from one Court to another after the issue has been heard and determined by a Court of competent jurisdiction between the same parties is an outright abuse of the Court process which must not be allowed. Litigation must come to an end.

In the case ***of Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Ltd (2014) e K.L.R,*** the Court of Appeal stated thus:

"In Management Corporation Stratta Title Plan No. 301-V-lee Tat Development Ple Ltd (2009) S Gttc 234, the Court of Appeal (of Singapore) examined the doctrine of res-judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res-judicata as a substantive principle of law are first " the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions".

The Court went on to state that:

"…… the general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle" and therefore the doctrine of res-judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly and if it makes a mistake, its decision is binding unless corrected in appeal".

I agree with decision of the superior Court and binding in this Court. In the upshot, the order commenting for this Court is that this suit is res-judicata.

(4) Whether the defendant has acquired the plaintiff's land by adverse possession?

The defendant at paragraph 7 of her defence has averred that she has acquired 1 acre out of L.R MWEA/NGUCWI/618 by adverse possession since she has been in open, un-interrupted exclusive adverse possession of the same for more than 12 years.

A claim for adverse possession is founded on ***Section 7 of the Limitation of Actions Act Cap. 22 Laws of Kenya*** which provides as follows:

"An action may not be brought by any person to recover land after the end of 12 years from the date in which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person".

In order to succeed in a claim for adverse possession, a party must prove by clear and unequivocal evidence the precise period of adverse possession. He must demonstrate the period when the title of the adversary party started to become adverse. In this case, the defendant did

not state in his pleadings when she took exclusive possession of the one acre which she lays claim by way of adverse possession. In her evidence, she produced some documents showing that she was allocated a parcel of land by Kirinyaga County Council on 27th February 1996. These could be some of the evidence which the defendant has raised in her Memorandum of Appeal No. 101/2011 contained in the plaintiff's list of documents item No. 4. Since the issues are subject of an Appeal, I leave it at that.

In the final analysis, I hold that having found that this suit is res-judicata, it may not be necessary to belabour on the other issues as that is sufficient to determine this case. In the upshot, this suit is hereby struck off for being res-judicata with costs to the defendant.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of November, 2019.

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E.C. CHERONO

ELC JUDGE

22ND NOVEMBER, 2019

In the presence of:

(1) Mr. Abubakar holding brief for Ann Thungu for Plaintiffs

(2) Jane Wamunyu – Defendant – present

(3) Mbogo – Court clerk – present