



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 138 OF 2017**

WANJOHI KAMAU.....1<sup>ST</sup> PLAINTIFF

NJOGU KAMAU.....2<sup>ND</sup> PLAINTIFF

(Suing as the Administrator and Personal Representative  
of the Estate of KAMAU MUNGE NGURE)

**VERSUS**

PAUL KANGANGI MUNENE.....1<sup>ST</sup> DEFENDANT

(Sued on his behalf and administrator of the Estate of  
Kangangi Ngunyi)

BETH CATHRINE W. KANGANGI.....2<sup>ND</sup> DEFENDANT

(Sued on her behalf and Administrator of the Estate of  
Kangangi Ngunyi)

DISTRICT LANDSREGISTRAR,

KIRINYAGA COUNTY.....3<sup>RD</sup> DEFENDANT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT

(Sued on behalf of the Ministry of Lands and Settlement)

**RULING**

The plaintiff filed this suit on 26<sup>th</sup> September 2017 seeking the following orders:

*(a) A declaration that land parcel No. INOI/MBETI/24 and 25 were erroneously combined and the same be separated accordingly.*

*(b) An order that the Registrar Kirinyaga District Land Registry do rectify the register by separating land parcel No. INOI/MBETI/24 and 25 and by opening register for land parcels No. INOI/MBETI/25 in the names of Kamau Munge Ngure.*

*(c) Alternatively, the Court do order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are holding land parcel No. INOI/MBETI/24 in trust for themselves and for the plaintiffs.*

*(d) Costs of the suit.*

On 6<sup>th</sup> December 2017, the 1<sup>st</sup> and 2<sup>nd</sup> defendant's filed a joint statement of defence in which they denied the plaintiffs claim and all

particulars of fraud. At paragraph 8 of their defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that this suit is Res-judicata vide judgments, decrees, orders and rulings issued vide the following suits:

**(a) Kerugoya ELC No. 700 of 2013 judgment of Hon. B.N. Olao dated 5/5/2017 – Martha Wakuthii Mutua & 7 others Vs Paul Munene Kangangi & 2 others.**

**(b) Nairobi HCCC No. 1816 of 1972 - Judgment of Hon. Justice J.M. Waiyaki dated 21/11/1972.**

**(c) Kerugoya SPMCC No. 85 of 1990 decree dated 1/12/1991.**

**(d) Nairobi HCCCA No. 32 of 1992.**

**(e) Nairobi HCCC No. 1115 of 2001.**

In a Notice of Preliminary Objection dated 24<sup>th</sup> April 2018, the 1<sup>st</sup> and 2<sup>nd</sup> defendants raised the same grounds similar to those raised in their statement of defence save that L.R. No. INOI/MBETI/25 is legally non-existence and that this suit is time barred by statute of limitation and hence an abuse of Court process.

When this matter came up for directions on 13<sup>th</sup> June 2019, the parties agreed by consent to canvass the said Notice of Preliminary Objection by way of written submissions.

### **1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANT'S CASE**

The 1<sup>st</sup> and 2<sup>nd</sup> defendants contend that L.R. No. INOI/MBETI/24 was a first registration given to their late father Kangangi Ngunyi in 1961 and a title deed duly issued. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further stated that the holder of a title registered as first registration is indefeasible and that such title cannot be legally challenged whether allegations of fraud, mistake or error are put forth by any litigant as the title is jealously protected by law under *Section 25 (1) of the Land Registration Act No. 3 of 2012*. The 1<sup>st</sup> and 2<sup>nd</sup> defendants also stated that the instant suit is res-judicata under *Section 7 of the CPA* in that the issues being raised have been determined in previous decisions of Courts of competent jurisdiction in the following decisions:

#### **1. ELC Case No. 700 of 2013 (Kerugoya)**

In that case, the plaintiff herein and 5 others had sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants claiming L.R. No. INOI/MBETI/24 by way of adverse possession and sought orders inter alia that they be registered as joint absolute proprietors of 4.0 Acres of land comprised in L.R. No. INOI/MBETI/24. In a judgment delivered by Hon. Mr. Justice B.N. Olao on 5<sup>th</sup> May 2017, the Court held that the suit was res-judicata in that the plaintiffs' parents had previously litigated with the defendants and also the defendants father Kangangi Ngunyi over the same subject matter L.R. No. INOI/MBETI/24 vide Nairobi High Court Civil Case No. 1816 of 1972 – Kamau Ngure & Mutua Munyongo Vs Kangangi Ngunyi.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants also stated that in another case being SPMCC No. 85 of 1990 (Kerugoya) between Paul Munene Kangangi & others Vs Kamau Ngure & Mutua Munyongo, the Court also ordered that the plaintiff and their parents (families) be evicted from L.R. No. INOI/MBETI/24.

In yet another case being HCCA No. 320 of 1992 (Nairobi) between Kamau Ngure & Mutua Munyongo Vs Paul Kangangi Munene & 2 others being an Appeal against the Decree/Judgment in SPMCC No. 85 of 1990 and which Appeal was lodged by the plaintiffs parents Kamau Ngure, the same was duly dismissed. In another case being HCCC No. 1115 of 2001 (O.S) between Mutua Munyango Vs Paul Kangangi Munene, Joseph Mugeru and Beth Catherine Wanjiru whereby Hon. Lady Justice Rawal (as she then was) dismissed a similar suit dealing with same subject matter between the same parties. The 1<sup>st</sup> and 2<sup>nd</sup> defendants stated that the current suit has been cleverly pleaded in a veiled way to add parties namely 3<sup>rd</sup> and 4<sup>th</sup> defendants and trying to change the cause of action. They argued that the plaintiffs in this case have sued in their capacity as legal Administrators and representatives of late Kamau Munge Ngure – their father who had several litigations with the 1<sup>st</sup> and 2<sup>nd</sup> defendants already and also with their late father Kangangi Ngunyi over issues of ownership of L.R. INOI/MBETI/24 and that despite change of capacity, the issues remain around same subject matter and same parties, a finding that was observed by Hon. Mr. Justice B.N. Olao in ELC Case No. 700 of 2013 (Kerugoya). The 1<sup>st</sup> and 2<sup>nd</sup> defendants attached copies of the judgments in the aforementioned cases which are also contained in their list of documents dated 5/2/2017.

### **PLAINTIFFS CASE**

The plaintiffs stated that for a party to plead the doctrine of Res-judicata, it has to prove the following three conditions:

- (a) He/she have to show that there was a former suit or proceedings in which the same parties as in the subsequent suit litigated.**
- (b) The matter in issue in the later suit must have been directly and substantially in issue in the former suit.**
- (c) That a Court competent to try it had heard and finally decided the matter in controversy between the parties in that former suit.**

The plaintiffs argued that in ELC Case No. 700 of 2013 (Kerugoya), the Judge in that case dismissed the suit on technicalities and that the suit was not heard on merit. The plaintiffs also stated that the issue in that former suit was not the same as in the instant suit. The plaintiffs also stated that the parties are also not the same. They said that the Judge in that case referred to other suits which had also been dismissed on technicalities and with different parties.

As regards HCCC No. 1816 of 1972 (Nairobi), the plaintiffs contend that that former suit was also dismissed on technicalities and that the parties were not also the same as in the present suit. In HCCC No. 115 of 2001 (Nairobi), the plaintiffs argued that the Court dismissed the case for want of prosecution and that the issues were not heard and determined on merit. They said that the parties in that suit were not the same as in the instant suit. In SPMCC No. 85 of 1990, the plaintiffs stated that the issues in the said suit was not the same as in the present suit and that the parties were also different. In regard to HCCCA No. 320 of 1992, the plaintiffs stated that the parties were not the same as in the instant case and the issues were not also the same.

## **LEGAL ANALYSIS**

I have considered the arguments by the parties and their submissions. The doctrine of Res-judicata is provided for under **Section 7 of the Civil Procedure Act** which reads thus:

***“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”.***

I have perused the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s list of documents dated 5<sup>th</sup> December 2017, particularly the judgment by Hon. Mr. Justice B.N. Olao (as he then was) in ELC No. 700 of 2013 (Kerugoya) between Martha Wakuthii Mutua, Grace Wakarima Mutua, Joyce Wangu Mutua, Peter Maina Mutua, Daniel Gachoki, Wanjohi Kamau & Njogu Kamau Ngure Vs Paul Kangangi Munene, Joseph Mugara Kangangi and Betha Catherine W. Kangangi. In that case, the learned Judge at page 11 observed as follows:

***“..... What the plaintiffs are claiming through this suit is the common interest that their late husband and father MUTUA MUNYONGO & ANOTHER were pursuing in NAIROBI HIGH COURT CIVIL CASE No. 1816 of 1972 where the defendant was KANGANGI NGUNYI the father to the defendants herein. That case also concerned a claim to the suit land by adverse possession and it was dismissed by Justice J.M. WAIYAKI Another suit was also NAIROBI HIGH COURT CIVIL CASE No. 1115 of 2001 (O.S) in which MUTUA MUNYONGO this time sued the defendants in this case also over the same suit land. That suit was also dismissed this time by K.H. RAWAL J. (as he then was) on 21<sup>st</sup> March 207 and in doing so, the Judge also referred to the suit as misconceived and an abuse of the process of the Court. The fact therefore that the plaintiffs were not parties in the previous cases does not defeat the plea of res-judicata. Res-judicata applies to parties and privies. The plaintiffs herein are clearly pursuing their late husband and father’s claim over the same suit land and the law is that the mere addition of parties cannot assist parties evade the plea of res-judicata”.***

In the same decision, **B.N. Olao J.** cited with approval the **Tanzanian Court of Appeal Case of LOTYA VS TANAKI & OTHERS (2003) 2 E.A. 556 (CAT)** where it was held as follows:

***“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 formerly enjoined in a suit but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”.***

I agree with the reasoning of the Court suffice to add that the plaintiffs in the previous suits are deemed to claim under the persons so litigating as plaintiffs in the present suit and the subject matter is the same as the one in the present suit. The subject matter is also similar to that in the present suit in all respect.

In the case of **E.T. VS Attorney General & another (2012) e K.L.R, Majanja J.** observed as follows:

***“The Courts must be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form a new cause of action which has been resolved by a Court of competent jurisdiction”.***

I agree with the decision by the learned Judge. Applying the stated law to the facts in this case, I find beyond peradventure that the previous decisions by Courts of competent jurisdictions between similar parties or their privies touching on the same issue(s) have directly and/or substantially resolved the dispute in controversy.

In the final analysis, I find merit in the Notice of Preliminary Objection dated 24<sup>th</sup> April 2018. Consequently, this suit be and is hereby struck out for being Res-judicata with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 22<sup>nd</sup> day of November, 2019.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**22<sup>ND</sup> NOVEMBER, 2019**

In the presence of:

1. Mr. Abubakar holding brief for Mr. Ndana for Plaintiffs
2. Mr. Chomba holding brief for Mr. Kahiga for Defendants
3. Mbogo – Court clerk – present