



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**ELC CASE NO. 23 OF 2019**

**(Formerly Nyahururu ELC No. 29/2018 and Formerly Nyahururu HCC No. 02/2018)**

**JESSE WAMBUGU NDIRANGU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ROBERT KINGORI NDIRANGU.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**- V E R S U S -**

**LUCY WANGARI NDIRANGU.....DEFENDANT/APPLICANT**

**RULING**

1. Pursuant to the dismissal of ELCA No. 1 of 2017, the Appellants Children, the Applicants herein filed a plaint being ELC No. 23 of 2019 dated the 11<sup>th</sup> June 2018 on the 12<sup>th</sup> June 2018 in which they sought for declaratory orders that;

i. There exists a customary and constructive trust over Nyandarua /Kaimbaga Block 1 (Muthaite)/ 22, 62 and 123 in favour of the Plaintiffs as sons of the registered proprietor Samwel Ndirangu Wambugu which interest is superior and defeats the Defendant's purported interest in the suit parcels of land.

ii. A permanent injunction restraining the Defendant either by herself, her relatives, servants, employees, agents or anybody claiming through her from in any way whatsoever interfering with the Plaintiffs' quiet and peaceful enjoyment of Nyandarua/ Kaimbaga Block 1 (Muthaite)/ 22, 62 and 123 *as well as general damages for nuisance and embarrassment. They also prayed for costs of the suit.*

2. Following the filing of the suit as well as an Application for interim injunction, the Defendant herein filed their Preliminary Objection dated the 18<sup>th</sup> June 2018 to which they raised the issue that the suit was res judicata and an abuse of the court process and secondly that the Plaintiffs lacked locus Standi to institute and sustain the entire suit.

3. By consent, parties agreed to dispose of the Preliminary Objection by way of written submissions.

**Defendant/Applicants Submission**

4. The Defendant's submission was to the effect that the subject matter herein was adjudged to be matrimonial property in CMCC.273/2009 wherein the same was also canvassed on Appeal in ELC.APP.1/2017 which confirmed the decision of the trial court that indeed the subject suit was matrimonial property belonging to the Applicant/Defendant.

5. Being therefore matrimonial property belonging to Applicant and her husband, the so called children who are the children of the Applicant's husband could not claim any interest in the land.

6. That Section 6 of the Matrimonial Property Act 2013, provides the meaning of matrimonial property, whereas Section 7, of the same Act 2013, stipulates that the ownership of matrimonial property vests in the spouses.

7. That the Applicants herein were claiming interests of that which had been adjudged to be matrimonial property. Section 9 of the Matrimonial Property Act was explicit on the issues acquisition of interest in matrimonial property by way of contribution. There was no contribution by Plaintiff/Respondents and their claim must fail.

8. The Defendant/Respondent submitted that the suit was defective, bad in law and unmerited. The Plaintiff/Respondents herein claim to be

children yet they are grown up and were trying to use the court into allowing them to inherit property yet this was not a Succession issue and the proprietor of the suit property was still alive.

9. That since the trial court in the Nyahururu CMCC No.273 of 2009, had declared the Applicants' mother as a trespasser to matrimonial property, her children could therefore not claim right to matrimonial property as they too were trespassers.

10. That Section 7 Civil Procedure Act defined Res judicata to be an issue that had been determined and therefore this matter also having been determined on Appeal, the court cannot entertain it.

11. That the litigants in the present suit were the same in the trial court save that they were using different parties, and the Counsel on record for Plaintiff was the same in lower court and Appeal, and therefore had been were aware of matter pending in lower court before filing this suit.

#### **Plaintiff/Respondents' submission**

12. The Plaintiff/Respondents, in response to the Preliminary objection, submitted that the principles regarding the same were well set out are in **Mukhisa Buscuit vs- West End Distributors Limited (1969) EA. 696** where it was held that a Preliminary Objection could not be raised if a fact had had to be ascertained or if what was to be sought was the exercise of judicial discretion. They framed their issues for determination as follows:

- i. Whether the Plaintiffs' have locus standi by to file and sustain the suit
- ii. Whether the Plaintiffs' this suit is incurably defective, bad in law and unmerited.
- iii. Whether the Plaintiffs' entire suit is res judicata and an abuse of the court process.

13. The Plaintiffs combined the above grounds of objection and argued them together to the effect that they were the sons of the registered proprietor of the suit parcels of land one Samwel Ndirangu had settled them on the suit land where they have been in actual possession and occupation. That by placing them on the said land their father had created a trust in their favour. That they had therefore moved to court to protect their rights as persons in actual occupation of the land. That once a trust had been pleaded, the issue as to whether there was a constructive customary trust was a matter to be determined on facts and evidence and not through a Preliminary Objection. The Plaintiffs relied on the decided case of **Kagia Githire vs George Ndichu Kagia & 4 Others [2008] eKLR** to support their submission.

14. As to whether the suit was Res judicata, the Plaintiffs' submission was that pursuant to the provisions of Sections 7 of the Civil Procedure Act in order for a suit to be termed as Res Judicata, the parties should be the same litigating over the same subject matter, using the same title, raising the same issues as the previous suit and the previous suit having been tried by a competent Court and finally decided.

15. That in the present suit the parties were different as they were children of the registered proprietor who had brought them to the land. That the Defendant was the stepmother who attempted to evict them from the land after successfully evicting their biological mother. That they were not parties to the previous suit and the orders issued in that matter did not affect them.

16. That the Defendant's assertion that the suit was res judicata was bereft of substance. That the cause of action herein was fresh and having arose the moment the Defendant intimated her intention to evict them after evicting their biological mother. It was therefore the Plaintiffs' submission that the suit was not res judicata and that ground 3 of the Preliminary Objection ought to fail.

#### **Determination.**

17. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. In this proceedings, it is the Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the same was res judicata by virtue of the proceedings in the Nyahururu CMCC No 273 of 2009.

19. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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”

20. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

21. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

22. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

23. The matter in issue is identical in both suits;

i. The parties in the suit are the same;

ii. Sameness of the title/claim;

iii. Concurrence of jurisdiction; and

iv. Finality of the previous decision

24. Facts surrounding the proceedings in this case are that *this matter was first heard in the Chief Magistrate's Court at Nyahururu in Civil Case No. 273 of 2009 wherein the parties were the Applicant's mother, Mary Wahiga Ngirangu vs Lucy Wangari Ndirangu*. The Plaintiff in that case sought orders of permanent injunction restraining the Respondent from interfering with her quiet possession and occupation of Nyandarua/ Kaimbaga Block 1 (Muthaite)/ 22, 62 and 123.

25. The learned trial Magistrate, upon taking the evidence of both parties, wrote his judgment which was delivered by the Chief Magistrate on the 23<sup>rd</sup> November 2016 dismissing the Plaintiff's suit with no orders as to cost. The Applicants' mother being dissatisfied with the judgment of the trial Magistrate has filed an Appeal before this court being Nyahururu ELCA No 1 of 2017. The Court after re-evaluating and analyzing the evidence adduced in the trial court afresh, delivered its judgment on the 18<sup>th</sup> day of January 2018 wherein it had found that the proprietor of the suit land herein Mr. Samuel Ndirangu Wambugu, lacked capacity to contract a second marriage to the Appellant pursuant to the provisions of section 37 of the Marriage Act, and further that then Appellant (the Plaintiffs mother) was not a wife as per the law, her presence on the matrimonial property therefore constituted trespass thereon.

26. Section 6 of the Matrimonial Property Act 2013, provides the meaning of matrimonial property, whereas Section 7, of the same Act 2013, stipulates that the ownership of matrimonial property vests in the spouses. The Plaintiffs who were children of the Appellant in the Appeal cannot claim any interest in the land.

27. This Court made a finding concurrent to the trial courts findings wherein it proceeded to dismiss the Appeal with cost to the Respondent

28. From the above summary of this matter it is not in dispute that the Plaintiff's mother and the Defendant herein were parties to the suit in Nyahururu Civil suit *Civil Case No. 273 of 2009 and Nyahururu ELCA No. 1 of 2017* where the subject matters were Nyandarua/ Kaimbaga Block 1 (Muthaite)/ 22, 62 and 123.

29. It is also not in dispute that the Plaintiffs' mother in the previous suit sought injunctive orders against the Defendant herein on the suit land claiming to have been settled on the same by the proprietor Mr. Samuel Ndirangu Wambugu. It is also not in dispute that the matter was heard and finally determined by a court of competent jurisdiction both at the trial and Appeal stages. And lastly it is not in dispute that the Plaintiffs herein have now filed a similar suit being Nyahururu ELC 23 of 2019 wherein the subject suit is similar and the prayers sought are similar to Nyahururu Civil suit No. 273 of 2009. It is not in dispute that the parties litigating in the subsequent suit are children of the Plaintiff in the former suit litigating over the same suit land and finally, it is not in dispute that there was an Appeal filed to challenge the decision of the court in Nyahururu Civil suit No. 273 of 2009 which Appeal was dismissed.

30. A further look at the provisions of Section 7 of the Civil Procedure Act, the same clearly stipulates that;

‘.....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... (My emphasis).

31. I find that the issues in the previous suit which were substantially the same in the subsequent suit were determined and covered by the decision in the previous case. I also find that parties in the subsequent suit, the Plaintiff/Respondents are children to the Plaintiff in the

