



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 5 OF 2019

MIRIAM WAITHIRA GITHENGI MWICIGI - 1ST RESPONDENT /PLAINTIFF

GEORGE MWICIGI GITHENGI.....2ND RESPONDENT/PLAINTIFF

VERSUS

JOHN BAPTISTA MURIRA KWERI.....APPLICANT / DEFENDANT

RULING

1. On the 22 /5/2019 the Applicant filed a Notice of Motion seeking the following orders;

- a. That the Court do issue an order dismissing the suit for being resjudicata.
- b. That the orders of 11/3/19 be set aside.
- c. Cost of the application and the suit be borne by the Respondents.

2. The application is grounded on the following grounds; the issues herein have been heard and determined in CMCC 146 of 2002 Thika and ELC 75 of 2018-Muranga; the issue in dispute is LOC16/KIARUTARA/43 which was the subject matter in CMCC No 1146 of 2002, Thika and ELC 75 of 2018.

3. The Applicant deposed in his supporting affidavit sworn on the 22/5/19 that in CMCC 1146 of 2002 the issues revolved around a claim of trust in respect to the suit land in favour of Moses Karanja Mwicigi who claimed as the administrator of the estate of the deceased Mwicigi Gathu. That Moses Karanja Mwicigi is the step brother of the Applicant and Simon Githengi, deceased who is the husband and father of the Respondents respectively. The Court determined that the evidence of the Plaintiff did not support a claim of trust and dismissed the suit.

4. That the issue in ELC 856 of 2012-Nairobi which was later transferred to the ELC Muranga and registered as ELC 75 of 2018 was for the removal of a caution and restraining orders against Jennifer Njeri Githengi, George Mwicigi Githengi and Eunice Wairimu Githegi , who are the children of the 1st Respondent/Plaintiff herein. George Mwicigi who is the 2nd Plaintiff herein was the 2nd Plaintiff in the ELC 75 of 2018.

5. That the Defendants in ELC 75 of 2018 filed a defence and denied having lodged the caution but also denied having any claim over the suit premises. The suit was heard and determined in favour of the Applicant in this suit.

6. That the current suit is resjudicata and urged the Court to dismiss it.

7. In opposing the application the Respondents filed grounds of opposition on the 3/7/19 and stated that the application is hopeless, a sham and an abuse of the process of the Court. That CMCC No 1146 of 2002 was not heard and determined on its merits. That the subject matter was different and the parties were different. That the issue in ELC 75 of 2018 was in respect to the removal of caution. That the two suits did not affect the rights of the Plaintiffs as the Defendants rights had been extinguished. That the claim of adverse possession has not been litigated.

8. Further that orders on status quo issued on the 11/3/19 were sought by way of consent and no grounds have been laid to warrant setting aside.

9. The parties elected to canvass the application by way of written submissions which I have read and considered. The Applicant submitted and gave a history of the suits in respect to the suit land and the parties. He stated that pursuant to section 7 of the Civil Procedure Act as read together with explanations 1.3.4.5 and 6 this suit is res judicata in view of the decision of the Court in CMCC No 1146 of 2002 and later

ELC 75 of 2018. The claim of trust was litigated upon in CMCC No 1146 of 2002. That in ELC 75 of 2018 the Respondents had the opportunity to raise their claims, including adverse possession as a counterclaim but they did not. It urged the Court to hold that this suit is res judicata.

10. The Respondents submitted that the issue in ELC 75 of 2018 was in respect to the removal of caution and the issue in this matter is adverse possession.

11. In respect to CMCC 1146 of 2002, the Respondents claimed that the parties in this suit were different. That the Plaintiff Moses Karanja was the administrator of the estate of Mwicigi Gathu and was claiming on behalf of Simon Githengi Mwicigi deceased over a quarter of an acre they are occupying and not the whole suit land.

12. That the Court dismissed the suit for lack of letters of administration and therefore was dismissed on technicality.

13. In respect to ELC 856 of 2012- the Respondents submitted that the suit land in issue was parcel LOC.16/KIARUTARA/143 and not LOC.16/KIARUTARA/43 and thus the subject matter was different.

14. In respect to orders of status quo, the Respondents argued these orders were obtained by consent and can only be set aside on grounds of fraud and such other grounds that vitiate a contract.

15. It is important to discuss the history of the suit. The parties are all related. According to the record, the family Patriach Mwicigi Gathu had 4 wives to wit; Nyakaruro, Kiringa, Lydia Wanjiku and Rachael Wambui. It is also said that the old man owned a number of lands at Mwagu, Kiarutara (43 and 44) interalia. He also had several children.

16. In CMCC No 1146, the parties were; Moses Karanja Vs John Baptista Kweri. The subject matter was LOC16/KIARUTURU/43. The Plaintiff sued the Defendant as the administrator of the estate of Mwicigi for a claim in trust against the Defendant. He sought the following prayers;

“ a declaration that the Defendant holds the entire land parcel LOC16/KIARUTARA/43 in trust for the estate of Mwicigi Gathu (deceased) in which the Plaintiff is the administrator and pursuant thereto the Plaintiff be registered for and on behalf of the estate of Mwicigi Gathu deceased.”

17. It is commonly acknowledged between the parties that Moses Karanja, Simon Githengi and the Defendant are brothers /step brothers, being sons of Mwicigi Gathu.

18. The Court in CMCC No 1146 of 2002 after a full hearing returned a verdict that upon analyzing the evidence the claim of trust is not supported by evidence. Further the Hon Learned Magistrate also stated in her evidence that the Plaintiff filed the suit without obtaining letters of grant of administration and on that account the suit fell too for dismissal. That either way the suit was for dismissal. It follows that the suit was fully heard and determined by a competent Court.

19. ELC 75 of 2018; the parties herein are John Baptista Kweri Vs Jennifer Njeri Githengi, George Mwicigi Githengi and Eunice Wairimu Githengi. The Defendants are the children of Simon Githengi and Miriam Waithera Githengi. Simon Githengi was the brother of the Defendant. The Defendants are therefore the nieces and nephew of the Plaintiff. The cause of action is the removal of the caution lodged by the Defendants on the suit land as well as restraining orders against the Defendants. The suit land is the same as in CMCC No 1146 of 2002 as well as the current suit.

20. The Court upon hearing the matter determined in favour of the Plaintiff.

21. The current suit is between Miriam Waithera Githengi and George Mwicigi Githengi Vs John Baptista Kweri. The suit land is parcel LOC.16/KIARUTARA/43. The Plaintiffs claim is for trust with an alternative claim of adverse possession. The Plaintiffs are wife and son of Simon Githengi and the sister in law and nephew of the Defendant accordingly.

22. Having reviewed the pleadings, the application, the grounds of opposition and the written submissions the issues that commend themselves for determination by this Court are;

- a). whether the suit is Resjudicata?
- b). If the answer to a) above is in the negative, whether the orders of 11/3/19 should be allowed to stand?
- c). who meets the costs of the application?

23. Section 7 of the Civil Procedure Act provides as follows;

“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”.

24. Resjudicata literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments. I rely on the decision in **Subramanian Swamy V state of T.N AIR 2015 SC 460**. The doctrine is founded on high public policy intended to achieve two objectives namely there must be a finality to litigation and that an individual should not be harassed twice over on account of the same litigation. It underscores the fundamental doctrine of law that there must be an end to litigation.

25. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the question in reference to;

- a. Matters directly and substantially in issue in the former suit.
- b. Whether the parties are the same or parties under whom they are or any of them claim
- c. Litigating under the same title
- d. Competence of the Court
- e. Matter has been heard and finally decided.

26. According to para 15-21, it is clear that the parties in the previous suits are related. The suits are pitting the family of the Defendant and that of his step brother Simon Githengi. Therefore the new parties in this suit are such that they claim under the previous parties. The subject matter of this suit is the same as in the previous suits.

27. In respect to whether the issues were directly and substantially in issue in the former suits, it is the finding of the Court that trust was adverted in CMCC No 1146 of 2002 which issue was heard and determined fully and found to have not been supported by evidence.

28. In the ELC 75 of 2018 the claim of the Plaintiff was removal of caution and restraining orders against the Defendants who are the children and siblings of the Plaintiffs in this case. It is clear the parties are the same or parties under whom they are or any of them claim under each other. In the CMCC 1146 of 2002 Respondents have admitted that the Plaintiff Moses Karanja Mwicigi was claiming on behalf of the estate of Simon Githengi, the husband and father of the current Plaintiffs. This thread has been maintained in ELC 75 of 2018 wherein the children of the said Simon were sued and currently it is the wife and the son that have filed suit. The Court finds that this limb has been satisfied and holds that the parties are the same.

29. It is also the finding of the Court that the parties are litigating under the same title which is LOC16/KARUTARA/43. The Respondent argued that the suit land in ELC 856 of 2012 was different from the one in the previous suit and ELC 75 of 2018 was different. This is misleading as the ELC 856 OF 2012 was transferred to ELC Muranga and registered as ELC 75 of 2018. The Court finds that the subject matter is the same.

30. In ELC 75 of 2018, the Defendants denied the Plaintiffs claim and under para 7 that they have no claim over the suit land and put the Plaintiff in the suit in strict proof.

31. Section 7 provides the following explanations in assessing the doctrine of resjudicata;

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

32. The Plaintiffs in this case had another chance in ELC 75 of 2018 to raise the current claim of trust and or adverse possession in their defence. The law provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. This is the position in the current case. Having failed to raise the defence of either trust or adverse possession in ELC 75 of 2018, the very defence and or attack are not available for litigation in the current suit.

33. The essence of the doctrine of res judicata is further explicated by **Wigram, V-C in Henderson v. Henderson (1843) 67 E.R. 313**, as

follows:

“ ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” .

34. In the case of George **W M Omondi & another v National Bank of Kenya Ltd & 2 Others [2001] eKLR** the Court stated as follows;

The doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.

35. Further the Court held that;

“.....the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in *Mwangi Njangu v Meshack Mbogo Wambugu* (supra) where he said:-

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays”.

It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter”.

36. The overarching principle is that parties cannot be allowed to litigate in instalments. Public policy demands that litigation has to come to an end.

37. In answer to issue No a) the Court has found the suit is resjudicata.

38. In view of the finding in Para 37 above the orders issued on 11/3/19 lapse automatically upon the determination of the suit to be resjudicata.

39. In the end this suit is resjudicata and it is dismissed with costs to the Applicants.

40. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kuria HB for Kimwere for the 1st & 2nd Plaintiffs

Ms Wangari for the Defendant

Irene and Njeri, Court Assistants