



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 20 OF 2017

**MARYANNE MWANGI GICHUKI (suing as the legal representative of the
estate of WILSON MWANGI RAMSON.....PLAINTIFF**

VERSUS

MARY NAYMBURA NJUGUNA.....1ST DEFENDANT

KARIUKI MUHOI2ND DEFENDANT

ALEX MWANGI KAMAU.....3RD DEFENDANT

ANDREW GACHINGIRI NGAHU.....4TH DEFENDANT

DAVID NJARIA KAGUNDA.....5TH DEFENDANT

AND

JAMES MICHAEL CHEGE.....1ST INTERESTED PARTY

FREDRICK MAINA GATHURI.....2ND INTERESTED PARTY

RULING

1. This suit was filed on the 1/12/13 initially between the original Plaintiff Wilson Mwangi Ramson and the Defendants. Later the Interested Parties were enjoined pursuant to the orders of this Court dated the 12/5/16.

2. In its defence the Defendants under para 3a) stated as follows;

“the issue of ownership and or proprietorship as raised in this suit is resjudicata as it was determined in NBI HCCA No 179 of 1995 and the land parcel number confirming to belong to Hilda Nyambura Gathuri (deceased).

The Plaintiff has deliberately misrepresented to the Court by his failure to disclose to the Court the true facts and circumstances.”

3. The issue of whether the suit was resjudicata was also raised by my Brother the Hon BN Olao in his ruling dated the 12/5/16 when he said;

“Before I leave this matter, it has become clear to me in the course of hearing this application that perhaps this suit may well be resjudicata. I was not addressed on that issue and so I cannot make any decision on it. But if indeed there is a pending matter in the High Court Nairobi involving the same parties and the issues, then Counsel would do well to stay these proceedings. I leave it to the Counsel and their clients to decide. That decision be communicated to this Court on the 31/8/16 when this matter shall be mentioned for further orders.”

4. I have perused the entire record of the proceedings and on the 8/12/16 the Counsel for the Plaintiff informed the Court from the bar that the suit is not resjudicata and the Court directed that the matter be listed for pretrial. The matter of resjudicata kept coming up and on the 19/9/18 the Court directed the parties to address the issue once and for all before the trial proceeds in earnest.

5. The parties elected to file written submissions to outline their respective positions which I have read and considered.
6. The brief facts of this case according to what I can glean from the pleadings is that the Plaintiff purchased the land parcel LOC 2/KINYORA/217 from Charles Njuguna Kamau who was an administrator of the estate of the late Stephano Ndingiri, the original owner of the suit land.
7. The Plaintiff filed a suit against the late Hilda Nyambura Gathuri in Murang'a SRMCC No 15 of 1995 where he sought for an eviction claiming proprietary rights over the land arising from purchase from Charles Njuguna Kamau. The deceased Defendant (Hilda) disputed the claim on the ground that she was living on the land and was the daughter in law of the late Stephano Ndingiri.
8. That Charles Njuguna, the vendor fraudulently transferred the land to himself by obtaining grant fraudulently and that the sale to the Plaintiff (Wilson) and further transfer was also fraudulent.
9. The suit was allowed and an eviction order was issued against the late Hilda Nyambura Gathuri. An appeal was filed vide Nairobi HCCA 179/95 where the deceased Appellant (Hilda) pleaded that the trial magistrate did not give her time to prosecute her application for revocation of grant issued to the vendor (Charles Njuguna Kamau). That the said Kamau who was her brother in law held the suit land in trust for the family of Ndingiri, her husband Samuel Gathuri, included. That the sale was fraudulent and that she had been on the land for over 40 years and claimed the land for herself and her late husband who was the brother of Charles Njuguna Kamau.
10. The Appellant also relied on Section 27 and 28 of the Registered Land Act CAP 300 of the Laws of Kenya (now repealed) and claimed trust in the land.
11. The High Court by the verdict of Hon. Mr Justice Aganyanya set aside the trial Court's judgement and noted that the trial Court ought to have been keen on the fact that there were pending revocation proceedings seeking to nullify the grant. It is this grant that was used to sell the land. The Hon Mr Justice Aganyanya J only addressed the impugned judgement which evicted the Appellant. He did not make any findings on ownership. The appeal was allowed to the extent that judgement for eviction was to be aside. That the Plaintiff's claim would be settled after determination of Nairobi Succession Cause No. 238/90 which was still pending.
12. Encouraged by the decision by Hon Justice Aganyanya, Hilda filed an application in the appellate Court seeking orders to have the title issued in her favour and that the Deputy Registrar executes relevant documents in her name to effect the transfer. As it would be, the application was dismissed by Hon. Lady Justice Okweng'u (as she then was) on 24/8/2010 while noting that the judgement by Hon. Justice Aganyanya issued on 24/2/2002 did not address the respondents/Plaintiff (Hilda's) claim of ownership in the land. The Learned Judge also noted, rightly, that the said Hilda had not filed any counterclaim in the suit in the lower Court that is SRMCC No 15 of 1995. The application was dismissed.
13. The Interested Parties in this case are the children of the late Hilda Nyambura. The 1st Interested Party obtained a grant of letters of administration of the late Appellant and objector in the succession cause. They filed their statement of claim before the land Court (this case) seeking a declaration that the Plaintiff's registration was an illegality and fraudulent. That the Plaintiff holds the property in trust for them as beneficiaries of the estate of the late Hilda Nyambura Gathuri and that they are the legal owners of the suit land.
14. The Defendants on the other hand have described themselves as purchasers and or licensees of the land pursuant to various sale transactions (the attached documents refer to sale and lease) between themselves and the late Hilda Nyambura and her children. The Defendants averred that the suit is resjudicata as the issue of ownership of the title was raised in HCCA 179/95 and the Court held that the land belongs to Hilda Nyambura.
15. The Interested Parties have raised the issue of trust and fraud. That the land was being held by their uncle Charles Kamau on behalf of their family. That the sale and transfer of the said land to Wilson was fraudulent and illegal on account of the claimed trust. They aver that the land belongs to them as grandchildren of the late Stephano Ndingiri and the children of Hilda Nyambura who was the surviving widow of the son of the deceased.
16. The key issue for determination is whether the case is resjudicata
17. 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 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 of 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.”
18. 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 that handled the previous cases.
- e. Matter has been heard and finally decided.

19. 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” .

20. I have anxiously reviewed this matter and the two suits being referred to which are SRMCC No 15 of 1995 and HCCA No 179 of 1995. The issue in the SRMCC 15 OF 1995 was eviction of Hilda from the suit land. The suit was determined in favour of the Plaintiff and eviction was ordered against Hilda.

21. Were the suits heard and finally determined? In the appellate suit HCCA 179 OF 1995, the Court set aside the judgement of the lower Court SRMCC No 15 of 1995 in its entirety with reasons. It however did not make any determination on the proprietorship of the suit land least of in the name of Hilda. The High Court's determination in Nairobi HCCA 175/95 did not decide who the rightful owner of the land was but pointed out that the Appellant's (Hilda) claim would be determined in the revocation of proceedings which were still pending. She was not given title to the land nor was anything said about the Plaintiff's title.

22. In the case of **MWK –Vs – AMW Kiambu HCCC NO 5/17** the Court held that the policy and rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points.... Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. [emphasis is mine].

23. In the case of *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880, the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed. *Also, that;*

“.....unless it is abundantly clear, when *res judicata* is raised, 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: 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case.” [emphasis is mine].

24. In this case it is the finding of the Court that the Plaintiff and the interested parties are the same (suing under the same title in the case of the interested parties who are the children of Hilda). The subject matter of the suit is the same, that is to say LOC2/KINYONA/217. One would think that the case between the Plaintiffs and the Interested Parties is resjudicata because the issues between the Plaintiff and the Interested Parties mirror the issues raised in the SRMCC No 15 of 1995 that is to say the claim of eviction and the defence of trust and or fraud on the part of the Plaintiff.

25. The Court finds that notwithstanding its findings in para 24 above the issues between the parties have not been heard and determined. I say so because the judgment of the SRMCC No 15 of 1995 was set aside. In other words, the judgement was reversed leaving nothing in its place.

26. The Defendants were not parties in the previous suits. Their claim is that they are purchasers and or licencees having purchased various portions of the suit land from Hilda and her children.

27. In the upshot the Court finds that this suit is not resjudicata.

28. However before I pen off, could this suit be subjudice? I say so based on the Interested parties' contention under para 8 of their statement of defence where they list the following cases as pending before the Court; HC Succ Appeal No 238 of 1990; Misc Application No 536 of 1995 and CMCC No 1197 of 2013 -Kigumo. The parties have not addressed me on this. In the event that they are pending I would be constrained to order that this suit be stayed pending either the successful prosecution of the cases or their withdrawal. I shall however give the parties the opportunity to address the Court on the issue when the matter comes for further mention and directions.

29. I make no orders as to costs.

30. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF DECEMBER, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Mwaniki HB for Ms Mungai for the Plaintiff/Applicant

Nabutete for the 1st – 3rd Respondents/Defendants

4th & 5th Defendant: Absent

Nabutete for the 1st and 2nd Interested Party.

Irene and Njeri, Court Assistants