



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 350 OF 2014

MARGARET KARUNGARI KAMAU

(Suing as the administrator of the Estate

of KAMAU KAIME).....PLAINTIFF

VERSUS

JECINTA WANJIRU MWANGI KAMAU

(being sued as the administrator of the Estate

of JOSEPH KAIME KAMAU).....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR, ARTHI HOUSE

NAIROBI.....3RD DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....4TH DEFENDANT

RULING

(Application to have suit dismissed for being res judicata; plaintiff claiming that the suit land was fraudulently transferred to 1st defendant; emerging that 1st defendant acquired title after distribution of the estate of his late father; plaintiff having been executor of the will and signing consent to the distribution; improper to file suit to attempt to overturn the decree in the succession matter; suit struck out as being res judicata).

1. The application before me is that dated 14 February 2018 filed by the 1st defendant. It is an application brought pursuant inter alia to the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, and Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant seeks that the plaintiff's suit be struck out as being res judicata. It is her position that the matter has been litigated before in the suits Nakuru HCCC No. 359 of 2010 (OS) and Nakuru High Court Succession Cause No. 9 of 1969. The application is opposed and before I go to the gist of it, I think it is prudent that I give a little background on the suit.

2. The suit was commenced by way of a plaint which was filed on 19 December 2014. The plaintiff has filed this suit as administrator of the estate of Kamau Kaime (deceased). The 1st defendant/applicant is the wife and administrator of the late Joseph Kaime Kamau (also deceased). The late Joseph Kaime Kamau is one of the sons of the plaintiff and the late Kamau Kaime, thus, the 1st defendant is daughter in law to the plaintiff. It is averred that on 19 December 1964, the late Kamau Kaime became registered as proprietor of the land parcel LR No. 451/675, and the family occupied the same and also used it as a business premises to operate a bar, butchery and lodgings. Kamau Kaime died on 19 April 1969 having left a will directing how his properties should be shared, and in the will, the plaintiff and her co-wife were appointed as executors of the will. It is averred that after the demise of her husband, the plaintiff continued occupying the suit premises and was later joined by her eldest son, the said Joseph Kaime Kamau (Joseph), who helped her operate the businesses on the premises. This continued until the plaintiff could no longer manage the same due to age and she left Joseph to run the businesses. It is averred that the plaintiff settled in her farm, but maintained and continues to occupy a room/office within the suit premises, where she has kept all her personal belongings and confidential documents including the original titles, and she would occasionally pass by the suit premises while she was in town. Joseph unfortunately died in October 2012 and the applicant, as his wife, took over the suit property and the businesses. It is

contended that on 19 November 2014, the applicant invaded the plaintiff's room/office within the suit property and broke the locks and threw out the plaintiff's personal belongings and documents. It is averred that she did this on the strength of the fact that Joseph became registered as owner of the suit land now registered as Nakuru Municipality Block 10/17. It is the position of the plaintiff that Joseph acquired registration illegally and by way of fraud and that she is in possession of the original title. Inter alia, it is pleaded that he presented fictitious documents to effect conversion of the title from the Registered Titles Act (RTA) to Registered Land Act (RLA) regime. It is further pleaded that the applicant has continued to collect rent from the suit property without accounting for the same and utilizing it for her sole benefit. In the suit, the plaintiff has asked for orders of a declaration that the transfer of the land parcel Nakuru Municipality Block 10/17 was illegal null and void; an order revoking the said title and for the same to revert to the estate of Kamau Kaime; an order to compel the applicant to account for rent collected since October 2012; and a permanent injunction against the applicant from interfering in any manner with the suit land.

3. The applicant filed a defence vide which she pleaded inter alia that the plaintiff is no longer executor of the will of Kamau Kaime as the estate was distributed vide the case Nakuru Succession Cause No. 9 of 1969. She averred that vide an agreement dated 5 February 1990, the beneficiaries of the estate of Kamau Kaime agreed on how to distribute his estate, and the estate of the late Kaime was distributed as agreed. It is stated that pursuant to the distribution, Joseph was granted the suit property. She has averred that this distribution has never been challenged and that there has been no appeal over this distribution. She has pleaded that two of the brothers of Joseph, (other sons of the plaintiff) filed the case *Nakuru HCCC No. 359 of 2010 (OS) Joseph Muchina Kamau & Anthony Nganga Kamau vs Jecinta Wanjiru Kaime and Benard Ndungu Kamau*, which case is still pending in court, and it is averred that they seek the same prayers sought in this case for their own benefit and the benefit of the estate of the late Kamau Kaime. It is averred that in the said suit, the two brothers seek the redistribution of the estate of Kamau Kaime, so that they be given shares in the suit property and the property Nakuru Municipality Block 10/18, which in the succession case was distributed to Benard Ndungu Kamau (another of their brothers). It is pleaded that this suit agitates the same issues to be addressed and determined in the case Nakuru HCCC No. 359 of 2010 (OS). It is also pleaded that the plaintiff has filed a suit before the Magistrate's Court, being Nakuru CMCC No. 10 of 2013, where she seeks the same prayers and reliefs as those in this suit. It is averred that the plaintiff ought to have applied to be enjoined as co-plaintiff in the suit Nakuru HCCC No. 359 of 2010 (OS) which seeks similar prayers to those sought herein. It is pointed out that the plaintiff testified in the said suit on behalf of her sons and she indicated that she wanted the properties Nakuru Municipality Block 10/17 and 18 redistributed. It is further pleaded that the claim herein is time barred having been lodged 24 years later after the distribution of the estate of Kamau Kaime. The applicant also denied that the plaintiff has occupied a room/office in the suit property as alleged. She pleaded that she took over the suit property and the businesses after the demise of her husband on 6 October 2012 on the basis that the suit property was registered in the name of her late husband.

4. In support of her application, the applicant has attached a copy of the lease to the suit property and the pleadings in Nakuru HCCC No. 359 of 2010 (OS). She has stated that the said suit was dismissed on 15 November 2017 and she has annexed a copy of the judgment. She has averred that no appeal or application for review has been preferred against the said judgment. She has stated that what the plaintiff has lodged is the same claim that was dismissed, and that since she testified in support of the said suit, she cannot be allowed to re-agitate the same before this court while she was eligible to be enjoined as a party to the previous suit. It is further deposed that the issue of ownership of the suit property was decided with finality when the estate of Kamau Kaime was distributed pursuant to the agreement of the beneficiaries, which order she has also annexed. It is her view that this suit is an abuse of the court process.

5. In her replying affidavit, the plaintiff/respondent has deposed inter alia that according to the will of Kamau Kaime, which she has annexed, no child was to have any property exclusive to himself. She denied any knowledge of the agreement dated 5 February 1990 and denied signing it. She has stated that if she signed it, she was misled to do so, as she does not know how to read and write. She averred being aware of the suit Nakuru HCCC No. 359 of 2010 but has stated that the prayers sought therein are different from the prayers in this suit. She has also pointed out that the parties are different. She denied having signed any documents to transmit the suit property to the late Joseph. She has deposed that she was not aware that her late son has acquired title to the suit property until recently, and that is what prompted her to file the current suit. She has stated that she cannot file an appeal or review of the judgment of 15 November 2017 as she is not a party. It is her position that her case is different from the other suits.

6. I have considered the application. The same is based inter alia on the provisions of Section 7 of the Civil Procedure Act which provides as follows :-

7. Res judicata

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.

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.

7. I think Section 8 of the Civil Procedure Act, is also instructive. It provides as follows :-

8. Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

8. It is clear from the above provisions of the law, that a person is not allowed to litigate over a matter that has been decided in a previous suit. If this was not the position, then parties would continue to bring to court what has already been decided, and there would be no end to litigation.

9. In this application, it is the contention of the applicant that the issues presented in this suit have been decided in the suits Nakuru Succession Cause No. of 1969 and Nakuru HCCC No. 359 of 2010 (OS). The only way to determine whether or not this suit is res judicata is by interrogating what the issues were in the cited two cases.

10. The first suit, Nakuru High Court P&A Cause No. 9 of 1969 is a succession matter over the estate of the late Kamau Kaime. I have no doubt in my mind that vide the said suit, the estate of the deceased was distributed. I have seen that the estate was distributed pursuant to an agreement of all beneficiaries which was filed in court and after an application dated 26 March 1990 seeking that the estate be distributed in accordance with the said agreement. The affidavit in support of the said application shows that it was signed by the plaintiff herein and her co-executor, one Wanjiru Kaime. The court heard this application and allowed it, and an order dated 9 May 1990 was issued, vide which Honourable Justice Tanui, did order the distribution of the estate of Kamau Kaime as follows :-

(i) To Joseph Kaime Kamau - LR No. Nakuru Municipality Block 10/17;

(i) To Sammy Wanjohi Kamau - LR NO. 530/84 Elburgon Township;

(ii) To John Muchina Kamau - LR No. Nakuru Municipality Block 2/168;

(iii) To Anthony Nganga Kamau - LR No. Nakuru Municipality Block 2/394;

(iv) To Peter Kirumba Kamau - TOL 15 Section 33 Njoro.

11. I have no evidence before me that any of the executors or beneficiaries have ever contested the above distribution in the same court that made the order. The above distribution was therefore a final order of the court.

12. I have seen the pleadings and judgment in the case Nakuru HCCC No. 359 of 2010 (OS). That suit was filed by John Muchina Kamau and Anthony Nganga Kamau against Joseph Kaime (later substituted after his death with his wife Jecinta Wanjiru Kaime) and Benard Ndungu Kamau. In the suit, the plaintiffs claimed that the act of transferring the prime properties into the names of the defendants to their exclusion was in breach of trust. They claimed a constructive trust over these properties and sought orders for the revocation of the transfers of the properties LR No. 451/675 and LR No. 451/676 (which are now registered as Nakuru Municipality Block 10/17 and 18. They further sought orders that the will of the late Kamau Kaime created a constructive, express or resulting trust, over the properties of the deceased mentioned in the distribution above. The case was opposed and proceeded for hearing. It is correct that the respondent herein testified in the said matter on behalf of the plaintiffs in that suit. In her judgment of 3 November 2017, Honourable Justice Janet Mulwa, held that the cause of action was subject of Nakuru Succession Cause No. 9 of 1969, and that what the plaintiffs wished in the suit was to revisit the said succession matter. The court held that if it proceeded to do so, it would be sitting on appeal against the orders made in the said suit and dismissed the said suit. I have no evidence that there is any appeal preferred against the said judgment.

13. In this suit, the respondent claims that the transfer of the land parcel Nakuru Municipality Block 10/17 to Joseph Kaime was illegal, null and void, and further seeks a revocation of the title for the same to revert back to the estate of Kamau Kaime. In my view, there is nothing different being raised in this matter. All that the respondent is trying to do is to couch the matter differently, but the subject matter remains the same as that in the Succession Cause No. 9 of 1969 and the case Nakuru HCCC No. 359 of 2010. A party ought not to be allowed by virtue of a clever drafting of proceedings, to circumvent the res judicata rule. I have no doubt in my mind that Joseph Kaime acquired title to the land parcel Nakuru Municipality Block 10/17 after the distribution of the estate of Kamau Kaime. There is certainly some disquiet from some beneficiaries who feel that they were left out of the prime properties which appear to have been distributed to Joseph Kaime and Benard Ndungu Kamau and they now want a piece of these properties. However, the parties did agree to the distribution of the suit properties and an order was made for the properties to be distributed as they were. If the respondent, or the other beneficiaries, wish to challenge that distribution, the avenue is not to file a multiplicity of suits. They can try their luck to overturn that order in the same cause that it was made. I am not saying anything new here, for that is exactly what Mulwa J, held in her judgment of 3 November 2015.

14. It is apparent to me that the plaintiff has not presented anything new. As I have mentioned, a party ought not to be permitted by craft of pleadings to present the same case that has been litigated before. To me, it does not matter that the plaintiff herein was not party to the case Nakuru HCCC No. 394 of 2010 (OS). She is caught up by explanation 6 to the res judicata rule at Section 7 of the Civil Procedure Act, which is as follows :-

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.

15. The respondent may not have been a party in Nakuru HCCC No. 394 of 2010 (OS) but she was certainly a person interested in the litigation, and she must be deemed to have claimed under the persons so litigating. All that the respondent is doing is to try and circumvent the res judicata rule by claiming that she is now bringing a different cause of action yet it is clear that what she really wants is to overturn the distribution of the estate as ordered in Succession Cause No. 9 of 1969; this certainly is not the avenue of doing so.

16. Given the above, I am of the view that this suit is res judicata, and/or is otherwise an abuse of the court process, and I hereby strike it out with costs to the defendants.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of June 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Kanyi Ngure for the 1st defendant /applicant.

Ms. Wanjiku Wamae holding brief for Mrs. Gatei for the plaintiff/respondent.

No appearance on the part of the State Law Office for the 3rd and 4th defendants.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU