

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 200 OF 2014

MWANIKI GAKUYA MBUTHI.....1ST PLAINTIFF

JAMES MUNENE GAKUYA.....2ND PLAINTIFF

VERSUS

PRISCILLA WANJIKU GAKUYA.....DEFENDANT

RULING

[1] The plaintiffs filed this case against the defendant for a declaration that the defendant holds land parcel MUTIRA/KAGUYU/2122 comprising of (0.28 Ha) in trust for two houses and that she should transfer half share to the plaintiffs or enjoin other names as owners.

[2] The defendant filed her defence and denied the plaintiffs' claim in toto. She stated that upon the death of her husband REUBEN GAKUYA MBUTHI on 9th September 1995, a Succession Cause was filed at Kerugoya Law Courts. The case was number 216 of 1996. The Court held that land parcel number MUTIRA/KAGUYU/2122 be divided into two equal portions whereby the defendant herein was to get one portion and the plaintiffs the other portion. Both portions were of 2 acres each.

[3] The defendant was dissatisfied with the Court's judgment and appealed to the High Court at Embu vide Appeal No. 30 of 1999. The appeal was heard, the order of the lower Court was set aside and the land parcel 2122 was to be succeeded by the defendant herein among other orders. The plaintiff was dissatisfied by that decision and he filed an application vide Nyeri Court of Appeal Application number 443 of 2001 to extend time to appeal to the Court of Appeal and the plaintiffs were granted 30 days to do so on 19th May 2001. No appeal has been filed to date.

[4] The defendant in his statement of defence paragraph 8 states that the ownership of the suit land MUTIRA/KAGUYU/2122 having been adjudicated by Embu High Court, a Court of equal jurisdiction with this Court, this Court then lacks jurisdiction to overturn that decision of 4th September 2001. He avers that the suit is res-judicata and stated that it will raise a Preliminary Objection (P.O) at the hearing of this suit. This defence was filed on 24th July 2014.

[5] When this case came up for hearing on 26th June 2018, the Preliminary Objection above quoted was raised. Learned counsel for the defendant Mr. Maina Kagio asked the Court to find that the issue of ownership has been settled. Further to find that the suit is res-judicata and that this suit should be struck out with costs to the defendant.

[6] In reply, the plaintiffs told this Court, that if the Court cannot change what the Embu Court did, it should uphold what the lower Court had decided.

[7] The second plaintiff said that since this Court and the Embu Court has same jurisdiction, that then, this Court should decide how the suit land should be shared since the land belonged to the parties' parents.

[8] Having perused the pleadings and documents filed in Court with the pleadings and having listened to the submissions by counsel for the defendant, I am satisfied that the suit land herein was litigated between the parties Kerugoya Succession Cause number 216 of 1996 where the lower Court ordered that the suit land be shared equally. I am also satisfied that the plaintiffs appealed that decision to Embu High Court vide Appeal number 30 of 1999 and the lower Court's decision was set aside and the land was given to the defendant herein. The plaintiffs herein filed an application to the Court of Appeal to file an appeal out of time. 30 days leave to do so was given on 4th September 2001. No appeal has ever been filed. The issue of ownership of the suit land in this case is therefore settled.

The matter was between the parties herein. The suit land was a subject matter in the aforesaid cases. This matter is therefore res-judicata. There is therefore nothing that this Court can decide. Time to file an appeal lapsed in the year 2001. 18 years ago. The Preliminary Objection has merit and it is sustained.

The end result is that this suit is struck out with costs to the defendant.

S.N. MUKUNYA

JUDGE

20TH JULY, 2018