



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 7 OF 2018

NILA KAGWIRIA GATOBU1ST APPLICANT

DOREEN GATWIRI GATOBU2ND APPLICANT

SAMUEL MURIITHI GATOBU3RD APPLICANT

YVONNE KARAMBU GATOBU.....4TH APPLICANT

VERSUS

AMOS GATOBU.....1ST RESPONDENT

MAINGI MUGAMBI 2ND RESPONDENT

RULING

1. This ruling is in respect of the preliminary objection filed on 6.3.2018, whereby defendants are seeking for the dismissal of the suit on the following grounds:

- (i) The suit is res-judicata and barred by statute by dint of section 7 of the civil procedure cap 21 laws of Kenya since the same issues have been canvassed/dealt with in High Court Civil suit no. 118 of 1997.
- (ii) The suit as currently constituted is barred by article 162 (2) since the matter is presented to courts with similar jurisdiction.
- (iii) The instant suit is an appeal of HCC NO. 118 OF 1997 where the plaintiffs/applicants mother was a party.
- (iv) The plaintiffs/applicants have failed to disclose to the court the existence of a judgment in HCC no. 118 of 1997 which declared the suit land not matrimonial property.
- (v) The plaintiffs/applicants suit is time barred by dint of section 7, 8, 9 of the Limitation Actions Act.
- (vi) The plaintiffs/applicants lack locus standi to institute the instant suit.
- (vii) The suit as currently constituted is an abuse of the due process of court and amounts to fraud.

Submissions of the defendant

2. Defendants aver that the matters directly and substantially in issue in the instant suit are similar to those in the previous suit no. 118 of 1997 the same where the suit land is parcel no. Ntima/Igoki/5471.

3. Defendants claim that the issues in dispute were determined in HCC no. 11 of 1997 by Hon. Gikonyo J and parties never raised the issue of jurisdiction in the previous suit.

4. Defendants further claim that judgment in HCC No. 118 of 1997 was delivered and the aggrieved parties moved to court of appeal vide Misc. No. 5 of 2017 which was later withdrawn.

Plaintiff's (respondent's submissions)

5. The plaintiffs have submitted that they are before this court seeking protection of their rights as beneficiaries of the estate established by their father. They aver that they have invested a lot in the suit properties and that they use the rental proceeds to take care of themselves and their sick mother.

6. Plaintiffs argue that the only matter that they knew about was the divorce case between their parents. They were therefore surprised to receive a letter dated 26.1.2018 instructing them to vacate the suit premises.

7. Plaintiffs argue that the suit is not Res-judicata because the parties are different and that the present plaintiffs were neither witnesses nor interested parties in the previous suit. The plaintiffs have urged the court to invoke the doctrine of **“Res inter acta alteria nocere non debet- things done between strangers must not cause an injury to people who are not parties to such acts”**.

8. It is also argued by the plaintiffs that the cause of action in HCC No. 118 of 1997 was matrimonial property where as in the present suit, the cause of action is couched in fraud, secrecy and misrepresentation and the main prayer is for cancellation of title.

Determination

9. The brief history of this case as captured in the plaint is that all the plaintiffs herein are the children of one Amos Gatobu who is the 1st defendant and one Joyce Gatobu. The couple divorced many years ago and a decree nisi was issued sometime in year 2000.

10. The family was occupying land parcel No. Ntima/Igoki/5471 which land was apparently sold by Amos Gatobu to M’Mugambi M’Marete and Henry Kiambi who according to plaintiffs are both dead.

Whether the suit is Res-judicata?

11. Section 7 of the civil procedure 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”.

12. It is generally accepted that for a matter to be res-judicata, the it is necessary for the following conditions to be met:

(i) The matter directly and substantially in issue in the subsequent suit must have the same and was in issue substantially as stated (see explanation 3 in section 7) constructively (see explanation 4) in the former suit.

(ii) The former suit was between the same parties or parties through whom any of them claim.

(iii) Parties must have been litigating under the same title in the former suit.

(iv) The court that heard and determined the former suit had jurisdiction to try the issue now in the issue in the subsequent suit.

(v) The matter in the subsequent suit was heard and finally determined by the court trying the former suit.

13. I have weighed and considered all the issues raised herein including the rival submissions.

14. It has been submitted by the defendants that the issues raised herein were determined in suit H.C.C No. 118/1997 whose existence the plaintiffs have failed to disclose. The plaintiffs on the other hand aver that the principle of res-judicata do not apply in this case because plaintiffs were not party to the suit H.C.C No. 118/1997. They have urged the court to take into account the doctrine of **“res-inta alteria necene non debet – Things done between strangers must not cause an injury to people who are not parties to such acts”**.

15. The defendants have availed a copy of the judgment in H.C.C.No 118 of 1997. In that suit the owners of plot no. 5471 are M’Mugambi M’Marete and Henry along with the father of plaintiff’s (Amos Gatobu) and they had sued Joyce Gacheri Gatobu, the mother of plaintiffs seeking inter-alia orders of eviction of Joyce Gatobu from the suit land.

16. A judgment thereof was delivered on 20.9.2017 and decree issued in favour of those plaintiffs on 31.1.2018.

17. The issues that Joyce Gatobu requested the court to determine in H.C.C 118/1997 were inter alia:

(i) An order of declaration that the transfer of Ntima/Igoki 5471 was fraudulent and subject to trust.

(ii) An order to nullify transfer of Ntima/Igoki/5471 and the transfer of the same to defendant’s name.

(iii) An order of permanent injunction restraining the plaintiffs from entering, taking possession and interfering with defendant’s occupation of Land registration no. 5471.

18. In the present suit, the case is anchored on fraud and particulars are set out in paragraphs 12 of the plaint.

19. The plaintiffs in the present suit want the title to land No. 5471 cancelled and to be registered in the name of Joyce Gacheri Gatobu their mother. They are also seeking a permanent injunction to restrain defendants from evicting, entering, developing, utilizing, fencing, alienating, settling or in any other way interfering with plaintiff's parcel of land.

20. To my mind all the matters that ought to be determined in the present suit were determined in HCC 118 of 1997 and to open them now would be resjudicata. The only difference is that in the present suit, it is the children of Joyce who are now claiming the land on behalf of their mother.

21. It is not lost to this court that this suit was only filed on 26.2.2018, less than a month from the time the decree in H.C.C.C 118/1997 was issued (on 31.1.2018). I am inclined to believe that this suit has been filed to circumvent the execution of the judgment in H.C.C 118 of 1997.

22. I am therefore in agreement with defendants submissions that this suit is an appeal in disguise. If plaintiff's mother was not satisfied with the decision in the H.C.C 118/1997, she ought to have sought legal redress in the hierarchal structures of the court and not to cause fresh litigation over the same issues in a court of equal status.

23. I find that the preliminary objection is merited. This suit is hereby dismissed with costs to respondents (defendants).

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 18TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Ashaba for plaintiffs

Mutungu for defendants

HON. LUCY. N. MBUGUA

ELC JUDGE