



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 72 OF 2017

MILKA NJERI THUO **1ST APPLICANT/PLAINITFF**

GRACE NJOKI KIMOTHO **2ND APPLICANT/PLAINITFF**

VS

PAULINE WANGARI GIKERA **1ST RESPONDENT/ DEFENDANT**

MWANGI GIKERA **2ND RESPONDENT/DEFENDANT**

RULING

1. On the 7/2/18 Applicants filed a Notice of Motion even date seeking the seeking the following orders;-

- a). That the Honourable Court be pleased to grant leave to the Applicants to amend the Originating Summons in terms of the draft originating summons annexed thereto.
- c). That the amended Originating summons be deemed as duly filed and served upon the Defendants.
- d). That Costs be in the cause.

2. The application is grounded on the following grounds that having obtained leave to substitute the 2nd Applicant with Simon Maina Nganga on 20/7/17, it is now necessary to amend the originating summons so that the real questions in controversy between the parties may be determined. That the intended amendments will not prejudice the Respondents as they will have the chance to and their defence, if need be.

3. The application is supported by the affidavit of Simon Maina Nganga sworn on the 7/2/18 reiterating the grounds aforestated.

4. In resisting the application the 2nd Respondent on his behalf and that of the 1st Respondent filed a Replying affidavit dated 26/4/18 wherein he gave a detailed history of litigation between the current parties and the former parties under whom they are still litigating under. In 1989 the 1st Applicants husband, Mwangi Nganga was sued by the Respondents father namely Kigera Mwangi vide RMCC NO. 182 of 1989, Thika seeking an order for injunction to restrain Mwangi Nganga from entering LOC 2 KINYONA/94 (the suit land). In the same year 1989 Mwangi Nganga and Nganga Mwangi Kimotho filed a suit RMCC 87 of 1989 at Muranga against Kigera Mwangi. The two suits were consolidated vide HCCC No 396 of 1989 giving rise to Thika RMCC No 30 of 1990. This suit was heard and determined in favour of Kigera Mwangi. Thereafter Mwangi Nganga and Nganga Mwangi Kimotho filed another suit at Muranga vide SPMCC NO 37 of 1997 against Kigera Mwangi. The trial Magistrate ruled that the suit was Resjudicata and directed that the parties pursue RMCC No 30 of 1990 to conclusion. Mwangi Nganga died and his wife Milka Njeri Thuo was substituted in the case.

5. Dissatisfied with the outcome in RMCC No 30 of 1990, Milka Njeri Thuo and Nganga Mwangi filed a land dispute at LDT Kigumo where it was determined that the suit land be shared equally between the families of Kigera Mwangi, Mwangi Nganga and Nganga Mwangi Kimotho with each getting 2.2. acres. Aggrieved by the said award Kigera Mwangi appealed to Provincial LDT in Nyeri which upheld the decision of the Kigumo LDT. Kigera Mwangi mounted an appeal at the High Court in Nyeri CA No 68A of 2009 wherein the Appeal Court set aside the awards in the two LDTs. The wives of Mwangi Nganga and Nganga Mwangi Kimotho namely Milka Njeri Thuo and Grace Njoki Kimotho filed a fresh suit at Kerugoya Vide Environment and Land Court 93 of 2014 (the precursor of this suit) seeking interalia a claim of the suit land under customary trust. At the establishment of Environment and Land Court at Murang'a the suit was transferred to this Court and given ELC 72 of 2017. Grace Njoki Kimotho died in 2015 and was substituted by her son Simon Maina Kimotho.

6. The Respondents aver that the decision in RMCC No 30 of 1990 at Thika has never been appealed, set aside or varied and is still in force restraining the Applicants from entering and interfering with the suit land. That the proposed amendments to the suit renders the suit Resjudicata as the same issues have been previously been adjudicated upon and urged the Court to dismiss the application. He has annexed the decree in RMCC No 30 of 1990 and the judgement in Civil Appeal No 68A of 2009.

7. On the 22/5/18 Milka Njeri Thuo, the 1st Applicant in her further supplementary affidavit and stated that the 2nd Respondent is the son of Mwangi Gikera who was substituted on 2/3/15 after the demise of his father on 29/8/14. That the Replying Affidavit filed by the 2nd Respondent did not comply with Order 1 rule 13(2) as the authority of the 1st Respondent was not filed in Court. Further she faulted the affidavit of the 2nd Respondent as misleading in that the previous suits were filed by Mwangi Kigera his father and not him. She reiterated the facts as given above in as far as the suits are concerned save that RMCC No 30 of 1990 was dismissed for want of prosecution on 11/5/2017. She refuted that the suit was heard and determined and judgment issued in favour of Kigera Mwangi and termed it a forgery. That RMCC 30 of 1990 was between Kigera Mwangi and Mwangi Nganga who are not parties to this suit. She denied being substituted in place of her husband Mwangi Nganga in RMCC NO 30 of 1990 who died on 10/2/1997. That her claim in this case is trust and title to the suit land and therefore is not resjudicata more so because the Applicants have never sued Kigera Mwangi and vice versa. That the parties in the previous suits were not the same.

8. The 2nd Respondent made a rejoinder through a further affidavit filed on 4/7/2018 where he stated that Order (section?) 19 of the Civil Procedure Act allows the Court to receive and rely on affidavits where a defect does not touch on the substance and in any event his co-Respondent has knowledge of the deponents and is not opposed to them same. Reiterating that RMCC No 30 of 1990 was heard and determined in 2007, the same has not been set aside appealed or varied. If the case was dismissed then the Applicants have not disclosed how the dismissal was done to the Court. He questioned the authenticity of the order issued in 2017 purporting to dismiss a case that was long decided in 2007. He has annexed copies of the decree obtained from Thika Court issued on 31/5/2007. The RMCC No 30 of 1990 related to the predecessors of the current parties in this suit. That the 1st Applicant was substituted on the 20/4/2009 and attached an order to that effect on record.

9. Parties have elected to file written submissions which I have read and considered.

10. The Applicants submitted that the suit is not resjudicata because there has not been any previous suits between the current parties relating to the subject matter as envisaged under section 7 of the Civil Procedure Act. They submitted that the Court has wide powers under Order 8 rule 5 of the Civil Procedure Rules to allow the amendments of the Originating summons to enable the Court determine the real question of controversy between the parties. They relied on case law as follows; **Kenya Cold Storage (1964) Ltd Vs Overseas Food Services (Africa) Ltd (1982) KLR 453; Omar Vs East Africa Cargo Handling Services Ltd (1985) KLR 837; Kihuni Vs Kakunga & Another (1986) KLR 572.**

11. Further the Applicants submitted that the issue of Resjudicata can only be raised in the main suit and not on an application. They urged the Court to grant their application to amend the Originating summons as prayed.

12. The Respondents submitted the Applicants claim of 4.4 acres from the suit land on the alleged trusteeship is a complete copy and paste of the claim filed against Kigera Mwangi by Mwangi Nganga and Nganga Mwangi Kimotho in RMCC No 30 of 1990 which was determined in favour of Kigera Mwangi and a decree issued on the 31st August 2007.

13. The Respondents have submitted that the parties are similar having been the successors in title of the previous parties who were litigating over the same subject matter. That the suit is resjudicata and the instant application lacks merit as it is founded on a suit which is improperly before this Court.

14. Relying on section 7 of the Civil Procedure Act that Respondents argued that test for determining resjudicata was set out in the case of **Bernard Mugo Ndegwa Vs James Nderitu Giathae & 2 others (2010) EKLR** which stated that if the components set out in section 7 are present then the suit is Resjudicata. Consequently, they argued that the claim of the Applicants is entitled to 2.2 acres each to be excised from the suit land which claim is the same as that in RMCC No 30 of 1990 where the Applicants had sought a similar entitlement to the suit land. That RMCC No 30 of 1990 was heard and determined in favour of Kigera Mwangi and the Applicants were restrained from the land and fined Kshs 5000/- for trespass. That the decision was not appealed set aside or varied in any way. That the parties in this suit are direct beneficiaries of those in Civil Suit No. 30 of 1990 and are claiming under the same parties.

15. Further the proceedings in this suit will only serve to vex the respondents and would amount to abuse of the process of the Court since the Applicants are subjecting the Respondents to unending litigation and urged the Court to find that the suit is resjudicata.

16. The background of this case is set out as follows; Land Reference No LOC 2/KINYONA/94 (suit land) was registered in the name of Wambui Mwangi on 2/7/1962. From the pleadings on record Wambui Mwangi was the mother of 3 sons; Kigera Mwangi, Mwangi Nganga and Nganga Mwangi also known as Kimotho. The land was registered under the name of Kigera Mwangi on the 12/5/1971 and a title issued in his name on the 31/5/1971.

17. Wambui Mwangi and her three sons are all dead. Pauline Wangari Kigera and Mwangi Kigera are the widow and son of Kigera Mwangi. Milka Njeri Thuo is the wife of Mwangi Nganga while Simon Maina Nganga is the son of Nganga Mwangi Kimotho.

18. In 1989 Kigera Mwangi deceased sued his two brothers Mwangi Nganga and Nganga Mwangi Kimotho in RMCC No 182 of 1989 at Thika seeking a permanent injunction against them from entering the suit land.

19. Mwangi Nganga and Nganga Mwangi Kimotho initiated their own suit against Kigera Mwangi in the RMCC No 87 of 1989 at Muranga. After consolidation both suits became RMCC No 30 of 1990. There is a dispute on the outcome of this suit. The Applicants aver that the suit was dismissed for want of prosecution in 2017 while the Respondents aver that the suit was determined in favour of Kigera Mwangi in 1995. Each have annexed decrees to support their positions.

20. Whilst RMCC No 30 of 1990 was ongoing Nganga Mwangi Kimotho instituted his own suit in 1997 against Kigera Mwangi in SPMCC No 37 of 1997 but the Court declared this suit resjudicata and directed the parties to pursue their issues in RMCC No 30 of 1990. The Court

was satisfied that the issues, parties and the subject matter are similar in all respects in the two suits and would offend section 6 and 7 of the Civil Procedure Act to canvass the two cases in parallel Courts that were seized with jurisdiction to hear and grant the same reliefs.

21. The parties moved to the Land Dispute Tribunal claiming 2.2 acres each on account of trust. The matter on appeal was dismissed for want of jurisdiction and the Judge noted that the case at the Land Dispute Tribunal was resjudicata as it had been heard and determined in RMCC No 30 of 1990 as seen in the decree issued on 31/8/2007 restraining the Defendants from entering the suit land.

22. Finally, after the decision of the High Court on Appeal aforesaid the said Milka Njeri Thuo and Grace Njoki Kimotho the widows of Mwangi Nganga and Nganga Mwangi Kimotho instituted the current case seeking title under customary trust. That Kigera Mwangi held the land under trust for their husbands. Further they accused Kigera Mwangi of having fraudulently transferred the suit land to himself in 1971 to the exclusion of his brothers.

23. Having reviewed the pleadings, the application, the replying affidavits 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 Applicants are entitled to leave to amend the originating summons.

24. 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”.

25. The literal meaning of res is everything that may form an object of rights and includes an object, subject matter or status. 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 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.

26. 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.

27. According to para 16 and 17 above it is clear that the parties in the previous suits were the parents and spouses of the parties in this suit. Indeed Milka Njeri Thuo was substituted as a party in place of her husband Nganga Mwangi in RMCC No 30 of 1990 on 23/6/2008. Her husband had passed on in 1997. 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 in the previous suits.

28. In respect to whether the issues were directly and substantially in issue in the former suits, according to the contested decree issued on the 1/2/95 the Respondents' husband and father in this case was granted judgment to the effect that the Applicants husband and father be permanently restrained from the suit land and were further fined 5000/- for trespass. The cause of action was therefore title in land based on trespass. In the ruling delivered by the Honourable Court in Muranga SPMCC No 37 of 1997 between Nganga Mwangi and Kigera Mwangi the Court declared the issues in that suit resjudicata and directed that the parties litigate in RMCC No 30 of 1990.

29. The essence of the res judicata doctrine is further explicated by Wigam, 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 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”.

30. 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”.

31. 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.

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”.

32. In the instant suit the issue raised by the Applicants is that the husband and father of the Respondents got himself registered as owner of the suit land fraudulently to the exclusion of his two brothers under whom the Applicants claim under. That the suit land was under trust in favour of the Applicants. The Court that heard and determined RMCC No 30 of 1990 had the jurisdiction to grant the reliefs in such a suit had a claim of fraud and customary trust been made a defence and or an attack. However, the totality of the issues in all the suits between the current parties and their previous privies is the question of title to the suit land. Any matter which might and ought to have been made a 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. Nganga Mwangi and Mwangi Nganga Kimotho had the opportunity to raise trust or fraud in RMCC No 30 of 1990. I say this because a party must of necessity bring the whole of his suit before the Court so that once it is heard and determined an end in litigation is achieved. The doctrine of Resjudicata bars litigation by instalments.

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

34. In view of the finding in Para 33 above I find no use in determining the issue on amendments of the Originating Summons.

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

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF NOVEMBER 2018

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st Plaintiff – Present in person/Advocate Absent.

2nd Plaintiff – Absent

1st Defendant – Absent

2nd Defendant – Present in person/Advocate absent.

Irene and Njeri, Court Assistants