



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 3 OF 2016**

**FRANCIS KAMAU MURIITHI.....PLAINTIFF**

**VERSUS**

**PATRICIA KABARI NDEGE.....DEFENDANT**

**RULING**

**FRANCIS KAMAU MURIITHI** (the plaintiff herein) is the son of the late **MURIITHI MURWA** Alias **MURIITHI KAMAU** (the deceased herein) who at the time of his death on 22nd December 2011 was the registered proprietor of land parcel No. INOI/THAITA/193. In 1973, the deceased relocated to Nairobi leaving **PATRICIA KABARI NDEGE** (the defendant herein) to take care of the suit land. The deceased was buried in Nanyuki where he had another family and on or about 19th May 2015 when his family was in the process of filing Succession Cause, it was discovered that land parcel No. INOI/THAITA/193 had been illegally and fraudulently transferred in the names of the defendant particulars whereof are pleaded in paragraph six (6) of the plaint. It is the plaintiff's case that upon learning of succession pleadings, the defendant caused the land parcel No. INOI/THAITA/193 to be subdivided into three portions being INOI/THAITA/2565, 2566 and 2567 (the suit land) which she then registered in her names. The plaintiff therefore seeks judgment against the defendant in the following terms:

***(a) A declaration that the transfer of land parcel No. INOI/THAITA/193 from the name of the deceased to the defendant's names vide entry No. 9 in the register was illegal and fraudulent.***

***(b) An order for the cancellation of the title deeds to land parcels No. INOI/THAITA/2565, 2566 and 2567 and reconstitution of the sub-divisions to the original No. INOI/THAITA/193 in the names of the deceased.***

***(c) Costs of this suit.***

The defendant filed a defence admitting that the deceased was the original registered proprietor of land parcel No. INOI/THAITA/193 but added that in 1985, she filed **NYERI HIGH COURT CIVIL CASE No. 19 of 1985** against the deceased seeking orders that she had acquired that parcel of land through adverse possession and on 29th August 1989 a judgment was delivered in her favour by **ABDULLAH J.** and a decree issued that she be registered as proprietor of that parcel of land in place of the deceased. She denied the allegations of fraud and stated that she sub-divided land parcel No. INOI/THAITA/193 into the three parcels INOI/THAITA/2565, 2566 and 2567 legally and as of right and that in the **NYERI HIGH COURT CIVIL CASE No. 19 of 1985** (the Nyeri Case), the land parcel No. INOI/THAITA/193 was directly and substantially in issue as between the plaintiff's father and the defendant and this suit is res-judicata. Further, the defendant pleaded that this suit is time-barred by virtue of **Section 7 of the Limitation of Actions Act.**

On 27th July 2016, the defendant filed a Notice of Motion citing **Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules** and seeking the striking out of the plaint herein for being scandalous, frivolous or vexatious and otherwise an abuse of the Court process. The application is premised on the grounds set out therein and supported by the defendant's affidavit. The gist of the application is that the suit land is registered in the names of the defendant and are sub-divisions of land parcel No. INOI/THAITA/193 which was registered in her names following lawful orders issued in the Nyeri Case where the defendant had claimed land parcel No. INOI/THAITA/193 from the plaintiff's deceased father by adverse possession after he (deceased) failed to defend that suit. That the plaintiff has now filed this suit more than 26 years after the defendant became the registered proprietor of the suit land and this suit is both res-judicata and statute barred and is therefore an abuse of the Court process. Annexed to the supporting affidavit are the Green Card to land parcel No. INOI/THAITA/193 and Decree in the Nyeri Case – annexures **PKN 1 to PKN 4**.

In reply to that Notice of Motion which is the subject of this ruling, the plaintiff filed a replying affidavit in which he deponed, inter alia, that the application is bad in law and an abuse of the Court process and that the deceased was the registered proprietor of land parcel No. INOI/THAITA/193 but after his death, the plaintiff's family discovered that it had been registered in the names of the defendant through unknown procedure yet all along, the defendant was employed by the deceased as a care-taker. That the Nyeri Case is strange to him and he would be seeking leave of the Court to produce the case file and that dismissing this suit would be a draconian measure.

In a supplementary affidavit however, the defendant denied having used unknown procedures adding that the land parcel No. INOI/THAITA/193 was transferred to her vide a Decree in the Nyeri Case – copy of which she annexed. That this Court cannot sit on appeal from the judgment in the Nyeri Case and it would be a waste of judicial time to hear a matter which is both time barred and res-judicata.

Submissions to that application have been filed both by the firm of **R. MUTHIKE MAKWORO ADVOCATE** for the plaintiff and **P.M. MUCHIRA & CO. ADVOCATE** for the defendant.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

Two issues call for my determination herein and those are:

- 1. Whether the suit is res-judicata and;**
- 2. Whether the suit is time-barred.**

### **RES-JUDICATA**

This will have to be determined first because if it is up-held, then it will be superfluous to consider the issue of limitation as there will be no suit to merit such consideration.

The doctrine of res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following terms:

***“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”***

That provision then goes on to give six (6) explanations of when the doctrine of res-judicata shall apply. It is clear from the above that before a plea of res-judicata can be invoked, the matter in issue in the former suit must be directly and substantially in issue in the subsequent suit where the plea of res-judicata is raised, the matter must have been heard and finally decided by a competent Court and the parties in the

former suit should be the same parties or parties under whom they or any of them claim litigating under the same title – **KAARIA & ANOTHER VS ATTORNEY GENERAL (2005) 1 E.A. 83**. See also **KAMUNYE & OTHERS VS PIONEER GENERAL ASSURANCE SOCIETY LTD 1971 E.A 263**. The essence of res-judicata is to bring litigation to an end so that parties are not vexed twice over the same issue that have been heard and finally determined by a competent Court.

In arguing that this suit is res-judicata, the defendant has annexed to her supporting affidavit a copy of the Originating Summons in the Nyeri Case seeking orders that she be registered as the owner of land parcel No. INOI/THAITA/193 in place of the deceased having acquired it by way of adverse possession. Her claim was up-held by Justice **F.F. ABDULLAH** (now deceased) and a decree was issued on 29th August 1989 directing that the defendant be registered as the proprietor of land parcel No. INOI/THAITA/193 in place of the deceased. There appears to have been no appeal against that decree. The plaintiff has pleaded, and rightly so, that he was not a party in the Nyeri Case which is strange to him and that he would be seeking leave of the Court for the Deputy Registrar to avail the file in the Nyeri Case. Of course the plaintiff was a stranger to the Nyeri Case as it could only have been filed against the registered proprietor of land parcel No. INOI/THAITA/193 who is the deceased. I did not hear the plaintiff allege that the Originating Summons and final decree issued in the Nyeri Case are not genuine documents. I have no doubt in my mind that the decree annexed to the defendant's supporting affidavit is a valid decree issued in the Nyeri Case and admissible as evidence under **Section 44 (1) of the Evidence Act**. It is clear from the decree issued in the Nyeri Case that the matter in issue was ownership of land parcel No. INOI/THAITA/193 which is the same issue in this case, that it was heard and finally determined and that the High Court in Nyeri which heard and determined the suit was a competent Court. Counsel for the plaintiff has submitted that the proceedings in the Nyeri Case have not been produced to prove that such a suit existed. That of course would have been better evidence but in my view, the production of the Originating Summons and the final decree in the Nyeri Case are sufficient evidence that indeed **NYERI HIGH COURT CIVIL CASE No. 19 of 1985** was filed and heard by the late Justice **F.F. ABDULLAH** and a final decree was issued. I am not persuaded that those documents are forgeries.

The plaintiff has correctly pleaded that he was not a party to the Nyeri Case and obviously he could not have been because the defendant was the deceased who was the registered proprietor of the land parcel No. INOI/THAITA/193. However that alone cannot aid him in avoiding the plea of res-judicata. It is clear from the plaint herein that the plaintiff is the son of the deceased who was the registered proprietor of land parcel No. INOI/THAITA/193. That is pleaded in paragraph three (3) of the plaint as follows:

***“The plaintiff is the son of MURIITHI MURWA alias MURIITHI KAMAU (deceased) who was the registered owner of land parcel number INOI/THAITA/193”***

It is in that capacity that he seeks the orders in this suit. The plaintiff herein is pursuing the same interest that was determined in the Nyeri Case and that is land parcel No. INOI/THAITA/193 which was subsequently sub-divided to give rise to the suit land. And although he was not a party to that case unless perhaps only as a witness for the deceased, he is essentially litigating under the same title as the deceased in the Nyeri Case. He cannot be allowed to re-open the case under his own names. This is well captured in explanation **No. 6 of Section 7 of the Civil Procedure Act** in the following terms:

***“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”***. Emphasis added.

In the Tanzanian Court of Appeal decision in **LOTTA VS TANAKI 2003 E.A. 556 (CAT)**, the Court had this to say about parties and their privies with regard to res-judicata:

***“Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit”***. Emphasis added

Res-judicata therefore applies not only to the parties in the suit but also their privies and those acting

under them. The plaintiff may not have been a party in the Nyeri Case but he is deemed to be claiming under the deceased since he is litigating on the basis of the common interest in the land parcel No. INOI/THAITA/193 in a matter that was heard and finally determined by a competent Court.

Counsel for the plaintiff **MS MAKWORO** has made a strong submission that it would be fair to give the parties a chance to be heard in support of their respective cases and has cited case law, including **D.T. DOBIE & CO. LTD VS MUCHINA & ANOTHER 1982 K.L.R 1** for the proposition that no suit should be summarily dismissed if it shows a semblance of a cause of action. That is the correct legal position. However, in up-holding the plea of res-judicata, this Court is not saying that the plaintiff has no good cause. The plaintiff may very well have had a good case to warrant trial and determination through evidence. But what res-judicata does is that it acts as an affirmative defence barring the plaintiff from litigating a second time over the same claim because he is acting in privity with the deceased who was a party in the Nyeri Case which was heard and finally determined. In that case, therefore, res-judicata bars the plaintiff from pursuing this claim even if he has a good case.

In the circumstances of this case, I am persuaded that the plea of res-judicata is properly raised and this Court must up-hold it.

As the plea of res-judicata has been up-held, it would be superfluous to consider the issue of limitation. However, for record purpose, I will comment on it since it was raised.

The plaintiff's claim is founded on fraud and it is pleaded that it was only on 19th May 2015 that the family of the deceased discovered that land parcel No. INOI/THAITA/193 had been illegally and fraudulently transferred to the defendant's names. Under **Section 26 of the Limitation of Actions Act**, it is provided as follows:

***“Where, in the case of an action for which a period of limitation is prescribed, either –***

- (a) the action is based upon the fraud of the defendant or his agent; or***
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or***
- (c) the action is for relief from the consequences of a mistake,***

***The period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it”.***

It is clear from the Green Card that land parcel No. INOI/THAITA/193 was transferred to the defendant on 28th February 1990. However, the alleged fraudulent transfer was only discovered on 19th May 2015 and this suit was filed on 12th January 2016 which would therefore be within the twelve years prescribed under **Section 7 of the Limitation of Actions Act**. If this suit was not barred by the doctrine of res-judicata, it would clearly not be statute barred by virtue of the provisions of **Section 7 as read together with Section 26 of the Limitation of Actions Act**.

Ultimately however, having found that this suit is res-judicata, the only order I can make is to have it struck out with costs.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**

Ruling delivered, dated and signed in open Court this 21<sup>st</sup> day of April 2017

Mr. Muchira for Defendant present

Ms Muthike for Plaintiff present.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**