



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 77 OF 2015 (O.S)

WILLIAM NGARI MUKINYO.....PLAINTIFF

VERSUS

EPHANTUS KAGUNDA KARIMI.....DEFENDANT

RULING

The plaintiff herein **WILLIAM NGARI MUKINYO** filed an Originating Summons on 24th June 2015 seeking a determination that he has acquired by adverse possession 1½ acres out of land parcel No. KIINE/KIANGAI/111 (the suit land) which is registered in the names of the defendant having occupied it for over 12 years.

The defendant **EPHANTUS KAGUNDA KARIMI** filed a replying affidavit in which he denied that the plaintiff has acquired 1½ acres of the suit land adding that infact the plaintiff is a son to one **MUKINYO NGARI IRURA** (deceased) who together with his aunt one **LYDIA NJOKI KARIUKI** are the registered proprietors of a neighbouring parcel of land known as KIINE/KIANGAI/168. That as far back as 1995, the said **MUKINYO NGARI IRURA** and **LYDIA NJOKI KARIUKI** filed **KERUGOYA SPMCC No. 51 of 1995** seeking to have the boundaries between the two parcels of land rectified and the District Land Registrar Kirinyaga heard the dispute and forwarded his award to the Court. That award was subsequently set aside. The dispute was thereafter transferred to the Kirinyaga Land Disputes Tribunal (the Tribunal) by **MAKHANDIA J.** (as he then was) vide orders made in **NYERI HIGH COURT CIVIL CASE No. 49 of 2003**. The Tribunal made an award which was filed in **BARICHO COURT LTD CASE No. 12 of 2009** which was however quashed by the **HIGH COURT** in **NYERI JUDICIAL REVIEW CASE No. 6 of 2011**. Thereafter, the plaintiff's aunt **LYDIA NJOKI KARIUKI** filed **KERUGOYA ELC CASE No. 165 of 2014** seeking a declaration that the defendant bought only 2 acres out of land parcel No. KIINE/KIANGAI/111 which suit is still pending and therefore the suit is res-judicata. Further, that the issues of trespass were settled in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S CASE No. 51 of 1995** and also **NYERI HIGH COURT CASE No. 49 of 2003** and later **NYERI HIGH COURT CONSTITUTIONAL PETITION No. 60 of 2009** and the plaintiff cannot therefore claim to have been in adverse possession of the suit land as the defendant has always sought his eviction therefrom.

When counsel for the parties appeared before me on 3rd December 2016, it was agreed that the issue of res-judicata be canvassed first as a preliminary issue by way of written submissions which have been filed by **MS ANN THUNGU** advocate for the plaintiff and **MR. WAHOME GIKONYO** advocate for the defendant.

I have considered the pleadings herein and the submissions by counsel.

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 by such Court”

From the above, the ingredients of res-judicata are:

- 1. The issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine of res-judicata is pleaded.***
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.***
- 3. The former suit must have been heard and finally decided.***
- 4. The Court or tribunal which determined the former suit must have been competent.***

See **KARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83.** It was also held in **HENDERSON VS HENDERSON (1843) 67 E.R. 313** that:

“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 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”.

Therefore, where a plea of res-judicata is raised, the Court will look at the previous litigation between the parties including the entire pleadings to see what was in issue, who the parties were, whether that issue was determined by a Court of competent jurisdiction and if the same issues are being litigated afresh. The test is whether the plaintiff is trying to revive a dispute that has previously been determined by a competent Court and as was held in **OMONDI VS NATIONAL BANK OF KENYA LIMITED & OTHERS (2001) E.A 177** ***“Parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit”.*** The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect parties from facing repetitive litigation over the same matter. It also ensures the economic use of the Court’s limited resources and timely termination of cases because Courts are already clogged and overwhelmed – **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE C.A CIVIL APPEAL No. 42 of 2014 MALINDI.**

I shall be guided by the above legal provision and precedents in determining whether the plea of res-judicata is properly raised by the defendant in this case as a Preliminary Objection. It is not in doubt that res-judicata, being a principle of law, can be properly raised as a Preliminary Objection as defined in the case of **MUKISA BISCUIT CO. VS WEST END DISTRIBUTORS LTD 1969 E.A 696.** In doing so, I shall look at the previous proceedings involving the parties herein as well as the pleadings now before me.

The suit now before me is a claim by the plaintiff that he is entitled to orders of entitlement to 1½ acres out of the suit land by virtue of having been in adverse possession thereof for over 12 years. The defendant has identified the following previous cases in an attempt to convince this Court that this suit is res-judicata.

1. KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 51 of 1995.

The parties therein were **LYDIA NJOKI** (the plaintiff's aunt) as 1st plaintiff and **MUKINYO NGARI IRURA** (the plaintiff's deceased father) as 2nd plaintiff while the defendant was **EPHANTUS KAGUNDA KARIMI** who is also the defendant in this case. The dispute involved rectification of the boundary between land parcels No. KIINE/KIANGAI/111 and KIINE/KIANGAI/168. That is the suit that **MAKHANDIA J.** (as he then was) transferred to the Kirinyaga Land Disputes Tribunal at Baricho vide orders made on 4th February 2009 in **NYERI HIGH COURT CIVIL CASE No. 49 of 2003**. That suit cannot bar this current suit by a plea of res-judicata because the issue therein was a boundary dispute between two parcels of land. The issue of adverse possession was neither raised nor determined and in any event, it could not be determined either by the Magistrate's Court at Kerugoya or the Land Disputes Tribunal at Baricho because, under ***Section 38 of the Limitation of Actions Act***, a party claiming land by adverse possession can only move to the High Court and not the subordinate Court. Therefore, even if the plaintiff herein was claiming under his deceased father, as alleged by the defendant's counsel in his submissions, the claim of res-judicata could not properly be raised in Kerugoya Senior Resident Magistrate's Court Civil Case No. 51 of 1995 because that Court was not competent to handle a dispute relating to adverse possession. Res-judicata cannot therefore be properly invoked on the basis of that case.

2. NYERI HIGH COURT JUDICIAL REVIEW CASE No. 6 of 2011.

In this Judicial Review application, the defendant herein was the applicant while **LYDIA NJOKI** was one of the two respondents. That application was filed to quash the award that followed the determination made by the Baricho Land Disputes Tribunal in their LDT Case No. 12 of 2009. Again the issue of adverse possession was not, and could not have been raised in such proceedings which only sought prerogative orders to quash the Tribunal's award.

3. KERUGOYA ENVIRONMENT AND LAND COURT CASE No. 165 of 2014.

That case involved **LYDIA NJOKI KARIUKI** as plaintiff against the defendant in this case seeking some declaratory orders with regard to land parcel No. KIINE/KIANGAI/111. It was struck out on 9th December 2016 for being statute barred. The plaintiff herein was not a party and there is nothing to suggest that he was claiming under his aunt **LYDIA NJOKI KARIUKI** in that case. Again the issue of adverse possession was not raised nor determined in that case. It is immaterial that both the plaintiff in **KERUGOYA ENVIRONMENT AND LAND COURT CASE No. 165 of 2014** and the plaintiff herein are represented by the same counsel.

In the circumstances, I am un-able to up-hold the plea of res-judicata as raised by the defendant herein.

The up-shot of the above is that the defendant's Preliminary Objection raising the plea of res-judicata is devoid of merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

21ST APRIL, 2017

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

Ms Muthike for Ms Thungu for Plaintiff present

Defendant present in person.

B.N. OLAO

JUDGE

21ST APRIL, 2017