**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 184 OF 2017**

**CHARITY NJANJA MWANIKI (Suing on her behalf**

**and 8 other siblings)…….....…PLAINTIFF**

**VERSUS**

**JAMES MWANIKI GATURU……1ST DEFENDANT**

**ESTHER WANGUI NDUNGU…...2nd DEFENDANT**

**RULING**

1. Before me for determination are two Motions brought by the 2nd Defendant herein; one dated and filed on 21st January, 2015 as a Notice of Preliminary Objection and the other dated the 23rd March 2016 brought under Section 3A,7 of the Civil Procedure Act and Order 51 Rule 1, of the Civil Procedure Rules.

2. In both the applications, the 2nd Defendant seeks for similar orders to the effect that the present suit be stuck out for being res judicata. The 2nd Defendant proffers similar arguments, I shall deal with them together.

3. In both applications the 2nd Defendant seeks that the Plaintiff's suit be dismissed as the same is Res Judicata having been decided by a court of competent jurisdiction in Nakuru HCC No. 189 of 2001 the parties being Esther Wangui Ndungu vs James Mwaniki Gaturu.

4. I will first analyze the arguments of 2nd defendant/Applicant on her applications herein which were undefended.

5. The court directed that the applications be heard in the absence of the Plaintiff/Respondent upon being satisfied that dates were taken by consent yet neither were documents filed nor an appearance made by the Plaintiff/Respondent, to oppose the applications.

6. Briefly, the 2nd defendant/Applicant herein filed a suit at the Nakuru High Court being Nakuru HCC No. 189 of 2001 against the 1st Defendant herein wherein she had sought for orders of injunction restraining him, by himself his servants and or agents from trespassing and/or interfering with land parcels Nyandarua/South Kinagop/3377, 3379, 3380, 3381 and 3382. She had also prayed for eviction orders to issue.

7. Judgment was delivered on the 15th October 2009 by Justice D.K Maraga as he was then, wherein the court found that the 2nd Defendant/Applicant had proved her case on a balance of probability that she was the registered proprietor of the suit land and that the 1st defendant's claim to the parcels of the suit land had been based on a void transaction.

8. The court had subsequently granted the 2nd Defendant/Applicant herein the prayers sought for which were prayers for eviction of the Defendant, as well as a perpetual injunction restraining him by himself, his family, agents or servants, having been evicted, from returning to the suit land.

9. The 1st Defendant then sought leave to harvest his trees before vacating the land, wherein the court granted him a period of 1 year from the date of the judgment, to harvest the trees and remove any improvements that he may have put on the suit land after which he would be forcefully evicted. There was no appeal filed to challenge the said judgment.

10. After delivery of Judgment to the above mentioned mater, one Robert Mwangi Mwaniki filed suit No. 282 of 2010, against the 2nd Defendant/applicant, by way of Originating Summons at the Nakuru Land and Environment Court claiming rights, by adverse possession, to Nyandarua/South Kinagop/3377, one of the suit lands herein. He however failed to prosecute the said case and its finality or lack thereof is not known to the court.

11. The plaintiff's in the present suit have now filed the current suit by way of an Originating summons claiming rights and interest in Nyandarua/South Kinagop/3377, 3379, 3380, 3381 and 3382 the suit parcels herein.

12. From the plaintiff's brief statement filed alongside the Origination summons, at paragraph 1, it is clear that the plaintiffs in the present case are the 1st defendant's children.

13. The Matter for determination hence is

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether the present suit is res judicata.

14. On the first issue raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus:-

> "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

15. In this proceedings it is the 2nd Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the same was res judicata and an abuse of the court process.

16. Having considered and reviewed the pleadings and submissions by counsel for the 2nd Defendant/Applicant, it is not in dispute, that there exists a judgment in the Nakuru HCCC No. 189 of 2001 **wherein the matter has been heard and finally decided by the court, which matters therein were directly and substantially in issue as those in the present case.**

**17. I therefore uphold the preliminary objection on the basis that pursuant to sections 7** of the Civil Procedure Act Cap 21 **the court lacks the jurisdiction to deal with a matter which has already been decided by a court of competent jurisdiction. The first part thus ties with the second issue for determination as to** whether the present suit is res judicata

18. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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"**

19. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

20. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

21. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR,** as follows that:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

22. Looking at the circumstance of the present suit as well as the previous suit, this court finds that the decision of the court was that the 2 nd Defendant/Applicant had proved her case on a balance of probability that she was the registered proprietor of the suit land, and granted her the orders for eviction of the 1st Defendant as well as a perpetual injunction restraining him by himself, his family, agents or servants, having been evicted, from returning to the suit land. This in my view was a decision of finality in the sense of res judicata.

23. I find that the issues in the previous suit which were substantially the same in the subsequent suit were determined and covered by the decision in the previous case.

24. The judgment was clear to the effect that:

> **"the Plaintiff (2nd Defendant/Applicant) had proved her case on a balance of probability, consequently I grant her the orders for eviction of the Defendant(1st Defendant)** ***as well as a perpetual injunction restraining him by himself, his family, agents or servants, having been evicted, from returning to the suit land."***

25. I also find that parties in the present case, the Plaintiffs herein, are children of the 1 st defendant hence are estopped from litigating under the provisions on Section 7 of the Civil Procedure Act.

26. Finally, I find that the previous case was determined by a court of competent jurisdiction.

27. The Plaintiff did not challenge that decision on Appeal and therefore trial of the present suit would amount to sitting on appeal. This court has no jurisdiction to overturn the decision of Justice D.K Maraga as he was then.

28. Succinctly put, the High Court has no jurisdiction to overturn its own decision except on reviewing its own decision, a procedure that the plaintiff has not pursued. Reliance is put on the case of **E.T vs Attorney General & Another (2012) eKLR** where it was held that:

> **"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of** ***Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."***

29. The upshot of the foregoing is that matters in this case were conclusively decided vide Nakuru High Court Civil Case No.189 of 2009 and therefore the present case is res judicata and an abuse of the court process. The same is therefore struck out and/or dismissed with costs to the 2nd Defendant/Applicant.

**Dated and delivered at Nyahururu this 15th day of November, 2017.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**