



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MERU
PETITION NO. 29 OF 2014
IN THE MATTER OF ARTICLE 23 & 27 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS & FREEDOMS PURSUANT TO ARTICLE
23 & 27 OF THE CONSTITUTION KENYA 2010
BETWEEN
SEVELINA KAIRIGO M'MIRITI.....1ST PETITIONER
AGNES NYAISAMUEL.....2ND PETITIONER
VERSUS
JAPHET MIRITI M'MWENGWA.....RESPONDENT
RULING

1. A Preliminary Objection was filed on 29:09:14 where the Respondent avers that:-

1. The Suit herein is res-judicata as the issues herein have been adjudicated and decided in High Court Succession Cause NO. 11 of 1983, HCCA No. 45 of 2002 and Nkubu PMCC No. 36 of 1993.

2. The Petition herein is also an abuse of the process of Court for the following reasons:

a) The same seeks to reopen litigation on the disputed Suitland that has been litigated upon since the year 1983.

b) This Petition seeks to challenge the decisions of the superior Courts in relation to LR. NO. ABOGETA/L-CHURE /210 without filing an appeal against the said decisions as required by the law.

2. Directions were given on 31:03:16 for the Preliminary Objection to be canvassed by way of Written Submissions.

3. At the heart of the dispute is a Land Parcel No. Abogeta/Lower Chure/210 which land initially belonged to one Gituoki Mburu. Gituaki Mburu was father of the two Petitioners while Respondent is apparently an adopted brother.
4. Litigation took place regarding inheritance and ownership of the land in question vide the following cases; succession cause No. 11 of 1983, HCCA No. 45 of 2002, SRM CC: No. 36 of 1993 and LDT No. 68 of 2000.
5. Respondent herein avers that all the issues raised herein were canvassed in the aforementioned suits and hence the matter is **Res-judicata**.
5. On the other hand the Petitioners admit that indeed the dispute was heard but the question before this Court is that of **discrimination which is a fundamental issue that was not raised before these other suits**.
6. This Court has to consider just one issue; **whether this suit is Res-Judicata**.
7. Section 7 of the Civil Procedure Act provides:-
- “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 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”.***
8. It is averred by the petitioners that the right set out under article 27 of the Constitution was not raised and hence the suit herein cannot be termed as Re judicata. To this end, petitioners have relied on the case of Kerugoya High Court case No. **783 of 2013 Michael Gachoki Gicheru vs. Joseph Karobia Gicheru Gicheru**.
9. I have perused the record of the other mentioned suits particularly case No. Succession Cause No.11 of 1983 whereby the present petitioners had made an application for annulment of the grant issued to the Respondent. The Ruling thereof by Judge Emukule delivered on 22.05.09 has given the history of the relationship between the two parties. it is clear that in that case, the present Petitioners were asserting their right to own property. This is the same issue in the present suit.
10. I am in agreement with Respondents Submissions that the bottom line of this petition is to open up litigation under the guise of Constitutional issues.
11. It is not lost to this Court that the Succession cause was not the only suit before the Court. The History of the other cases is captured in the High Court Civil Appeal No. 45 of 2002 where the mother of the present petitioner was the Respondent while Appellant is the present Respondent.
12. Against this back ground, I am inclined to find that this petition is Re-judicata to the previous suits. Litigation must come to an end.
13. I therefore, **find that the Preliminary Objection has merits. The suit is dismissed with costs to Respondent**.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Ashaba H/B for Mwanzia for Petitioners Present

M. Kariuki H/B for Kiogora for Respondent Present

Hon. L. N. MBUGUA

ELC JUDGE