



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 217 OF 2013

DOMINIC KANGANGI MUGOPLAINTIFF

VERSUS

JOSEPH GATHURE MUGO1ST DEFENDANT

FRANCIS NDUNGU MBURU2ND DEFENDANT

JUDGMENT

The parties herein are acting in person and the issue as to whether or not this suit is res-judicata in view of Kerugoya PMCC No. 84 of 2000 kept popping up but since the parties are lay persons, this Court decided that it would be prudent to have the suit heard and a determination made on all the issues raised. Obviously lay persons would not be in a position to raise the issues of res-judicata as a Preliminary Objection more so in a rural set up such as the one in which this Court operates. I also appreciate that what such litigants want is to be heard on their cases and a decision made.

By his “**home-made**” plaint filed herein on 15th October 2008, the plaintiff sought judgment against the 1st and 2nd defendants jointly and severally in the following terms:-

- a. ***A permanent injunction restraining the 1st and 2nd defendants by themselves, their servants, agents and/or employees from trespassing, entering into, transferring, charging and/or interfering in any manner whatsoever with all that piece of land known as No. MWERUA/KITHUMBU/1256 and MWERUA/KITHUMBU/1257***
- b. ***The transfer and title deeds in respect of the above parcels to 1st and 2nd defendants be cancelled and the same be restituted to the plaintiff***
- c. ***Costs of this suit.***
- d. ***Any other relief that this Honourable Court may deem fit to grant.***

The basis of the plaintiff’s claim is that since 1998, he has been the registered proprietor of land parcels No. MWERUA/KITHUMBU/1256 and MWERUA/KITHUMBU/1256 (the suit land) but on 6th May 2003 and again on 13th October 2004 the 1st defendant fraudulently and without the knowledge of the plaintiff had the suit land transferred into his names and thereafter transferred the portion MWERUA/KITHUMBU/1256 into the names of the 2nd defendant. The particulars of fraud as against the defendants were pleaded in paragraph 7 of the plaint as follows:-

- Transferring the parcel No. MWERUA/KITHUMBU/1257 into the 1st defendant’s names without the plaintiff’s consent.

- Transferring land parcel No. MWERUA/KITHUMBU/1256 into the 2nd defendant's names while aware that the 1st defendant was acting out of bad faith with the sole aim of circumventing the course of justice and to deprive the plaintiff of his right.

The plaintiff also pleaded in paragraph 8 of his plaint that while there has been previous proceedings between him and the 1st defendant involving this matter, there have not been any previous proceedings between him and the 2nd defendant.

The defendants filed a brief joint statement of defence in which they denied all the plaintiff's averments and most particularly that there was any fraudulent dealings with the suit land with the 2nd defendant pleading that he bought parcel No. MWERUA/KITHUMBU1256 from the 1st defendant for value and free from all encumbrances or restrictions. The 1st defendant further pleaded that the suit land was in fact awarded to him vide Principal Magistrate's Court Kerugoya in Land Disputes Tribunal Case No. 84 of 2000.

In a reply to that defence, the plaintiff pleaded that the decree in Principal Magistrate's Court Kerugoya Case No. LDT 84 of 2000 was cancelled by the Provincial Land Disputes Committee vide Case No. 195 of 2000 and the plaintiff's appeal in Embu High Court was struck out for not having been filed in time.

The trial commenced before me on 22nd April 2015 with the plaintiff testifying that he had taken the defendants to Court which ordered them to remove the caution on his land and pay him Ksh. 10,000 for damaging his crop. The defendants appealed upto the High Court in Embu but their appeal was dismissed. He therefore urged this Court to order the defendants to return the suit land to him. He produced the following as evidence:

Plaintiffs Exhibit 1: Order in Appeal Case No. 72 of 2001 at Embu High Court

Plaintiffs Exhibit 2: Order in the Provincial Lands Committee

Plaintiffs Exhibit 3: Decree in Kerugoya SRM Court Civil Suit No. 9 of 1999.

On his part, the 1st defendant simply asked the Court to rely on the following documents:-

Defence Exhibit 1: Letter dated 17.5.1998 by his Assistant Chief

Defence Exhibit 2: Order in Kerugoya PMCC No. 84 of 2000

Defence Exhibit 3: Agreement dated 25.3.1996

Defence Exhibit 4: Agreement dated 5.9.2001

On his part, the 2nd defendant stated that he bought the suit land and so it is not true that he and 1st defendant took it from the plaintiff. He referred to the agreement between him and the 1st defendant dated 5th September 2001 (Defence exhibit 4).

I have considered the pleadings herein as well as the parties respective oral and documentary evidence. The plaintiff's case is that whereas he was the registered proprietor of the suit land, the two defendants fraudulently had it registered in the names of the 1st defendant who then transferred parcel No. MWERUA/KITHUMBU/1256 to the 2nd defendant. The defendants have denied all that.

Since the issue of previous proceedings including the same parties and property was alluded to, this may be the right time to interrogate that issue. As indicated earlier, the parties herein being lay persons were not in a position to canvass the issue of res-judicata which is a legal issue far beyond their comprehension. However, they did place before me material which will assist in determining that issue and which I need to determine at this early stage as it goes to the jurisdiction of this Court.

Res-judicata is provided for under **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”

The essence of res-judicata is to bring an end to litigation so that parties are not vexed twice over the same subject matter. In determining whether a matter is res-judicata, the Court will consider the following pertinent issues:-

1. ***Has the matter in issue been directly and substantially in issue in the former suit?***
2. ***Does the issue involve the same parties or those acting under them litigating under the same title?***
3. ***Was the Court that determined the former suit competent to do so?***
4. ***Were the issues raised in the former suit heard and finally decided by that Court?***

In the matter before me, the defendants pleaded in their defence that the issues herein had been determined in Kerugoya Principal Magistrate’s Court Land Dispute Case No. 84 of 2000. I have now looked at the order in that case which was adopting an award of Land Disputes Tribunal in a dispute involving the 1st defendant (as claimant) and the plaintiff (as objector) and the Kerugoya Principal Magistrate’s Court in adopting that award made the following orders:-

1. ***“The elders award be and is hereby adopted as a judgment of this Court”***
2. ***“That the objector DOMINIC KANGANGI MUGO is awarded land parcels No. MWERUA/KITHUMBU/1254 and MWERUA/KITHUMBU/1255”***
3. ***“That the claimant JOSEPH GATHURE MUGO be and is hereby awarded land parcels MWERUA/KITHUMBU/1256 and MWERUA/KITHUMBU/1257”***
4. ***“That the objector DOMINIC KANGANGI MUGO be and is hereby ordered to sign all the necessary documents to necessitate transfer of the said share failure to which the Executive officer of this Court will sign the same”***

What concerns me is whether the Land Dispute Tribunal whose award was being adopted by the Kerugoya Principal Magistrate’s Court in Case No. 84 of 2000 was actually a competent Court to make the orders that it did. This is because, unless the order or judgment was made by a Court with competent jurisdiction, it cannot operate as res-judicata. In **MULLA, THE CODE OF CIVIL PROCEDURE, 18TH EDITION 2012 at page 285**, the writer observes as follows:-

“Judgment of a Court not competent to deliver it. A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since since a judgment is not of any effect. It is a well-settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decided the suit, it does not operate as res-judicata between the same parties in subsequent proceedings”.

It is common knowledge that the Land Disputes Tribunal that made the award referred to above (unfortunately the award itself was not availed by either party), could only have been exercising a jurisdiction donated to it by **Section 3 of the now repealed Land Disputes Tribunal Act**. It is clear that the said Tribunal made an order regarding ownership of registered land and even purported to direct the Executive officer of the Court to sign transfer forms to give effect to its orders. It has been settled in a long line of authorities that such a Tribunal had no such jurisdiction and so its award would be a nullity –

see **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO. 256 OF 2002.** It follows therefore that the award of the Land Disputes Tribunal and subsequent adoption by the Kerugoya Principal Magistrate's Court in case No. 84 of 2000 were all nullities which cannot therefore be invoked to sustain a plea of res-judicata. I therefore rule that this suit is not res-judicata.

I shall now consider the plaintiff's case on its merits.

The plaintiff pleads that the 1st defendant fraudulently transferred the suit land into his names and thereafter transferred parcel No. MWERUA/KITHUMBU/1256 to the 2nd defendant. The defendants have denied all that. Although the documents of title with respect to the suit land were not availed for my inspection, it is not in dispute that the same is registered in the names of the defendants who, by virtue of the provisions of **Sections 27 and 28 of the repealed Registered Land Act, (now Sections 24 and 25 of the new Land Registration Act 2012).** such registration is prima facie evidence that the defendants are the absolute and indefeasible owners of the suit land and their titles shall not be subject to challenge unless it is shown that the said registration was obtained through fraud or misrepresentation to which the defendants are proved to have been parties or unless it can be shown that the title was acquired illegally or through other corrupt schemes. The plaintiff having pleaded fraud on the part of the defendants in their acquisition of the suit land, the onus was on him to prove that allegation. **Sections 107 to 109 of the Evidence Act** imposes upon him the burden of proving fraud. Those sections provide as follows:-

107(1) "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

(2) "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

108 "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"

109 "The burden of proof as to any particular facts lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

Apart from pleading fraud against the defendants, the plaintiff did not lead any evidence to prove that allegation. A mere assertion that something was done fraudulently is not sufficient. The plaintiff was under an obligation to lead cogent evidence of fraud or illegality to enable this Court impugn the defendants title to the suit land. And the standard is more than a mere balance of probability. In the case of **R.G. PATEL VS LALJI MAKANJA 1957 E.A 314**, the then Court of Appeal for East Africa stated as follows:-

"Allegation of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required"

In **CENTRAL BANK OF KENYA LIMITED VS TRUST BANK LIMITED & FOUR OTHERS 1996 e K.L.R (CIVIL APPEAL NO. 215 OF 1996)**, the Court of Appeal rendered itself as follows:-

"The appellant made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case".

From the totality of the plaintiff's oral and documentary evidence, I am not persuaded that he has proved the allegation of fraud against the defendants and I see no basis upon which their respective titles to the suit land can be impugned.

On the other hand, the defendants led evidence which shows that infact their respective titles to the suit land were obtained through a process that cannot be faulted. The 1st defendant produced an agreement dated 25th March 1996 (Defence Exhibit 3) signed both by himself and the plaintiff by which the original land parcel No. MWERUA/KITHUMBI/599 was to be shared between the two, who are brothers, with each getting two (2) acres. That agreement was not disputed. There was also a letter dated 17th May 1998 from their Assistant Chief confirming that indeed the plaintiff and 1st defendant had entered into that agreement (Defence Exhibit 1). Therefore, the plaintiff having been a party to an agreement by which the original land was sub-divided to give rise to the suit land, he cannot now be heard to say that the registration of the suit land in the 1st defendant's names was obtained through fraud.

The 2nd defendant, on his part, testified that he bought the other portion of the suit land from the 1st defendant on 5th September 2001 for Ksh. 140,000 and he produced an agreement between him and the 1st defendant to that effect (Defence Exhibit 4). Attached to that agreement is the letter of consent issued by the Ndia Land Control Board on 2nd November 2004. Again, there was no challenge on the authenticity of that agreement and the consent. This Court is therefore satisfied that both defendants obtained their respective titles to the suit land through a lawful process.

From the above evidence, it is clear to this Court that not only has the plaintiff failed to prove that the defendants obtained registration of the suit land in their names through fraud, mis-representation or other un-lawful, un-procedural or corrupt means to warrant the cancellation of those titles but also, the defendants have on their part led evidence which shows that infact they obtained their respective titles legally. There is therefore no basis upon which their titles can be impugned and neither is there any justification for this Court to issue a permanent injunction to restrain the defendants, their servants, agents or employees from dealing with the suit land as sought in the plaint. Indeed to do so would be a violation of the defendants right to property which is guaranteed under **Article 40(1) of the Constitution** which provides:-

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) of any description; and

(b) in any part of Kenya.

Article 65 of the Constitution of course places restrictions on land holding in respect of non-citizens and it has not been suggested that the defendants are not citizens of Kenya.

In the circumstances therefore, the plaintiff's suit is dismissed with costs to the defendants.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment dated, signed and delivered in open Court this 22nd day of April, 2016.

Plaintiff present in person

1st Defendant present

2nd Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016