



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 900 OF 2013(O.S)**

**MIRIAM WAHU NGAE and**

**ALEX NGAE MBOOTHU (Suing in their capacity as**

**the legal Representative of the estate of**

**ELIZAPHANSON NGAE MBOOTHU Deceased)**

**and in their own capacity**

**JOHN GITATA NGAE**

**JAMES MUNGAI**

**NGAE.....PLAINTIFFS**

**VERSUS**

**WANGARI NJUGUNA MBOOTHU(Sued in her capacity**

**As the registered Trustee of**

**JOSEPH NDUNGU NJUGUNA,**

**STEPHEN WAINANA NJUGUNA,**

**MICHAEL ROMAN GACHINGIRI &**

**JOHNSTONE GITATA NJUGUNA.....**

**DEFENDANT**

**RULING**

**The Preliminary Objection**

The Plaintiffs filed a Notice of Motion herein dated 23<sup>rd</sup> July 2013 seeking orders of a temporary injunction restraining the Defendant from evicting the Plaintiffs from the parcel of land known as Title Nos. Kiganjo/Gachika/2839, 2840, 2841 & 2842 and a portion of Title No. Kiganjo/Gachika/2838 (formerly Title No. Kiganjo/Gachika/533) (hereinafter the “suit properties”), or from demolishing or fencing in the Plaintiffs’ buildings or interfering with the Plaintiffs possession of the same, or alienating, transferring, disposing off or dealing with the suit properties in any manner whatsoever pending hearing

and determination of their application and the suit herein.

The Plaintiffs' grounds for the Notice of Motion were that they have occupied the suit land since 1949 and have constructed dwelling houses thereon, and that the Defendant has threatened to forcefully evict them by use of any means necessary to demolish their buildings. Further, that the Plaintiffs have a *prima facie* case by virtue of their continuous, open, uninterrupted and occupation of the suit properties.

The Defendant subsequently filed a Preliminary Objection dated 6<sup>th</sup> September 2013 on the ground that the Plaintiff's suit and application are *res judicata*, and that the issues in the present application and suit were conclusively dealt with vide a judgment delivered by Hon. Justice Mr. Hatari Waweru on the 15<sup>th</sup> day of July 2011 in the HCCC No. 3610 of 1991.

The parties were directed to file written submissions on the Preliminary Objection. The Defendant's counsel filed submissions dated 18<sup>th</sup> September 2013. He argued therein that the Plaintiffs herein were privy to HCCC No. 3610 of 1991 as the 1<sup>st</sup> Plaintiff in the present suit was a witness in the previous suit, and the Plaintiffs are legal representatives and beneficiaries of Ngae Mbothu who was listed as one of the beneficiaries in HCCC No. 3610 of 1991. Further, that the land that was in dispute in HCCC No. 3610 of 1991 is the same land in the present dispute, and the new title number cited by the Plaintiffs in the present suit arise as a result of subdivision of the said land namely Kiganjo/Gachika/533. The Defendant's counsel referred to the mutation forms attached to the Plaintiffs' pleadings in this respect.

The Plaintiff's counsel filed submissions dated 17<sup>th</sup> October 2013, wherein he argued that while HCCC No. 3610 of 1991 was heard and decided by a court of competent jurisdiction, the parties to the said suit are not the same as those in the present suit. He argued that the Plaintiff in HCCC No. 3610 of 1991 was Mwangi Mbothu, and the Defendant Martha Wangari Njuguna, while the Plaintiffs in the present suit are Mariam Wahu Ngae, Alex Ngae Mbothu, John Gitata Ngae and James Mungae Ngae, and the Defendant is Martha Njuguna Mbothu. The counsel further denied that the late Ngae Mbothu was a party in HCCC No. 3610 of 1991 and stated that he was only mentioned a beneficiary therein.

Lastly, the Plaintiff's counsel submitted that the matter in issue in the present case was not directly and substantially in issue in HCCC No. 3610 of 1991, as in the previous issue the substantial issue was a declaration of trust while in the present suit the issue is a vesting order by virtue of adverse possession.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issue is whether the Defendant's preliminary objection has merit and should be upheld. The applicable law is section 7 of the Civil Procedure Act which provides as follows with regard to the doctrine of *res judicata*:

**“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 requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with

finality.

In the present suit I have perused the pleadings herein and judgment given in **Mwangi Mbothu vs Martha Wangari Njuguna, HCCC No. 3610 of 1991** that was attached to the Defendant's submissions. The suit properties herein are indeed sub-divisions of Title No. Kiganjo/Gachika/533, which was the suit property in HCCC No. 3610 of 1991. This is confirmed by the mutation forms attached as exhibit "JMN 3" to the Plaintiffs' supporting affidavit filed herein and sworn on 23<sup>rd</sup> July 2013 by James Mungai Ngae.

It is also the position that the Defendant herein was also the Defendant in HCCC No. 3610 of 1991. In the present suit the Plaintiffs are the wife and children of Ngae Mbothu (Deceased), and have brought the suit in their capacity as legal representatives and beneficiaries of the Deceased. In HCCC No. 3610 of 1991 the Plaintiff therein brought a suit seeking orders that the Defendant herein was holding the suit property on trust for himself and his brothers, who included Ngae Mbothu (Deceased). It is thus evident that the parties herein are suing in the same capacity and under the same title as the Plaintiff in the earlier suit, as they are seeking rights over the same property as claimed in the earlier suit by the Plaintiff therein, who was acting on behalf of Ngae Mbothu (Deceased).

I am in this respect guided by Explanation (6) to section 7 of the Civil Procedure Act which provides as follows in this regard:

**"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"**

While it is true as claimed by the Plaintiff that the issue in HCCC No. 3610 of 1991 was that of a declaration of trust and that herein is of adverse possession, I am guided in this respect by Explanation (4) to section 7 of the Civil Procedure Act which provides that any matter which might and ought to have been made ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The Plaintiff in HCCC No. 3610 of 1991 ought to have also raised the issue of adverse possession in their attack on the Defendant's title. Since the Plaintiffs herein have been found to be litigating under the same title and capacity as the Plaintiff in HCCC No. 3610 of 1991, the issue of adverse possession in the present suit is therefore deemed to have been directly and substantially in issue in HCCC No. 3610 of 1991.

Arising from the foregoing reasons I find that the Defendant's Preliminary Objection dated 6<sup>th</sup> September 2013 has merit, and the Plaintiffs' suit herein and Notice of Motion dated 23<sup>rd</sup> July 2013 are accordingly dismissed for being *res judicata*.

The Plaintiffs shall bear the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of January, 2014.

**P. NYAMWEYA**

**JUDGE**