



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 654 OF 2009

EVANSON GACHIE KARIUKI1ST PLAINTIFF

JOSEPH WACHIRA KARIUKI.....2ND PLAINTIFF

JOHN KAHORO KARIUKI.....3RD PLAINTIFF

VERSUS

FRANCIS KARIUKI WACHIRA1ST DEFENDANT

WANJIRU MUTAHI.....2ND DEFENDANT

RULING

Coming before me for determination is the 1st Defendant's Preliminary Objection dated 19th December 2012 in which the 1st Defendant has objected to the hearing of this suit on the grounds that the suit is res judicata.

The Plaintiffs filed this suit way back on 21st December 2009 by their Complaint dated 18th October 2009 as the administrators and personal representatives of the estate of Kariuki Kihungu ("the Deceased") seeking for this court to issue a declaration to the effect that the transfer of the land parcel known as Dagoretti/Uthiru/282 (hereinafter referred to as the "Suit Property") into the joint names of the Defendants was unlawful and order cancellation of the Defendants title and for the registration of the Suit Property into their joint names . In the Complaint, the Plaintiffs allege that the Suit Property was previously owned by the Deceased who never transferred the same to anybody but that the Defendants had, through fraud and other unlawful means, became the registered proprietors of the Suit Property.

In support of his Preliminary Objection, the 1st Defendant filed written submissions dated 11th February 2014 in which he stated that the issues raised by the Plaintiffs in their pleadings in this suit are the same issues that were raised by them in other courts and were settled, namely the ruling by the High Court in Nyeri in **Succession Cause No. 219 of 2001** by Judge Makhandia and the Land Tribunal Kikuyu in Land **Case No. 16/20/177/2000**. He submitted further that the main issue in this suit being the ownership of the Suit Property was dealt with in the Land Tribunal Kikuyu which confirmed the Defendants as the rightful owners thereof. He further submitted that in **Succession Cause No. 219 of 2001**, Judge Makhandia also ruled that the Suit Property was not part of the estate of the Deceased and that the registered owners

thereof were the Defendants. He further submitted that there should be an end to litigation and a party should not be vexed twice over the same issue. He further submitted that this suit is the third suit to be filed by the Plaintiffs against the Defendants over the Suit Property and that it was an abuse of the court process. He submitted that this suit should be dismissed with costs.

In response thereto, the Plaintiffs filed their undated written submissions filed on 25th February 2014 in which they submitted that it was true that in **Succession Cause No. 219 of 2001**, Judge Makhandia ruled that the 1st Defendant is the registered owner of the Suit Property and therefore could not be enjoined from dealing or possessing his property. They further conceded that in Land Tribunal Kikuyu in Land **Case No. 16/20/177/2000**, the Tribunal adjudged that the Suit Property belonged to the Defendants. They further submitted that their pleadings in this present suit demonstrate that they acknowledge that the Suit Property is registered in the joint names of the Defendants. They further submitted that in this present suit, the Plaintiffs are challenging the registration of the Defendants as the owners of the Suit Property on the grounds of fraud, particulars of which they enumerated in their pleadings, an issue which was not addressed in those previous suits. They further submitted that it is on those grounds that they seek the cancellation and nullification of the transfer in favour of the Defendants.

The law pertaining to the doctrine of res judicata is captured under the provision of **Section 7** of the **Civil Procedure Act** which provides as follows-

“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 Plaintiffs concede to there being two previous determinations on the issue of ownership of the Suit Property and reiterated the Defendants’ assertion that the previous determinations were to the effect that the Defendants are the registered proprietors of the Suit Property. However, the Plaintiffs argument is that they are raising a new issue in this present suit, being that they wish to challenge the transfer of the Suit Property to the Defendants on the grounds of fraud, which issue they did not raise in the previous suits. To that argument, the decision in the case of **Henderson -Vs- Henderson (1843-60) All E.R. 378** is instructive where the Court stated that,

“... where a given matter becomes the subject of litigation in, and of 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 of litigation in respect of a matter which might have been brought forward as part of the 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 case, 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.”

I believe the above decision clearly forms the position of this court, which in short, is that the Plaintiffs should have raised the issue of fraudulent transfer of the Suit Property to the Defendants in the previous suit as that issue properly belongs to the subject of litigation which was before those previous suits. Having failed to do so, the Plaintiffs are now precluded from raising that issue in this suit. With that finding, I am satisfied that the Preliminary Objection has merit and do hereby uphold the same. This suit therefore stands dismissed with costs to the Defendants.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF March 2014

MARY M. GITUMBI

JUDGE