REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

LAND AND ENVIRONMENT COURT

CIVIL CASE NO.111 OF 2010

PETER NGUGI KABIRI.....PLAINTIFF

VERSUS

ESTHER WANGARI GITHINJI

FLORAH WANJIKU GITHINJI.....DEFENDANT

R U L I N G

By plaint dated 16th September 2010 Peter Ngugi Kabiri ***(hereinafter referred to as the plaintiff)*** sued Esther Wangari Githinji and florah Wanjiku Githinji (***hereinafter referred to as the defendants).*** The defendants are widows of one Githinji Kabiri who was the registered owner of land ***L.R. Maragua/Ridge/18*** measuring 6.3 hectares which was inherited by the above mentioned two widows after his death and subdivided into LR Maragua/ridge/559 and 560 respectively.

The plaintiff claims that the said Githinji Kabiri was his elder brother and that he was registered the owner of L.R.Maragua/Ridge/18 as a trustee for himself, the plaintiff and their common mother the late Mary Njoki Kabiri who was identified by the government as landless and was considered for allocation of settlement land in 1962 but since she did not have an identity card she offered the land to be registered in the name of his elder son the late Githinji Kabiri as a trustee of the family and the settlement fund was paid with the sale of food stuff from the farm cultivated by all family members.

He states that there have been several cases involving the parcel of land which are particularized in the suit. The cases will be addressed later as these cases are the subject of the application.

The plaintiff claims that the defendants are a registered owners of plots L.R.Maragua/Ridge/551 and Maragua/Ridge/560 respectively as trustees for themselves and the plaintiff in equal shares and that he claims overriding interest under section 30 (h) and (g) of Registered Land Act Cap 300 Laws Of Kenya (repealed) over one third share of plots L.R.Maragua/Ridge/559 and 560 respectively.

He prays for orders that the Court declares that the defendants are registered owners of L.R.Maragua/Ridge/559 and 560 in trust for the plaintiff as to one third share thereof.

Moreover, he prays for an order that the defendants do sub-divide the lands L.R. Maragua/Ridge/559 and 560 and transfer one third share thereof measuring 2.1 ha. (5 acres) to the plaintiff failing of which the Deputy Registrar of the court to execute mutation forms and transfer forms

to effect the court order. Lastly that an order of injunction be issued restraining the defendants from transferring, alienating, assigning, leasing, subdividing and or in any other manner dealing with the said land parcels to the prejudice of the plaintiff.

The defendants filed a joint statement of defence and denied the claims by the plaintiff and asserted that the plaintiff is non suited and that the proceedings herein are a nullity. They aver that the suit is time barred and therefore should be struck out with costs. They further aver that they were only registered as owners of the parcel of land to hold as trustees of their children pursuant to an order of the honorable court in NBI H.C. Succession Cause No.174 of 1994 in the matter of the estate of Githinji Kabiri (deceased wherein the grant was confirmed on 24/2/1995. The defendant further claims that the plaintiffs claim amounts to a claim for provision for a Dependant which is confirmed by paragraph 8 of the plaint. They aver that the claim is a desperate attempt to circumvent the express limitation set in section 30 of the law of succession Act chapter 160 laws of Kenya.

In the alternative, the defendants state that the late Githinji Kabiri applied for allocation of land in 1962 and was allocated the same and paid for the same between 1962 and 1977 and his late mother was present as a licensee. The mother was working in Thika and living in squalor with the plaintiff as a young boy and therefore the late Githinji invited her to stay on the land. She came with the plaintiff to live with her.

The defendants claim that the issue of trust in paragraph 6 of the plaint was determined in **Thika Resident Magistrates Court Civil Case NO.26/1990 Githinji Kabiri -VS- Peter Ngugi Kabiri** and another case being **NBI H.C. CIVIL APPEAL NO.213 OF 1992**, Esther Wangari Githinji and Flora Wanjiku Githinji -VS- Peter Ngugi Kabui and therefore the suit herein is statute barred by section 7 of the C.P.A Cap 21 Laws of Kenya.

The defendants deny that the suits were dismissed on technicalities and aver that the current suit contradicts the plaintiffs claim in High Court of Kenya at Nairobi in Civil suit No.2061 of 1995 (O.S) wherein the plaintiff sought to be registered as a holder of 5 acres from the suit property by reason of adversely possessing the same.

On the 16th August 2011, the defendant took out a Notice of Motion that the plaint filed on 24/9/2010 be struck out with costs and the defendant be at liberty to apply for such further orders and/or directions as the court may deem fit and just to grant. The application is made on grounds that the plaint is scandalous frivolous and/or oppressive as it does not raise triable issues before court. Moreover that the said plaint is bad in law and as such is an abuse of the process of this honourable court. The application is supported by the affidavit of Esther Wangari Githinji.

The gist of the affidavit is that this suit is meant to delay justice in this matter as the defendants are the registered proprietors of the parcels of land in dispute since 20/4/1995 to date hence the suit is bad in law and time barred by section 7 of Limitation of Actions Act Cap 22 Laws of Kenya by the doctrine of Res Judicata.

The plaintiff filed a replying affidavit on 18/11/2013 whose gist is that the suit filed on 24/9/2010 is based on fraud and/or fraudulent breach of trust by the defendants and their late husband and the same is not time barred under section 20 (a) and (b) of the Limitation of Actions Act Cap 22 Laws of Kenya.The plaintiff argues that the defendants hold the land for themselves and as trustees of the plaintiff.

He further argues that Section 7 of the Civil Procedure Act does not apply where previous suits have not been heard and determined and that the suits referred to paragraph 7 of the supplementary affidavit were not adjudicated to the finality to make the present suit res judicata.

The plaintiff claims that he is still in occupation of five acres of the suit land by virtue of trust under section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed) and under adverse possession and Limitation of Actions Act.

The applicant filed a supplementary affidavit on 6/9/2012 reiterating the contents of the supporting affidavit but now giving more details of the previous suits.

The plaintiff also filed a supplementary affidavit on 4/9/2011 whose import is that this suit is not ***res judicata*** and also provided further evidence and a reply to supplementary affidavit whose import is similar to the supplementary affidavit.

The ***gravamen*** of the defendants' submissions is that this suit is an abuse of the process of the court and cited the decision of Justice Hatari Waweru in **Somon Kitundu & 2 others -VS- Part Towers (2006) eKLR** where the Honourable Judge found that a suit that is res judicata is an abuse of the process of the court.

The defendant has also cited the case of **Henderson -VS- Henderson (1843 – 60) ALL E.R. 378 AT 381** to support the argument that the suit is ***res judicata.***

The ***gravamen*** of this plaintiffs submissions is that the cause of action in this suit is based on trust in that the defendants are registered owners of the suit parcels of land as trustees for the plaintiff for the five acres which the plaintiff claims under customary trust and/or under an overriding interest. He submits that section 7 of the Limitation of Actions Act dos not apply in view of section 20 of the same Act. He further submits passionately that the principle of ***res judciata*** does not apply in this case and finally submits that the application be dismissed with costs so that he be allowed to be heard under the Constitution.

I have read the application, affidavits herein and considered the submissions by parties and do list the issues for consideration as follows.

1. **Does the suit raise any triable issue?**
2. **Is the suit scandalous?**
3. **Is the suit frivolous?**
4. **Is the suit oppressing?**
5. **Is the suit an abuse of the process of the court?**
6. **Is the suit time barred?**
7. **Is the suit res judicata**

On the 1st issue it is the defendant's argument that the suit does not raise any triable issues while the plaintiff argues that the same raises triable issues. This court finds for the plaintiff because the plaint raises the triable issue of Kikuyu customary trust. The fact that the plaintiff occupies 5 acres of the land in dispute and has been in such occupation for a long period of time is not disputed and that the defendants are the registered proprietor raises the issue of adverse possession. The court should at least be told during full trial how the plaintiff came into possession of the five acres and continues to utilize the same. The plaintiff's claim of overriding interest in accordance with the provisions of Section 30 of the R.L.A (repealed) is an issue to be tried by law.

In judging whether a plaint discloses triable issue the court will assume all the allegations in it to be true and to have been admitted by the other parties. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists the court will strike it out. A pleading will not be struck out if it is merely demurrable. The pleading to be struck out must be so bad that no legitimate amendment could cure the defects.The jurisdiction to strike out pleadings must be exercised with extreme caution and only in obvious cases and where a question of general importance or a serious question of law would arise on the pleadings. The court cannot strike out pleadings on grounds that it does not raise triable issues unless it is clear and obvious that the action will not lie in law.

In the case of ***D.T Dobie & Company (k) Ltd -VS- Muchera,*** Court of Appeal Nairobi, Madam, Miller & Potter JJA held that "***The words reasonable cause of action in Order vi rule 13(1) means an action with some chances of success when the allegations in the plaint only are considered . A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer."***

clearly the claim by the plaintiff against the two widows is not one that can be described as disclosing no reasonable cause of action or raising no triable issues as the same is not as hopeless as described by the defendants since the plaintiff is in occupation of five acres and claims that he has an overriding interest on the land due to customary trust.

On the issue as to whether the suit is ***scandalous*** I do find that no material has been placed before court to show that the suit is scandalous. A scandalous pleading is one that is indecent or contain offensive and abusive material or has allegation made for the purpose of abusing or prejudicing the other party.

On the issue of the suit being ***frivolous*** I do find the same is not frivolous. For a pleading to be frivolous it must be so hopeless that to put it forward would be an abuse of the process of the court. **Young -V- Hillary 1895 P 87/90 in Ng'okonyo & 2 others -VS- K.P.T.C 1992 KLR P.567.**

Bosire J as he then was held that scandalous pleading implies a pleading which is merely made to prejudice the other parties case.

On the issues as to whether the suit is offensive oppressive, prejudicial and/or embarrassing. I do find that this suit does not tend to delay the fair trial of this matter or fair dealing with the main issue because the plaintiff has not raised a claim that he is not entitled to make. The plaintiff is entitled to make a claim of customary trust in the pleading subject to the legal principle of res judicata which will be addressed hereinafter.

The next issue that this court now embarks on is the issue of whether the plaint (suit) is an abuse of the process of the court. I will deal with this issue alongside the issue of res judicata.

It is trite law that a statement of claim would be an abuse of the process of the court if it raises an issue that has been determined by the court or raises an issue based on speculation rather than facts. To determine this two issues the court should go down the memory lane of litigation in this matter.

The ***first matter*** to be determined by a court was **Murang'a R.M Arbitration Case No.26 of 1986.** I do note that the two elders appointed by Gathinji Kabiri namely Mwangi Gayo Maindi Bulandi refused to sign the proceedings and award. The dispute was in respect of the suit land and the arbitration panel of elders held that the land was registered in the deceased's name as a trustee and awarded the deceased 10.5 acres and the plaintiff was to get 5.0 acres.The panel of elders gave their verdict on a majority of three against two.

The ***second suit*** is the one filed in the Resident Magistrate's court at Thika being civil case No.26 of 1990. The claim was based on trust and adverse possession. The Hon. Magistrate rightly held that he lacked jurisdiction to entertain the same and therefore he dismissed both the suit with counter claim and ordered that the plaintiff herein continues occupying the land.

The defendants filed Civil Appeal No.213 of 1992 at the High Court of Kenya at Nairobi. The memorandum of Appeal is dated 13/7/1992. The grounds of appeal were:

1. **The learned Magistrate erred in law and fact in failing to refer the suit for arbitration before a panel of elders.**

2. **The learned Magistrate erred in law and fact in finding that the plaintiff's suit was statute barred.**

3. **The learned Magistrate erred in law and fact in finding that the plaintiff's cause of action accrued on 30th 1977.**

4. **The learned magistrate erred in law and fact in making an order that the defendant continues to occupy five acres of the suit land without jurisdiction.**

This appeal was comprised by consent letter dated 18/9/1996 which was signed by both parties. The court issued an order based on the consent. Ground 4 of the memorandum of appeal was allowed while the rest were withdrawn with an order that the existing status quo be maintained pending the hearing and final determination of the HCCC No.2061 of 1995 (O.S) involving the same parties and the same subject matter. For avoidance of doubt, the status quo was that the plaintiff herein occupies 5 acres and the estate of the deceased occupies 10.5 acres.

The Third suit was Nairobi High Court Civil Case No.2061 of 1995 (O.S) between the plaintiff and the defendants. The Originating Summons was premised on the doctrine of adverse possession and customary trust. The same was dismissed for want of prosecution. Instead of filing an application to set aside the order dismissing the suit for want of prosecution and therefore reinstate the dismissed suit, the plaintiff filed the current suit.

Coming back on the issues before court on the doctrine of res judicata.The applicant must establish the following conditions.

1. **The matters in issue are identical.**
2. **The parties are identical.**
3. **The title is the same.**
4. **There is concurrence of jurisdiction.**
5. **Finality of the previous decision.**

This court finds that issue in this suit and the originating summons dismissed for want of prosecution are identical and that the parties are the same and further that the titles are the same and that there is concurrent jurisdiction. However, the applicant has failed to establish that there was finality of the previous decision as the originating summons was dismissed for non attendance and want of prosecution.

However, the above does not rest this case as the application is also premised on abuse of the process of the court.

The Originating Summons dated 15/6/1995 in HCCC No.2061 of 1995 were taken out by the plaintiff through the firm of Muguku Muriu & Co. Advocates. In an application dated 6th and filed on 13/10/2005 the defendant sought the dismissal of the same for want of prosecution and for failure to comply with an order by the court that the plaintiff pays Kshs.2500 as thrown out costs and fix the suit for hearing within 30 days of the order.

On the 19/5/2004 the application was placed before Justice Ojwang for hearing who ordered that the same be placed before Justice Nyamu. Justice Nyamu ordered that the plaintiff to pay Kshs.2500 before fixing the same for hearing. The plaintiff ignored the court orders and took a rather lackluster attitude towards the case.

When the matter came up in court on 1/10/2007 neither the plaintiff nor their counsel appeared in court despite their counsel having been served with the hearing notice through registered post on 5/6/2007.

In a nut shell the Originating Summons was dismissed by Justice D.K.S Aganyanya (retired) on grounds that the plaintiff had lost interest in the case and did not file any response or appear in court.

Instead of filing an application to review or set aside the decision of the court by justice Aganyanya (rtd) the plaintiff filed the current suit. The plaintiff has not indicated that he has paid the costs of Kshs.2500 as ordered in the Originating Summons. He has not explained why he abandoned the Originating Summons in the NBI HCCC No.2051 of 1995. I do hold that the actions by the plaintiff amount to abuse of the process of the court and ultimately allow the application dated 10/8/2011 that the plaint dated 16/9/2010 and filed on 24/9/2010 be struck out for being an abuse of the process of the court. The cost of the application and the suit shall be borne by the plaintiff. Orders accordingly.

Dated, signed and delivered at Nyeri this 11th day of October 2013.

A. OMBWAYO

JUDGE