



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & OTIENO-ODEK JJA)**

**CIVIL APPEAL NO. 270 OF 2014**

**BETWEEN**

**EVANSON GACHIE KARIUKI.....1ST APPELLANT**

**JOSEPH WACHIRA KARIUKI.....2<sup>ND</sup> APPELLANT**

**JOHN KAHORO KARIUKI.....3<sup>RD</sup> APPELLANT**

**AND**

**FRANCIS KARIUKI WACHIRA (*deceased represented by***

**MARGARET WAMWITHA KARIUKI).....1ST RESPONDENT**

**WANJIRU MUTAHI (*deceased, represented by***

**FRANCIS WANJOHI WAGURA).....2<sup>nd</sup> RESPONDENT**

**(Being an appeal from the Judgment of the High Court of Kenya**

**at Nairobi, Milimani Law Court (Gitumbi , J.) dated 21<sup>st</sup> March 2014**

**in**

**H.C ELC No. 654 of 2009)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. By a Plaint dated 18<sup>th</sup> October 2009, the appellants filed suit against the respondents **over LR No. Dagoretti/Uthiru/282**, hereinafter referred to as the suit property. In the plaint, it is alleged that the respondent acquired registration as proprietors of the suit property fraudulently and through misrepresentation.

2. In his amended statement of defence dated 27<sup>th</sup> February 2010, the 1<sup>st</sup> respondent, **Evanson Gachie Kariuki**, denied the particulars of fraud pleaded in the plaint. He averred that he is the absolute and *bona fide* proprietor of the property.

3. Before the suit was listed for hearing, the 1<sup>st</sup> respondent filed a preliminary objection dated 19<sup>th</sup> December 2012 asserting the issues in dispute and the suit were *res judicata*.

4. The preliminary objection was heard by the court and in a ruling dated 21<sup>st</sup> March 2014, the objection was upheld and the appellants' suit struck out. The ruling is the subject matter of the instant appeal.

5. In support of the preliminary objection, the 1<sup>st</sup> respondent asserted that the issues urged in the instant suit are the same as the issues that were raised by the appellants in **Nyeri High Court Succession Cause No. 219 of 2001** and **Kikuyu Land Tribunal Case No. 16/20/177/2000**. It was claimed that the main issue in the Succession Cause and before the Land Tribunal and in the Environment and Land Court (ELC) suit is ownership of the suit property; that the question of ownership was determined by the Kikuyu Land Tribunal which confirmed the respondents as the rightful owners thereof; that in Succession Cause No. 219 of 2001, the High Court ruled that the suit property was not part of the estate of the deceased and the registered owners thereof were the respondents.

6. In response to the assertion of *res judicata*, the appellants submitted that the instant suit is not *res judicata* as they are contesting the registration of the respondents as proprietors of the suit property on grounds of fraud and misrepresentation; that both the Kikuyu Lands Tribunal and the High Court Succession Cause did not consider fraud and misrepresentation as issues to be determined.

7. The learned Judge upon hearing the parties held that the doctrine of *res judicata* applies to the instant suit; the preliminary objection was upheld and the appellants' suit dismissed with costs.

8. Aggrieved, the appellants have lodged the instant appeal citing the following grounds in their memorandum:

**“i. The judge erred in failing to find the appellants were challenging registration of the respondents as proprietors of the suit property on grounds of fraud and which ground was not addressed in the previous suits.**

**ii. The judge erred in holding the suit was *res judicata* and further erred in holding the appellants were precluded from raising the issue of fraudulent transfer of the suit property to the respondents.”**

9. At the hearing of this appeal, the appellants appeared in person and oral submission were made on their behalf by the 1<sup>st</sup> appellant. The 1<sup>st</sup> respondent, **Evanson Gachie Kariuki**, was represented by learned counsel **Mrs Kerio** while the 2<sup>nd</sup> respondent was represented by **Mr. Francis Wanjohi Wagura** who appeared in person.

#### **APPELLANTS and 2<sup>nd</sup> RESPONDENT'S SUBMISSIONS**

10. The appeal was prosecuted by way of oral submission by all parties. On behalf of the appellants it was submitted that the trial court erred in dismissing the suit as *res judicata*; that the issue in contestation in the case before the ELC is fraud in the transfer and registration of the suit property in the name of the respondents; fraud was not an issue before the Kikuyu Land Tribunal and in the Succession Cause before the High Court.

11. In this matter the Judge erred in relying on the documents and material that was before the Tribunal to make her determination; the material before the Tribunal did not consider the allegation on fraudulent transfer of the suit property.

12. The appellants further submitted that the judge erred in ignoring a previous ruling by Ombija, J. delivered in relation to the suit property. The appellants asserted that Ombija, J. determined the appellants were the true owners of the suit property. Citing Ombija, J.'s ruling, the appellants contended that the correct property that belongs to the respondents is **LR Dagoretti/Uthiru/ 285 and not LR Dagoretti/Uthiru/282**. It was urged all along, through Ombija, J.'s ruling, it was found that there was documentary error in the Plot Numbers and the appellants are the true owners of the suit property and the respondents are owners of **LR Dagoretti/Uthiru/285**. For the foregoing reasons, the appellants' urged us to find the learned Judge erred in dismissing the suit as *res judicata*.

13. The 2<sup>nd</sup> respondent, **Francis Wanjohi Wagura**, adopted and supported the appellants' submissions and urged us to allow the instant appeal.

#### **1<sup>st</sup> RESPONDENT'S SUBMISSION**

14. The 1<sup>st</sup> respondent through learned counsel Mrs. Kerio in opposing the appeal urged that the Judge correctly dismissed the appellants suit as *res judicata*; the Judge correctly held that the appellants should have raised the issue of fraudulent transfer of the suit property to the respondents in the previous suits; that having failed to do so, the appellants are precluded in the instant appeal from alleging or raising fraud.

#### **ANALYSIS and DETERMINATION**

15. We have considered the grounds urged in support of the appeal, submissions by parties and the ruling by the learned Judge as well as the record of appeal.

16. The learned Judge appropriately restated the law on *res judicata* as provided in **Section 7 of the Civil Procedure Act (Cap 21 of the Laws of Kenya)**; the Judge also correctly cited judicial authorities on *res judicata*. The essence of the doctrine of *res judicata* was aptly set out by this Court in **WILLIAM KOROSS -v- HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015] ECLR:-**

**“The philosophy behind the principle of *res judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his**

**success and the unsuccessful one must learn to let go.”**

17. The issue in this appeal is whether the doctrine of *res judicata* applies to the pleadings and plaint filed by the appellants. It is the appellant’ contention that *res judicata* is inapplicable as fraud and misrepresentation in the transfer and registration of the respondents as proprietors of the suit property was not in issue in the High Court Succession Cause and before the Kikuyu Land Tribunal.

18. The learned Judge in applying the doctrine of *res judicata* cited the decision in **Henderson vs. Henderson [1843] Hare 100, 115** where it is stated:

**“The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce 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.”**

19. In dismissing the appellants’ suit on the basis of *res judicata*, the Judge held that the appellants ought to have raised the issue of fraudulent transfer of the suit property in the previous proceedings before the High Court Succession Cause and the Kikuyu Land Tribunal. It is apparent that the Judge acknowledged that fraud was not an issue in the previous proceedings. It is settled law that fraud must be specifically pleaded and proved. In **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi, JA** (as he then was) stated as follows:

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”** Emphasis added.

20. We are cognizant that this Court in **Pop-in (Kenya) Ltd & 3 Others -v-Habib Bank A.G Zurich (1990) KLR 609** stated the raising in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings is an abuse of the court process. (See **Yat Tung Investment Company Limited -v- Dao Heng Bank Ltd & Another (1975) AC 581**).

21. Notwithstanding, we have examined the proceedings of the Tribunal dated 17<sup>th</sup> November 2000 and the award made in relation to the suit property. Of relevance to our decision is the finding and recommendation in the award dated 9<sup>th</sup> January 2001 that:

**“In view of the fact that the plot is registered in Peter Wanganga Kihara’s name who should not be denied his rights to own plots in Uthiru, the title deed in his names erroneously issued during documentation should be canceled and issue to Waniru and Francis Kariuki Wacira. Wanganga should be correctly issued with a title deed for Dagoretti/Uthiru. T/285.”**

22. We have also considered the appellants’ submission that there exists a ruling by Ombija, J. in relation to the suit property. The alleged ruling by Ombija, J. is not on record. We have examined the ruling by the High Court dated 25<sup>th</sup> January 2008 in Succession Cause No. 219 of 2001.

23. Before the High Court and the Kikuyu Tribunal, contestation of fraudulent transfer of the suit property to the respondents was not in issue and could not be determined. Fraud is proved largely by oral evidence tested through cross-examination. In the instant matter, we find that the Judge erred in dismissing the appellants’ suit based on *res judicata* without giving due consideration to the recommendation of the Tribunal that points towards an error in documentation; the Judge erred in failing to take into account the allegation that a ruling of the High Court delivered by Ombija, J. may be relevant to the dispute before the court. The Judge ought to have called for and examined the alleged ruling by Ombija, J. which *prima facie* is relevant to the suit. Further, the Judge erred in failing to consider that allegations of fraud cannot be dismissed summarily when the same was not in issue in previous suits. In failing to consider the foregoing, the Judge erred in finding *res judicata* was applicable to the facts and plaint filed by the appellants.

24. For the foregoing reasons, this appeal has merit. We hereby allow the appeal and set aside in entirety the ruling of the Environment and Land Court dated 21<sup>st</sup> March 2014. The appellants suit filed as **ELC No. 654 of 2009** be and is hereby reinstated. Each party to bear its own costs in this appeal and before the Environment and Land Court.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of July, 2019**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**