IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 8 OF 2016

BETWEEN

MARY IGANDU KIGOTHO.....APPELLANT

AND

MICHAEL WANG'OMBE GITITU.....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya, Environment and Land Court at Nyeri, (Waithaka, J.) dated 24th September, 2015 in **ELC NO. 66 of 2014 (OS))**

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JUDGMENT OF THE COURT

This is an appeal from the ruling of **Waithaka, J**. delivered on 24th September 2015 dismissing an application for injunction as well as the main suit filed by the appellant. **MARY IGANDU KIGOTHO**, the main suit was an originating summons (hereinafter O.S.) filed on 31st March, 2014 against **MICHAEL WANG'OMBE GITITU**, the respondent herein seeing the following orders:-

> "**a) That the Plaintiff has been on Land parcel No. MAGUTU/GATEI/875 since 1974 when it was originally MAGUTU/GATEI/413 and has used the said land as her property.**
>
> **b)That since the registration of Land Parcel No. MAGUTU/GATEI/875 on 16th July 1993 in the name of the Defendant, the Plaintiff has been on the land and used it as her property.**
>
> **c) That the Plaintiff herself is personally in occupation of the entire land and has so occupied the entire land openly without force and without interference from the Defendant or his servants, agents or any other person claiming under him.**
>
> **d)That the total period of occupation and utilization of the said land by the Plaintiff is now in excess of 12 years and the Plaintiff has therefore acquired title thereto by adverse possession.**
>
> **e)That it is mete and just that the Plaintiff is now registered as the absolute proprietor of the said land**."

The respondent refuted the appellant's claim vide a replying affidavit dated 10th July, 2014. In the main, the respondent contended that the suit was *res judicata*.

During the pendency of the originating summons, the appellant filed a notice of motion dated 3rd July. 2014 and sought a temporary order of injunction against the respondent "…**restraining him through himself, his agents, servants or anybody else (sic) claim through and or under him from entering, performing acts of waste, evicting and or otherwise interfering with the Applicant's occupation, quite** (sic) **possession and use of Land Parcel No. MAGUTU/GATEI/875 until the hearing and determination of the suit herein**."

In the supporting affidavit, the appellant deponed that she had been on the suit property from 1974 when it was originally **LR. No. MAGUTU/GATEI /413** before it was sub-divided into **LR No. MAGUTU/GATEI/875** (the suit land) and **LR No. MAGUTU/GATEI/876**; that although the respondent was registered as the owner of the suit land on 16th June, 1993, he had never taken possession; that on 17th June, 2014, the respondent unlawfully moved into the suit land destroying her maize and cabbage crops and on 30th

June, 2014 he erected a structure thereon.

In a replying affidavit dated 10th July, 2014, the respondent refuted the appellant's averments and deponed, *inter alia,* that the originating summons was incompetent on account of it being *res judicata*.

The motion was considered by **Waithaka, J.** who, as stated above, found in favour of the respondent. In the penultimate part she rendered herself as follows:

> **"I find and hold that the plaintiff cannot be allowed to re-litigate the suit herein because she was ably represented by her deceased husband in the previously instituted suits. The upshot of the foregoing, is that the application herein and the originating motion on which it is based are an abuse of the process of the court. Consequently, I dismiss both the notice of motion and the originating summons with costs to the defendant/respondent."**

The appellant was dissatisfied with the said outcome, and hence the appeal before us.

On 20th March, 2018, **Mr. Macharia**, learned counsel for the appellant appeared before us to urge the appeal whilst the respondent, who appeared in person, opposed the appeal. Learned counsel relied on the appellant's written submissions filed on 5th August, 2016 and a list of authorities filed on 23rd September, 2016. It was counsel's submission that the case was not *res judicata* because ***"…the appellant was not a party in Nyeri CMC Award No. 65 of 1999. The case was between the respondent and the appellant's husband the late KIGOTHO KARIITHI. The eviction orders (page 39 of the record) were against the late KIGOTHO KARIITHI personally. The said order was not to be enforced against his family or anybody claiming through him. The respondent never sought to enforce the orders while the (sic) KIGOTHO KARIITHI was alive. He only filed to enforce the then (sic) against the appellant after the demise of her husband****,"* It was emphasized, that the appellant was not suing on behalf of her husband but in her own right. Learned counsel also took issue with the dismissal of the O.S. whilst what fell for consideration by the learned Judge was the notice of motion.

On his part, the respondent relied on his counsel's filed submissions at the High Court. It was the respondent's submission that the suit land which is registered in his name was the subject matter in **Nyeri CM Award No. 65 of 1999** between him and the appellant's husband. The outcome of the suit was that the respondent was successful. The appellant's husband challenged the said outcome by filing a Judicial Review Application which was dismissed and orders of eviction issued against him on 12th August, 2011. The respondent contended that the appellant had *"rebranded"* her claim vide the doctrine of adverse possession in order to evade the fate of the suit being *res judicata*. In answer to the complaint that the O.S. was determined together with the motion, the respondent contended that it was agreed that the O.S be determined together with the notice of motion, the central issue being whether the suit was *res judicata*.

We have considered the appellant's oral and written submissions dated 5th August, 2016, the respondent's submissions filed at the High Court dated 17th March, 2015, the authorities cited, the record and the law.

In the affidavit dated 31st March, 2014 in support of the motion at the High Court the appellant deponed:-

> **"1. Spent.**
>
> **2. *Spent.***
>
> **3. That sometimes in the year 1974 I got married one Kigotho Kariithi and we settled in Land Parcel No. MAGUTU/GATEI/413 which was then registered in the name of KAGOTHO s/o KIAURI.**
>
> **4. That KAGOTHO S/O KIARI died on 18th December, 1987 and a succession cause was filed in respect of his estate being NYERI SRM SUCC Cause No. 147 of 1989.**
>
> **5. *That on 22nd December, 1992 a certificate of confirmation of grant was issued whereby Land Parcel NO. MAGUTU /GATEI/413 was to be shared as follows;***
>
> > **(i) MICHAEL WANGOMBE GITITU – 0.75 ACRES**
> >
> > **(ii) PENNINAH WANJERI – 1.45 acres (annexed hereon is copy of the certificate** *of confirmation of grant marked "MIK I').*
>
> **6. That pursuant to the said Grant LR No. MAGUTU/GATEI/413 was subdivided and new registration numbers issued on 16th June 1993 as follows:**
>
> > **(i) L.R. No. MAGUTU/GATEI/875 – registered to MICHAEL WANGOMBE GITITU**
> >
> > **(ii) L.R. No. MAGUTU/GATEI/876 – registered to PENNINAH WANJERI"**

From the above, the appellant admits to have been married to **Kigotho Kariithi**. It is also not disputed that the respondent and the appellant's husband **Kigotho Kariithi** were involved in a legal tussle over the same suit land in Nyeri CM Award No. 65 of 1999. However, the appellant's case was that she was litigating in her own right. In the appellant's submissions at the High Court on the Notice of Motion

dated 3rd July, 2014 which submissions are dated 25th February, 2015, it was submitted:-

> **"The respondent avers that Nyeri CMCC No. 65 of 1999 was between him and the late Kigotho Kariithi, the applicant's husband. (Though he has not annexed copies marked as "MW1", "MW2", and "MW3)". The applicant was not a party in the said suit. She is not the legal representative of the late Kigotho Kariithi. This case cannot be res judicata as the 2 suits do not involve the same subject matter or the same parties. The order of eviction is Nyeri CMCC 65 of 1999 was against the late Kigotho Kariithi only. The respondent cannot purport to use the order against persons who were not party to the suit. The applicant's claim is based on adverse possession and has brought it on her own right therefore the issue of res judicata cannot arise."**

Before us the appellant has maintained the position that she is litigating in her own right and not on behalf of her late husband.

Section 7 of the Civil Procedure Act 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**".

In **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another CA. No. 107 of 2010**, this court held that:-

> **"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res-judicata on account of a former suit**.
>
> **a. The suit or issue was directly and substantially an issue on the former suit**.
>
> **b. The former suit was between the same parties or parties under whom they or any of them claim**.
>
> **c. Those parties were litigating under the same title**.
>
> **d. The issue was heard and finally determined to the former suit**.
>
> **e. The court that formerly heard and determined the issue was competent to try the subsequent suit in which the issue is raised"**.

In our view, the issue before **Waithaka, J.** was directly and substantially an issue in Nyeri CM. Award No. 65 of 1999, the suit between the respondent and the appellant's husband. That suit was heard and determined and the court that determined the issue was a competent court. We have no hesitation in finding that the learned trial Judge was right in coming to the conclusion that the suit before her was *res judicata*. It does not matter that the appellant was not a party in Nyeri CM Award No. 65 of 1999. It also matters less that she has not brought this suit as a legal representative of her late husband but in her own capacity. The High Court and this court is able to see through the appellant's ingenuity of bringing a suit in her own capacity yet she is the widow of the late **Kigotho Kariithi** who had litigated with the respondent and lost. This was a clear attempt to evade the doctrine of *res judicata*. Like the trial judge, we are of the view that the suit between the appellant and the respondent was *res judicata*.

In **Independent Electoral Boundaries Commission vs. Maina Kiai & 5 Others 2017 eKLR** this court quoted with approval the Indian Supreme Court in the case of ***Lal Chand vs. Radha Kishan, AIR 1977 SC 789*** where it was stated:

> **"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.**
>
> **The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."**

By parity of reasoning the High Court was debarred by a jurisdictional injunct to entertain the appellant's suit and the learned Judge's conclusion to that effect was properly grounded in law.

One other issue deserves mention by us. The appellant faulted the trial judge for determining the OS together with the Notice of Motion. In our view, nothing much turns on this. The issue/s in the motion and/or the OS was the issue of res judicata. On 11th February, 2015 the parties agreed by consent to determine the application by way of submissions. In the appellant's submissions dated 25th February, 2015 the appellant submitted "***the respondent claim that the suit is res judicata and relies on a replying affidavit to the O.S. marked as MW1***".

It is clear that the respondent relied on the same affidavit filed in response to the OS in opposing the motion. Indeed when they appeared before the learned Judge on 11th February, 2015, **Mr. Kiminde** learned counsel for the respondent is on record as having said:

> **"I have raised the issue of res judicata in my replying affidavit. I believe the applicant** *(sic)* ***will be able to dispose off (sic) the matter*****."**

Mr. Kahiga who appeared on behalf of the appellant had no objection to **Mr. Kiminda's** application that the application disposes the whole matter. Whereas, we note that the learned trial Judge did not make an order to the effect that the motion and the OS would be determined at the same time and as stated above we think that nothing turns on this. The issue raised in the motion was *res judicata*. This was the same issue raised in the OS. It did not occasion the appellant any prejudice.

The upshot of the above is that we find no merit in this appeal. It is dismissed with costs.

Dated and Delivered at Nyeri this 6th day of June, 2018.

P. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR