



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 470 OF 2017

JUDITH WANJIRU THWAGI.....1<sup>st</sup> PLAINTIFF/APPLICANT

RACHEL WAMBUI MITHANGA.....2<sup>nd</sup> PLAINTIFF/APPLICANT

LYDIA WANJIKU MGITHANGA.....3<sup>rd</sup> PLAINTIFF/APPLICANT

VERSUS

DAVID NYOIKE WAWERU and 19 OTHERS.....DEFENDANT/RESPONDENTS

RULING

1. The Plaintiffs in this case filed their suit on the 11<sup>th</sup> July 2017 together with the same, they filed an application by ways of a Notice of Motion dated 17<sup>th</sup> July 2017 in which they had sought interim injunctive orders against the Defendants injuncting them from dealing with suit land No. Nyandarua/Nandarasi/2724 pending the hearing and determination of the suit.

2. On the 3<sup>rd</sup> October 2017 when the matter came before court on the hearing of the application, it was noted that the Defendants had not entered appearance although, save for Defendants 7<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> the rest were present in court. Counsel for the Plaintiff/Applicant sought to compromise the application in favour of the obtaining the order of staus quo that no development of the land should be undertaken by either of the parties, pending the hearing of the main suit.

3. The court obliged them and marked the Application dated the 17<sup>th</sup> July 2017 as compromised with orders that parties maintain the staus quo. Parties were then directed to comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days and the matter to be mentioned on the 27<sup>th</sup> November 2017 to confirm compliance on which date there had been no compliance and the matter was adjourned to the 20<sup>th</sup> February 2018.

4. On the 20<sup>th</sup> February 2018, the court was informed that the 1<sup>st</sup> to 19<sup>th</sup> Defendants had not filed their defence due to some errors on the plaint in particular errors of the numbering of the paragraphs particularly paragraphs 26- onwards and as it stood, it would be impossible to respond to the averments of those paragraphs to which counsel for the Plaintiff applied to amend his plaint as he had recently come on record and only saw the file that year wherein upon perusal of the same, he had also noted the need for said amendment. They sought leave to amend the plaint within 21 days which leave was granted by the

court. Leave was also granted to the Defendant's to file and serve their defence 14 days upon service. The matter was set to be mentioned to confirm compliance on the 25<sup>th</sup> April 2018.

5. Come the 25<sup>th</sup> April 2018, wherein the court was informed by counsel for the 1<sup>st</sup> -19<sup>th</sup> Defendants that the Defendants were yet to comply with the provisions of Order 11 of the Civil Procedure Rules as they had filed a Preliminary Objection dated 24<sup>th</sup> April 2018. That the crux of the said Preliminary Objection being that they sought to have the Plaintiffs' suit dismissed for being res- judicata and time barred which amounted to the abuse of the court process. They sought to have their Preliminary Objection disposed of by way of written submissions and thereafter highlight on the same.

6. Counsel for the Plaintiff responded to the effect that pursuant to the directions issued by the court on 19<sup>th</sup> February 2018, leave was granted to both parties to file an amended plaint as well as to file a defence within 14 days. That they had amended their plaint, filed and served the same. That the Defendants on the other hand had not complied to the directions but instead had filed a notice to raise a Preliminary Objection instead to which they objected.

7. The court having heard both submissions by counsel ruled that it was trite law and practice that when a Preliminary Objection that sought to have a suit dismissed is raised, the same took precedence to which effect thereof, the Preliminary Objection dated 24<sup>th</sup> April 2018 was to be disposed of in the first instance by way of written submissions. That the highlighting of the written submissions to proceed on the 12<sup>th</sup> July 2018.

8. In the meantime, the Deputy Registrar was directed to place file No. Nyahururu PMCC land dispute No. 31 of 2006 before the court.

9. On the 12<sup>th</sup> July 2018, counsel for the Defendants informed the court of their inability to file their written submissions due to the inability to obtain the proceedings in the Kinangop Land Tribunal which formed the basis for their preliminary objection. The Plaintiffs were ready to proceed.

10. The court informed counsel for the Defendant to gain sight of the said proceedings which were contained in the Nyahururu PMCC Land Dispute No. 31 of 2006 herein attached to the present file. The matter was thus adjourned to the 26<sup>th</sup> July 2018.

11. On the said date there was no appearance by counsel for the Defendant and neither had they filed their written submissions to their application. On the other hand, Counsel for the Plaintiff was present and ready to highlight on her response to the Preliminary Objection. She also sought for the Preliminary Objection to be dismissed with costs since the defence had not complied to the directions issued on the 12<sup>th</sup> July 2018.

12. The court having noted that the date was taken by consent despite which the Defendant was absent, proceeded to receive the Plaintiff's highlight on their written submissions.

### **Plaintiff's highlight**

13. It was the Plaintiff's submission that since the Defendants had filed a Preliminary Objection to have the suit dismissed for being Res judicata, the court was obliged to determine;

- i. whether the present suit was between the same parties and over the same subject matter being LR Nyandarua/Nandarasi/63 as it were in the Nyahururu PMCC Land Dispute No. 31 of 2006.
- ii. Whether Nyahururu PMCC Land Dispute No. 31 of 2006 was heard and determined and whether the said court had jurisdiction to determine the subsequent suit and whether the Plaintiff ought to have appealed or sought to have the said judgment set aside.
- iii. Whether the present suit was time barred.

14. The Plaintiff's counsel submitted that on the 1<sup>st</sup> issue they relied on Section 7 of the Civil Procedure Act which provision applied to cases where the issue in disputes were similar to an issue that was previously in dispute between the same parties when they were litigating under the same title.
15. That the issue in dispute in Nyahururu PMCC Land Dispute No. 31 of 2006 was Nyandarua/Nandarasi 63, land which was divided into 6 parcels of land being Nyandarua/Nandarasi 351-356 of which land Numbers 351 and 352 were merged to form parcel No. Nyandarua/Nandarasi 2724.
16. That the matter in dispute in this matter being No. Nyandarua/Nandarasi 2724 was not the same as No. 63. The subject was therefore different.
17. That indeed the parties were also different as the parties in the present suit were not the same as the parties in the previous suit.
18. The Plaintiffs relied on the decided case of **Karia and Another vs Attorney General and Others [2005]1 EA 83** where the court had laid down the ingredients that applied to the principles of Res Judicata.
19. On the 2<sup>nd</sup> issue, it was the Plaintiff's submission that the Plaintiff's father died intestate on the 5<sup>th</sup> November 2006. That the case in the Nyahururu PMCC Land Dispute No. 31 of 2006 had been set down for hearing for the 7<sup>th</sup> November 2006 which was two days after the death of the Plaintiff's father. None of his children had substituted him and therefore the matter could not be said to have been heard and determined. Further, the said court was also declared functus officio. The case could therefore not have been appealed against or set aside. The issue of Res Judicata cannot arise in the circumstance. They relied on the decided case of **Kenya Management vs Kenya Reinsurance Corporation [2007] eKLR** to buttress their submission.
20. The Plaintiff also relied on Article 159 of the Constitution and Section 3A of the Civil Procedure Act to urge the court to hear the Plaintiff on the merit of the case.
21. The Plaintiff further submitted that the deceased herein died on the 5<sup>th</sup> November 2006 and the present suit was filed on the 17<sup>th</sup> July 2017b a period which was within the 12 years one is allowed to file suit seeking redress for recovery of land as is contained in Section 7 and 9(2) of the Limitation of Actions Act. That this matter was therefore not time barred.
22. The Preliminary Objection dated the 24<sup>th</sup> April 2018 was filed by the 1<sup>st</sup> to 19<sup>th</sup> Defendants herein pursuant to the amended plaint filed by the Plaintiffs on the 7<sup>th</sup> March 2018. The Defendants in their Preliminary Objection raised two points of objection the suit, the first being that the same was Res judicata by virtue of the proceedings in the Nyahururu PMCC Land Dispute No. 31 of 2006 while the second issue being that the suit was time barred.
23. The court directed that since the application on a Preliminary Objection sought to dispose of the whole suit, that the same should take precedence in hearing. Parties were directed to file and serve their written submissions to the Preliminary Objection within 21 days. Whereas the Plaintiff complied, the Defendants did not comply for reason that they did not have a copy of the proceedings in the Nyahururu PMCC Land Dispute No. 31 of 2006 upon which they had sought to base their arguments.
24. The court directed the Defendant's counsel to obtain a copy from the court file and directed that they file and serve their submissions within 7 days. On the date given for highlighting of the written submissions, which was on the 26<sup>th</sup> July 2018, the Defendants had neither filed nor served their written submissions and neither was their counsel present in court when the matter was called out.
25. With leave of the court, the Plaintiff's counsel highlighted on their written submission and a date was issued for ruling.

26. I note that somehow the Defendant's written submissions filed on the 26<sup>th</sup> July 2018 somehow found its way in the court file but since the same was filed out of time and not served within the stipulated time, I shall expunge them from the record herein.

### **Analyses and Determination.**

27. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

*“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

28. In this proceedings, it is the Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the same was res judicata by virtue of the proceedings in the Nyahururu PMCC Land Dispute No. 31 of 2006.

29. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

*“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”*

30. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

31. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. what issues were really determined in the previous case;
- ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

32. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

33. The matter in issue is identical in both suits;

- i. The parties in the suit are the same;

- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

34. Facts surrounding the proceedings in the Nyahururu PMCC Land Dispute No. 31 of 2006 are that on the 11<sup>th</sup> August 2005 there was a hearing instituted at the North Kinangop Land Disputes Tribunal which was moved by one Michael Gachanja and 16 others and attended by Mithanga Githinji Mithanga and Lydia W. Githanja as the objectors. The claimants demanded that Mr. Mithanga Githinji Mithanga do transfer to them their respective parcels of land which they had bought from him.

35. The finding of the Land Disputes Tribunal was that the Objector Mr. Mithanga Githinji Mithanga do transfer the portions to the respective buyers while the second objector Lydia W. Githanja do remove the caution placed on the suit land. That the remaining portion of land be registered in the name of the 1<sup>st</sup> Objector and his daughters to avoid the further sell of the same.

36. Subsequently Michael Gachanja and 16 others filed a Miscellaneous Application No. 31 of 2006 at the Principle Magistrates Court- Nyahururu to have the Tribunal's award adopted as a Judgment of the Court, in terms of the provisions of the Land Disputes Tribunal Act (now repealed).

37. The award was not adopted as the Defendant passed away pending the adoption wherein on the 9<sup>th</sup> November 2010 the court declared the suit against him as having abated.

38. Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows;

- a). the division of, or the determination of boundaries to land, including land held in common;
- (b). a claim to occupy or work land; or
- (c). trespass to land

39. The Act did not confer to it jurisdiction to determine disputes over title or ownership of land. The Land dispute tribunal therefore acted in excess of jurisdiction when it purported to apportion land to the claimants and to remove the caution placed on the suit land, a power that is a preserve of the High Court.

40. In the case of **SIR ALI BIN SALIM VS. SHARIFF MOHAMED SHATRY CIVIL APPEAL NO. 29 1940** it was stated that; -

*“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.*

41. It therefore follows that the decision by the North Kinangop Land Disputes Tribunal to determine ownership of Nyandarua/Nandarasi/2724 and to lift the caution therein in total disregard to its limits of jurisdiction in law.

42. Since the award of the North Kinangop Land Disputes Tribunal was not taken further in respect of the fact that the same was not adopted, this court has the jurisdiction to nullify the said award of the Tribunal, the same having been made outside jurisdiction. I proceed to hold that the plea of res judicata must fail as against the decision of the tribunal.

43. On the second issue that that the suit was time barred, it is clear from the Plaintiffs' pleading, it is clear that in 1986, the Plaintiffs' father was the registered proprietor of land parcel No. Nyandarua/Nandarasi/63 which property was subsequently sub-divided into 6 parcels in the year 1988 giving rise to parcels No. Nyandarua/Nandarasi/351-356.

44. That in the year 2005 parcel No. Nyandarua/Nandarasi/351 and 354 were consolidated into Nyandarua/Nandarasi/2724, herein referred to as the suit land, and registered in the name of Mithanga Githinji Mithanga, the Plaintiffs' father herein. The same measured about 2.84 hectares.

45. That vide a succession Cause No. 150 of 2011 the Plaintiffs were confirmed the beneficiaries of the Estate of Mithanga Githinji Mithanga in regard to the property known as Nyandarua/Nandarasi/2724 and a title deed to the same issued to them on the 28<sup>th</sup> February 2013. That since then they have tried to get vacant possession of the said land in vain as the 1<sup>st</sup> to 19<sup>th</sup> Defendants have jointly and severally unlawfully apportioned, allocated and/or encroached on the same with the facilitation of the 20<sup>th</sup> Defendant who has caused a caution to be placed on the suit land by the 1<sup>st</sup> Defendant and 17 others.

46. The Plaintiff have thus prayed for the eviction of the 1<sup>st</sup> -19<sup>th</sup> Defendants as well as the removal of the caution from land parcel No. Nyandarua/Nandarasi/2724.

47. From the 1<sup>st</sup> Plaintiffs' affidavit filed on the 21<sup>st</sup> February 2018 in the amended Plaint, it is clear that after their father passed away in the month of November 2006, the Defendants herein started erecting permanent houses on the suit land. The cause of action thus began in November 2006 this matter was filed on the 17<sup>th</sup> July 2017, 12 years had not lapsed.

48. Section 7 of the Limitation of Actions Act provides:

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person*

49. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued having found that the right of action accrued in the month of November or thereby in the year 2006, clearly 12 years had not lapsed prior to the filing of the present suit.

50. The Preliminary Objection dated the dated the 24<sup>th</sup> April 2018 is herein dismissed with costs to the Plaintiff.

**Dated and delivered at Nyahururu this 8<sup>th</sup> day of November 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**