



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. E002 OF 2020

KIMITEI ARAP CHIRCHIR.....PLAINTIFF

VERSUS

KIMUTAI ARAP KIRUI1ST DEFENDANT

AMOS LUMET KIMOSOP.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 18th September 2020 and defendants' Notice of Preliminary Objection dated 19th October 2020. The application seeks the following orders:

1. [Spent]

2. [Spent]

3. *THAT a temporary injunction do issue restraining the Land Registrar Koibatek/Eldama Ravine Land Registry from registering any subdivision, transfer and/or any other interest whatsoever in respect to the parcels of land known as Baringo/Ravine-102/693 and 694 formerly Baringo/Ravine-102/264, Baringo/Ravine102/265 and Baringo/Ravine-102/156 pending the hearing and determination of this application inter partes and thereafter pending the hearing and determination of the main suit.*

4. *THAT this Honourable Court be pleased to call for Nakuru RMC Land Dispute Case No. 3 of 1983, and Nakuru RMCC No. 764 of 1989 and Nakuru DMC No. 4 of 1972 for its perusal and/or further orders of the court.*

5. *THAT cost (sic) of this application be provided for.*

2. The Notice of Preliminary Objection targets the application and the entire suit. It is based on the following grounds:

1. *THAT both the Notice of Motion and the Plaintiff is res judicata on the basis of Consent entered into on 2nd June, 2014 and adopted as an order of the Court on 1st October, 2014.*

2. *THAT an Application dated 31st July, 2015, filed by the Plaintiff herein, seeking to set aside the said Consent Order was dismissed on 4th December, 2018.*

3. *THAT the Consent Order dated 1st October, 2014 is still in force.*

3. I will deal with the preliminary objection first, since it raises a jurisdictional question. Parties filed written submissions. The defendants argued that this suit is *res judicata* since it concerns ownership of the parcel of land known as Baringo/Ravine-102/156 and which issue has been determined through judgment delivered on 24th October 1986 in **Eldama Ravine DMCC Land Succession No. 4 of 1972** and through judgment delivered on 8th December 1994 in **Nakuru RMCC No. 764 of 1989** and ruling delivered on 4th December 2018 in the same case.

4. The plaintiff in his submissions addressed the issue of whether the suit is *res judicata* and also raised issues of whether enforcement of previous judgments between the parties is barred by virtue of **Section 4 (4) of the Limitation of Actions Act**. Needless to state, the preliminary objection did not on the aspect of limitation of actions. Regarding the aspect of *res judicata*, the plaintiff argued that this suit is not *res judicata* since the judgment in **Nakuru RMCC No. 764 of 1989** was an irregular judgment. The plaintiff further argued that the subordinate court had no jurisdiction to record consent orders on 1st October 2014 in **Nakuru RMCC No. 764 of 1989** which consent later led to the ruling delivered on 4th December 2018 in the same case. Additionally, the plaintiff argued that the cause of action in his case is one of adverse possession and fraud and that the matter can only be resolved upon trial.

5. I have considered the preliminary objection and the parties' respective submissions. The law relating to preliminary objections is settled. For a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

6. The objection herein is that this suit is *res judicata*. The essence of *res judicata* has been reduced to statutory expression at **Section 7** of the **Civil Procedure Act** which provides:

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.

7. Thus, for *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** and **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

8. So as to better appreciate the issues raised in the preliminary objection, I will revisit the plaintiff's case as pleaded in the plaint. It is manifest therein that the dispute concerns the parcel of land known as Baringo/Ravine-102/156 which the plaintiff avers was later subdivided into Baringo/Ravine-102/264 and Baringo/Ravine-102/265 and yet again into Baringo/Ravine-102/693 and Baringo/Ravine-102/694. The plaintiff's case is further that there was a tribunal claim concerning ownership of Baringo/Ravine-102/156 and that the tribunal's decision was adopted as an order of the court on 5th January 1984 in **Nakuru RMC Land Dispute Case No. 3 of 1983** between the plaintiff herein and one Kipkurui Cherop. That subsequently, he instituted **Nakuru RMCC No. 764 of 1989** between himself and the 1st defendant herein and that judgment was delivered in the said case on 8th December 1994 wherein the court found that the issue of ownership of the land was *res judicata*. The plaintiff contends following the judgment, the subdivision of Baringo/Ravine-102/156 into Baringo/Ravine-102/264 and Baringo/Ravine-102/265 was reversed back to Baringo/Ravine-102/156 and that the 1st defendant then sold the whole of Baringo/Ravine-102/156 to the 2nd defendant who then became registered as proprietor on 9th October 2014. He further avers that the said judgment was obtained through fraud and that it is therefore irregular.

9. The plaintiff's case as pleaded in the plaint is further that the 2nd defendant herein was enjoined in **Nakuru RMCC No. 764 of 1989** pursuant to a consent adopted in the said case on 1st October 2014, after judgment and without jurisdiction. Among other prayers, the plaintiff seeks judgment against the defendants for a declaration that the judgment in **Nakuru RMCC No. 764 of 1989** is irregular for being obtained through fraud and misrepresentation, that the said judgment became statute barred on 8th December 2006 and incapable of execution, a declaration that the defendants' claim to Baringo/Ravine-102/264 based on the judgment is a nullity, a declaration that the consent orders of 1st October 2014 pursuant to which the 2nd defendant herein was joined to **Nakuru RMCC No. 764 of 1989** is a nullity, a declaration that the cancellation pursuant to the judgment of the title issued to him in respect of Baringo/Ravine-102/264 was irregular, a declaration that the consolidation of Baringo/Ravine-102/264 and Baringo/Ravine-102/265 back to Baringo/Ravine-102/156 pursuant to the judgment was irregular and an order that he has acquired Baringo/Ravine-102/264 through adverse possession.

10. The 2nd defendant responded to the plaintiff's case by filing a counterclaim in which he affirmed the existence of the judgment in **Nakuru RMCC No. 764 of 1989** and the consent referred to by the plaintiff. He added that the plaintiff has used extra-judicial means to deny him peaceful and quiet possession of Baringo/Ravine-102/693 and Baringo/Ravine-102/694 which are the new subdivisions of Baringo/Ravine-102/156. He prayed for judgment against the plaintiff for an order compelling the plaintiff to surrender to court the original title deed in respect of Baringo/Ravine-102/264 which was cancelled, a permanent injunction restraining the plaintiff from filing further suit against the defendants touching on ownership of Baringo/Ravine-102/693 and Baringo/Ravine-102/694, eviction of the plaintiff from Baringo/Ravine-102/693 and Baringo/Ravine-102/694, an order compelling the plaintiff to deliver free, peaceful and vacant possession of Baringo/Ravine-102/693 and Baringo/Ravine-102/694 and an order restraining the plaintiff from trespassing onto his person, entering his home, work place, rental premises or in any other way interfering with him and his estate, agents, servants and/or representatives or any other person acting on his behalf.

11. From the above analysis, it is clear that parties agree that they were all parties to **Nakuru RMCC No. 764 of 1989** and that judgment was delivered in that case which addressed the issue of ownership of Baringo/Ravine-102/156 and its resultant subdivisions. A judgment of a court of law is valid until set aside by the court itself or through appeal. No party has referred to any appeal against the judgment. A judgment cannot be challenged through a new suit. That is precisely what **Section 7** of the **Civil Procedure Act** and the doctrine of *res judicata* bars. Any dissatisfaction with a judgment whether on the basis of irregularity, fraud or want of jurisdiction must be raised before the court that delivered the judgment or by way of appeal. If litigants were to be allowed to commence litigation all over again on the basis of such allegations, litigation would never come to an end. All it would take is for a losing party to craft the most innovative allegations of fraud and once again engage the judicial process.

12. Having been parties to **Nakuru RMCC No. 764 of 1989**, the parties herein must exhaust their claims and reliefs there. They cannot leapfrog to this court otherwise than by way of appeal.

13. The plaintiff has argued that this suit raises adverse possession and fraud which were not determined in **Nakuru RMCC No. 764 of 1989**. The simple answer to that is that fraud is raised in connection with the judgment and as we have seen, that cannot be raised in a new suit. Regarding adverse possession, the parties herein have been litigating against each other from as far back as 1972. The plaintiff has averred at paragraph 27 of the plaint that he has been in possession since the 1960s. I am persuaded that pursuant to explanation number 4 of **Section 7** of the **Civil Procedure Act**, adverse possession is an issue that ought to have been raised in the past proceedings, even if by a parallel originating summons. By introducing the angle of adverse possession in this matter through an amended plaint which was filed after the preliminary objection had been raised, the plaintiff was clearly attempting to give his old claim a cosmetic facelift with a view to

circumventing *res judicata*. That cannot work.

14. In view of the foregoing, the preliminary objection is well grounded. I uphold it. I have also analysed the 2nd defendant's counterclaim above. Whereas no objection has been raised on the counterclaim, the 2nd defendant himself raised the issue of *res judicata*. He is no doubt aware that *res judicata* cuts both ways. Having obtained joinder in **Nakuru RMCC No. 764 of 1989**, he is for all intents and purposes bound by the outcome of the said case. Even before he joined the case, he was litigating therein under the 1st defendant, pursuant to explanation number 6 of **Section 7 of the Civil Procedure Act**. He cannot seek to advance his claim in **Nakuru RMCC No. 764 of 1989** through this new case or to enforce the judgment in the said case by filing a fresh case. His claims for surrender to court the original title deed in respect of Baringo/Ravine-102/264 and for eviction of the plaintiff from Baringo/Ravine-102/693 and Baringo/Ravine-102/694 are all matters that ought to have been raised in **Nakuru RMCC No. 764 of 1989**. His counterclaim is therefore equally caught in the dragnet of *res judicata*.

15. In the end, both the plaintiff's claim and the counterclaim are struck out for being *res judicata*. Each party to bear own costs of the suit.

Dated, signed and delivered at Nakuru this 25th day of February 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Sambu for the plaintiff

No appearance for the defendants

Mr Amos Lumet Kimosop (the 2nd defendant) present

Court Assistants: B. Jelimo & J. Lotkomo