



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

E & L CASE NO. 19 OF 2019

DIocese of Eldoret Trustees (Registered).....PLAINTIFF

VERSUS

ATTORNEY GENERAL (ON BEHALF

OF THE PRINCIPAL SECRETARY TREASURY.....1ST DEFENDANT

LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

RULING

This ruling is in respect of a preliminary objection by the 1st defendant on the grounds that the court lacks jurisdiction to hear and determine this suit as there is a prevailing judgment issued by a competent court in Eldoret ELC Petition No. 2 of 2015 hence the plaintiff's suit is incompetent as it offends the mandatory provisions of section 7 of the Civil Procedure Act Chap 21. Further that the suit is an abuse of the court process and should be dismissed with costs to the defendants.

Counsel agreed to canvass the preliminary objection vide written submissions which were duly filed

Defendant's Submission

Mr. Odongo Counsel for the defendants submitted that this court lacks jurisdiction on the basis that there is an existing judgment of the court and thus the case is *res judicata*.

It was Counsel's further submission that the plaintiff had filed Eldoret Petition No. 2 of 2015 which the court heard and delivered a judgment on 1st April 2016 to the effect that the plaintiff had been unlawfully registered and thus the title was cancelled. The court had therefore determined the issue of ownership of the land and as such the court became *functus officio*.

Counsel submitted that the court can not interfere in a matter already adjudicated, unless there is an appeal or review on the same. In this case the plaintiff changed the parties, though the subject matter was the same. This is in reference to section 7 of the Civil Procedure Act, Cap 21.

Mr Odongo cited the case of **Grace Njeri Kabiru v. Stephen Wagita Kiboi & 2 Ors [2018] eKLR** where the plaintiff filed a suit in court but the cause of action had been determined, though the parties had been added.

Further that in the case of **Kungu Ngethe v. George Kibatia[2018] eKLR** the court struck out the matter on the grounds that it was *res judicata* and would lead to an embarrassment in the administration of justice where conflicting judgments are arrived at.

Counsel submitted that the plaintiff sought for the following orders:

1. A declaration that the defendant's fraudulent actions amounts to deprivation of property and therefore illegal.
2. Cancellation of the register and the title deed for parcel number Kiplombe/Kiplombe Block 5(Kaptich)70 Registered and issued in the name of Principal Secretary Treasury (Reserved for Kaptich Secondary).
3. A declaration that the plaintiff is the rightful owner of the property Kiplombe/Kiplombe Block 5(Kaptich) 70 and its registered in the name of the plaintiff be maintained.

4. A conservancy Order restraining the defendants from interfering with the plaintiff's property be issued.

5. Costs of this suit.

Counsel submitted that the same prayers were heard and determined in petition No. 2 of 2015 and a judgment rendered. Counsel prayed that the preliminary objection be allowed and the plaintiff's suit be dismissed with costs.

Respondent's Submission

Counsel for the respondent submitted that the suit does not offend the provisions of section 7 of the Civil Procedure Act Cap 21 Laws of Kenya. That for the principle of *res judicata* to apply, there had to be a previous suit in which the matter was the same as the current, same parties litigating under the same title.

It was Counsel's submission that in , the current suit the issue is fraud since the 2nd defendant had deliberately registered title in the names of the 1st defendant, which was non existent entity, yet they still held their title. Counsel cited the case of ***Kitale Chepkoror Farm v. Peter Nasasa & 4 Ors***[2019]eKLR where the court dismissed a preliminary objection on the ground that the previous suit was in regard to subdivision of land the present was in regard to the real beneficiaries.

Counsel also submitted that the 1st defendant is still holding the title to the suit land which is the first registration and that it is the *bonafide* registered owner as provided by Section 26(1) of the Land Registration Act, 2012. Counsel submitted that this suit shall dispose off and determine between the two registered people who the legitimate owner is.

Counsel cited that case of **D.T Dobie & Co.(Kenya) Ltdv. Joseph Mbaria Muchina & Anor(1980)** eKLR Madan JA stated that

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere resemblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it." See also *Nancy Mwangi t/a Worthlink Marketers v. Airtel Networks(K) Ltd(formerly Celtel Kenya Ltd) & 2 Ors* [2014] eklr.

Counsel therefore urged the court to dismiss the preliminary objection and allow the case to proceed on merit.

Analysis and determination.

This is a preliminary objection raised on a point of law on the grounds that this matter is *res judicata*. The issue for determination is whether this suit falls on all fours of section 7 of the Civil Procedure Act which stipulates 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."

Courts have rendered many rulings on the doctrine of *res judicata* which essentially frowns upon the use of the courts to abuse processes. The moment the court comes to the conclusion that the suit is *res judicata*, then the court should not shy away from pronouncing itself so.

The proceedings, Judgment and decree in Eldoret ELC Petition No 2 of 2015 were availed to court. The defendant's contention that this matter has already been determined by a competent court of the same jurisdiction vide Eldoret ELC Petition no. 2 of 2015 is sound as the subject matter and parties in the current suit are directly and substantially in issue in ELC Petition No. 2 of 2015 which was determined by a competent court. This court cannot sit on its own judgment unless it is a review. If the plaintiff was dissatisfied with the outcome of ELC Petition No 2 of 2015 whereby the court found that it had been unlawfully registered as the proprietor of the suit property as the same was public property reserved for a public secondary school, then it should have preferred an appeal and not file another suit.

In the previous suit ELC Petition No. 2 of 2015, the plaintiff who was the petitioner had sued the National Land Commission, Trustees of Koplombe Kaptich School, Land Registrar Uasin Gishu County, and Uasin Gishu County for the LR NO KOPLOMBE/KIPLOMBE BLOCK 5(KAPTICH)/70 and in the current suit the plaintiff has sued the AG on behalf of the Principal Secretary Treasury and Land Registrar Uasin Gishu County in respect of the same parcel of land and same orders which had been adjudicated upon.

From the proceedings and the decree it is clear that this is a case that falls on all fours within the doctrine of *res judicata*. What more would a party require to prove that a case is *res judicata*. In the case of **Henderson vs Henderson (1843) 67 ER 313** *res-judicata* was described as follows;

*"...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas 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 a 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”.

Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.

I find that this suit is res judicata and an abuse of the court process. The preliminary objection has merit and hence upheld. Plaintiff's case is dismissed with costs.

DATED and DELIVERED at ELDORET this 30TH DAY OF JANUARY, 2020

M. A. ODENY

JUDGE

RULING is read in open court in the presence of Mr. R.M. Wafula holding brief for Miss. Tum for Plaintiff/Respondent and in the absence of the AG for Defendant/Applicant.

Mr. Yator – Court Assistant