



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 392 OF 2017

FORMERLY KISII ELC NO. 267 OF 2016

SAMSON OKARI ANCHING'A & 2 OTHERS.....PLAINTIFFS

VERSUS

JOHN MOSIMA MOSOTI.....DEFENDANT

RULING

The Application before me is the Notice of Motion dated 3rd November, 2016 which was filed under a certificate of urgency. The Application was brought under order 2 Rule 15 (1) (b),(c) and (d) and order 51 Rule 1 of the CPR seeking that the Defence filed by the Defendant be struck out.

The Application was based on the grounds that the Plaintiffs are the registered owners of LR parcel No. TransMara/Moyoi/2017, 2018 and 2019 which were sub-divisions of Trans Mara/Moyoi/408 which was formerly owned by one John Monari Obiero and sold to the Plaintiffs herein.

That the former owners of the suit land had obtained eviction order against the Defendant herein pursuant to a judgement of the court dated 9th September, 2009 in which an appeal against the same was dismissed by the High Court.

The Applicants further averred that the Defence is res judicata as the issues raised in the defence were decided by a court of competent jurisdiction.

The Application was further supported by the Affidavit of 1st Applicant with the authority of the other Applicant in which he deponed that they are the registered owners of the suit land and in support of this the Applicant annexed copies of official search certificates. The Applicants further contend that they have been in occupation and possession of the said land.

The Applicants further averred that the Respondent wrongfully and unlawfully entered into the suit land and created disturbance in which he was charged at Kilgoris Magistrate's Court vide Criminal Case No. 43 of 2015 and despite that, the Respondent has severally threatened to trespass on the suit land.

The Applicant further averred that the Respondent had a civil suit against one John Morari Obiero being Kilgoris Civil Case No. 10 of 2005 which upon being heard was dismissed and an order of injunction against him issued. In support the Applicant annexed a copy of the proceedings in Kilgoris CMCC No. 10 of 2015 and on this the Applicant avers that the suit is res judicata.

The Application was opposed by the Respondent who filed a replying affidavit and in reply he averred that the provisions of Section 7 of the Civil Procedure Act do not apply to the suit herein and states that he owns a different land different from LR Parcel No. Trans Mara/Moyoi/408 which does not exist and hence the res judicata does not arise.

I have read the Application before me and the issue for determination before me is whether the suit is res judicata and offends the provisions of section 7 of the CPA.

It is the Applicants contention that there was a dispute between the Defendant/Respondent and one John Morari Obiero in touching on the Land Reference No. TransMara/Moyoi/408 which dispute was determined vide Kilgoris CMCC No. 10 of 2015.

I have read the proceeding in Kilgoris CMCC No. 10 of 2015 and it is evident that indeed the suit is related to Land Parcel No. Trans

Mara/Moyoi/408, however in the proceeding, there is nothing to show how and when the said parcel of land was sub-divided into Trans Mara/Moyoi/2017, 2018 and 2019.

Section 7 of the Civil Procedure provides:-

The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it”

The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

In the instant Application there was a suit between John Morari Obiero and the Defendant here in respect of LR Trans Mara/Moyoi/408 and in the absence of a clear explanation by the Applicants how and when the sub-division was done and with no mutation forms attached, I find that the issue between the parties is not res judicata.

Striking out a defence is draconian and a court must exercise its discretion at the clearance of a case and it is my finding that the instant case is not and the issue thus raised may be heard at a full trial.

In view of the above, I decline to strike out the Respondent’s defence as prayed and hence I dismiss the Application.

Costs in the cause.

DATED, SIGNED and DELIVERED in open court at NAROK on this 25th day of October, 2018.

Mohamed N. Kullow

Judge

25/10/18

In the presence of:

Mr Masikonde holding brief for Ombachi for Plaintiff/Applicant

N/A for the Defendant

CA:Chuma