



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

CIVIL SUIT NO 110 OF 2015

PHILIP KIPKOECH MUTAI.....PLAINTIFF

VERSUS

BENJAMIN MILGO.....1ST DEFENDANT

HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

This Ruling is in respect of the Notice of Motion dated 19th August 2015. The said Notice of Motion which is brought pursuant to sections 3, 3A, 7 and 8 of the Civil Procedure Act seeks the following orders:

- 1. That the Plaintiff/ Respondent's suit be dismissed since it is res judicata**
- 2. That directions be given**
- 3. That the costs of this application be provided for.**

The application is based on the grounds stated in the Notice of Motion and is supported by the affidavit of the applicant's counsel sworn on the 19th August 2015. In the said affidavit learned counsel Mr. Kirui depones that the suit herein is res judicata as the same was heard and determined by this honourable court in High Court Miscellaneous Application No. 8 of 2009 (JR) whereby a Judicial Review seeking to quash the decision of the court in Kericho PMCC No. 78 of 2008 which adopted the award of the Sigowet Land Disputes Tribunal was struck out. He further depones that the suit herein is fatally defective as no letters of administration have been taken out in respect of the registered owner of land parcel number KERICHO/KIPTERE/1642.

The application is opposed through the Grounds of Opposition filed on behalf of the Respondent in which learned counsel for the respondent has raised a number of issues. First it is contended on behalf of the respondent that the suit is not res judicata as Miscellaneous Application No. 8 of 2009 (JR) was only struck out for failure to comply with Civil Procedure Rules and was therefore not determined on the merits. The suit therefore does not meet the threshold of res judicata.

Secondly, it is submitted that this court is not seized with the jurisdiction to adjudicate on an issue which has not been pleaded in the defendant's defence. That since defendant did not raise the issue of res judicata in his defence, he cannot raise it through the instant application.

Thirdly, that there are triable issues raised in the pleadings which deserve consideration at a full hearing.

Finally, the applicant states that the application lacks bonafides and it is a mischievous attempt to delay the finalization of this matter as it was filed four years after the suit was filed.

The following issues stand out for determination:

- 1. Whether this court has jurisdiction to adjudicate on an issue that was not raised in the pleadings**
- 2. Whether the suit herein is res judicata**
- 3. Is the suit incurably defective for the reason that the Plaintiff has not taken out letters of administration in respect of the registered owner of land parcel no. KERICHO/KIPTERE/1642?**

The first issue touches on the issue as to whether a preliminary objection must be raised in the pleadings for it to be entertained by the court. The definition of Preliminary objection was succinctly captured in the celebrated case of **Mukisa Biscuit Manufacturing Limited V West End Distributors 1969 EA 696 at page 700** where Law J.A stated as follows:

“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 a contract giving rise to the suit to refer the dispute to arbitration”

Sir Charles Newbold elaborated further that:

“ A preliminary point is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It can't be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The second point is that the suit is res judicata. This is a pure point of law which may not have been specifically pleaded but it arises from the pleadings as reference is made to the suit that was instituted at the Land Disputes Tribunal whose award was adopted by the court. It therefore qualifies to be raised as a preliminary point as it is likely to dispose of the suit.

The doctrine of res judicata is contained in section 7 of the Civil Procedure Act which 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 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”

The plaintiff has stated in the plaint that he filed a case against the defendants in the Sigowet Land Disputes Tribunal touching on the suit property. The Land Disputes Tribunal decided the case against him by awarding the defendant 7 acres out of the suit property. The award of the Tribunal was then forwarded to the Kericho Resident Magistrates Court for adoption vide Miscellaneous Application No. 78 of 2008. The same was duly adopted as a judgment of the court. Even though the Plaintiff does not mention it in his plaint, it is clear from the supporting affidavit that the plaintiff's application to have the decision of the court adopting the award quashed was struck out as it was brought pursuant to the wrong provisions of the Civil Procedure Act.

Arising from the foregoing facts, the question that I am called upon to decide is whether the plaintiff's suit is res judicata. It is instructive to note that the Plaintiff's Notice of Motion challenging the award of the Tribunal was struck out for want of form without being heard on its merits.

In the case of **Enock Kirao Muhanji V Hanud Abdalla Mbarak (2013) eKLR** the court held that a matter is heard and determined when the court which has heard it has exercised its judicial mind on the matter in controversy after it has heard arguments, considered it and come to a decision.

A suit that is struck out without being heard on the merits is therefore not res judicata. When as a suit is struck out, one may be allowed to file a fresh suit unlike a situation where as suit is dismissed. In the instant case the Notice of Motion challenging the jurisdiction of the Tribunal to hear the dispute was not heard on the merits and it is therefore not res judicata.

The third point touches on the issue of the defendant's *locus standi*. In his Complaint, the plaintiff states at paragraph 3 that he is the registered owner of land parcel no. KERICHOKIPTERE/4933 which touches and borders L.R No. KERICHOKIPTERE/1642 registered in the name of Chebas Arap Maroko Deceased but occupied by the defendant. At paragraph 9 of the Complaint the Plaintiff states that the 1st defendant has not applied for and obtained letters of administration in respect of the registered owner of L.R NO. KERICHOKIPTERE/1642, Chebas Arap Maroko, deceased, hence he had no *locus standi* before the Sigowet Land Disputes Tribunal as well as the Resident Magistrates court at Kericho. If this argument is to be taken to its logical conclusion, it would mean that the defendant has no *locus standi* to be sued in this suit until such a time as he shall have taken out letters of administration. In arriving at this conclusion I rely on the case of **Rajesh Pranjivan Chudasama V Sailesh Pranjivan Chudasama (2014) eKLR** where the court stated that in dealing with the estate of a deceased person one is clothed with *locus standi* upon obtaining a limited or full grant of letter of administration in cases of intestate succession. If one has no *locus standi* he cannot be heard even if he has a good case. By admitting that the defendant has no *locus standi*, the plaintiff has in effect shot himself in the foot.

The issue of *locus standi* is a point of law which goes to the root of any suit and its absence renders a suit fatally defective. For that reason, I find and hold that the suit herein is incurably defective and is struck out with costs.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2017

J.M ONYANGO

JUDGE

In the presence of :

Migiro for the plaintiff/Respondent

Miss Kitur for the Defendant/Applicant

Court Assistant: Rotich