



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 47 OF 2013

FRED SIMIYU OKIYA PLAINTIFF

VERSUS

DISMAS JEFETHER EKISA DEFENDANT

R U L I N G

1. Before the hearing of this suit could commence, a preliminary objection was taken on behalf of the defendant on three grounds as follows:-

- a) That the entire originating summons is bad in law and ought to be struck out as the defendant is not the registered proprietor.
- b) That the suit is res judicata.
- c) That , the applicant has not complied with the provisions of order XXIV Rule 4 in respect of Kitale HCCC. No.4 of 2007 that was withdrawn.

2. During the hearing of the preliminary objection, Mr. Musumba for the defendant did not address the court on the second ground of the preliminary objection. I think this was deliberate because he was aware that the previous suit was not heard on merits and therefore the issue of this originating summons being res judicata does not arise. The previous suit i.e. Kitale HCCC. No. 4 of 2007 was withdrawn by the Plaintiff.

3. The first ground of preliminary objection has no merit. The defendant is contending that he is not the registered owner of the suit land. Of course the defendant is not the registered owner of the suit land but he has been sued in his capacity as the legal representative of the registered owner who is now deceased. He cannot therefore argue that the suit is bad as he is not the registered owner of the suit land.

4. The third ground of the preliminary objection is equally without merit Order XXIV Rule 4 of the Old Civil Procedure Rules which is now order 25 Rule 4 provides that if any subsequent suit is brought before payment of costs of a discontinued suit the court may order a stay of the subsequent suit until such costs have been paid. One cannot therefore bring such an issue as a preliminary ground of objection.

I find that the entire Preliminary objection lacks merits., The same is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, Signed and Delivered at Kitale on this 26th day of May 2015.

E. OBAGA

JUDGE

In the presence of Mr. Nyamu for Mr. Musumba for defendant. Court Clerk - Isabella

E. OBAGA

JUDGE

26.5.2015