



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 174 OF 2013

KAGAI MWANGI PLAINTIFF

VERSUS

EPHANTUS NGARI MWANGI DEFENDANT

RULING

This is in respect to the Preliminary Objection filed by the plaintiff herein on 16th May 2013.

The genesis of this matter is that the plaintiff filed this suit seeking the eviction of the defendant from a parcel of land known as KABARE/MUTIGE/160 on the basis that the said land is registered in plaintiff's names.

On his part, the defendant filed a defence in which he conceded that the land KABARE/MUTIGE/1600 (hereinafter referred to as the suit land) though registered in the names of the plaintiff, the plaintiff is only registered as a trustee of the same on behalf of the defendant and that defendant is in fact residing on the suit land. The defendant therefore sought in his counter-claim an order that the plaintiff holds the suit land in trust for himself and defendant in equal shares and that the said trust be dissolved and a share of the suit land be transferred to the defendant.

The said counter-claim provoked the Preliminary Objection subject of this ruling in which the plaintiff seeks the dismissal of that counter-claim on the following grounds:-

“That the same is an abuse of the Court process, vexatious and frivolous in view of Kerugoya P.M.C.C No. 245 OF 2002 which to date no appeal has never (sic) been lodged/and or set aside”

I have considered the submissions on that Preliminary Objection by both Mr. Muraguri for the plaintiff and Mr. Muchira for the defendant.

To my mind, what I understand the plaintiff to be saying is that this suit is res-judicata in view of the decision in Kerugoya P.M.C.C No. 245 of 2002. The doctrine of res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following words:-

“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”

From the above definition of the doctrine of res-judicata, I can discern five essential elements that must exist before the said doctrine can be successfully raised as a bar to a litigation and these are:-

1. ***The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.***
2. ***The former suit must have been between the same parties or parties under whom they claim.***
3. ***The parties must have litigated under the same title***
4. ***The Court which decided the former suit must have been competent and lastly***
5. ***The former suit must have been heard and finally decided by the Court.***

Having looked at the proceedings in Kerugoya S.R.M.C.C No. 245 of 2002, there is no doubt that the same parties herein were litigating in that case over the same subject matter in this case now before me. There were other proceedings in the Land Disputes Tribunal and also the Provincial Appeals Committee. The ruling of the magistrate in Kerugoya S.R.M.C.C No. 245 of 2002 was basically premised on the ground that there had been other proceedings in the Land Disputes Tribunal. However, the proceedings in the Tribunal were really of no consequences because, the subject matter of this dispute being registered land, the Land Disputes Tribunal had no jurisdiction to entertain the suit and any orders made were in excess of jurisdiction. Therefore, the orders in Kerugoya S.R.M.C.C No. 245 of 2002 dismissing the suit were similarly made in excess of jurisdiction. On that basis, the plea of res-judicata is not available to the plaintiff because the trial magistrate's Court in Kerugoya S.R.M.C.C No. 245 of 2002 was not "***a Court competent***" to try the suit between the parties. Indeed when the matter went before Khaminwa J in Embu High Court Civil Appeal No. 21 of 2003, the learned Judge made the following observations with regard to the Tribunal's award:-

"I therefore find the award of the Tribunal contrary to law and in excess of Tribunal's jurisdiction. Consequently, the decree issued in the Senior Resident Magistrate's Court in Kirinyaga is null and void having arisen from the proceedings of the Tribunal"

Clearly therefore, the plea of res-judicata cannot be properly raised herein because both the Tribunal and the Magistrate's Court which made the earlier orders in this dispute had no jurisdiction over the same. On that ground alone, the Preliminary Objection cannot succeed.

Secondly, for res-judicata to succeed, the matter substantially in issue in the previous suit must also be the same matter "***directly and substantially***" in issue in the subsequent suit or a matter which may or ought to have been raised in the previous suit. From the pleadings in the suit now before me, the defendant is seeking the declaration of a trust in his counter-claim. A claim of trust could not have been raised in the previous suit either in the Tribunal or the Magistrate's Court as that is the preserve of the High Court. So the claim of trust was not "***directly or substantially***" the issue in the previous suit. It is being raised in these proceedings for the first time and therefore, it cannot be said to be res-judicata.

It is therefore clear from the above that the Preliminary Objection raised by the plaintiff lacks merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

18TH FEBRUARY, 2014

18/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. Muraguri for Plaintiff - absent

Mr. Rurige for Defendant - present

COURT: Ruling delivered in open Court this 18th day of February, 2014.

Mr. Muraguri for plaintiff absent

Mr. Rurige for defendant present.

B.N. OLAO

JUDGE

18TH FEBRUARY, 2014