



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL CASE NO. 55 OF 2006
SARAH CHEBOO LANGATPLAINTIFF
VERSUS
THE BOARD OF GOVERNORS
CHEPSEON COMPLEX SCHOOL *THRO'*
MOSES YEGON (CHAIRMAN).....DEFENDANT

RULING

1. Before me is a notice of Preliminary Objection dated 31st January, 2012 and brought by the defendant in this suit seeking to strike out the plaint filed on 12th July, 2006 on the ground that :-

The suit herein is resjudicata as the dispute in respect of the suit land was heard and determined by the District Land registrar in the year 2005 when the suit land was still in the plaintiff's husband's name.

2. Both parties filed Written Submissions which I have carefully perused.
3. The sole issue raised in the preliminary objection is that the suit is resjudicata. The defendant submits that the plaintiff's husband in whose name the land was registered in 2005 together with Phillip Ngetich, Johana Tonui, William Mibei took a boundary dispute to the District Land Registrar alleging that Chepseon Complex School, the registered owner of Kericho/ Kipkelion Block 4 (Chepseon) 97 had encroached onto the parcel Kericho/ Kipkelion Block 4 (Chepseon) 946. (hereinafter referred to as the suit property)
4. The District Land Registrar heard and determined the matter and issued his ruling in 21st July, 2005 that;

" 1. The roads of access passing through the school are strictly private and not for public use.

2. The disputants should plant a permanent fence to form a common boundary between them.

3. The boundary must in future be maintained in good order and repair by both parties."

5. The plaintiff's husband did not appeal to the High Court within the prescribed time. The plaintiff has now instituted a fresh suit without disclosing to this court that the matter had already been determined by the District Land Registrar in 2005.

6. Counsel for the applicant submitted that this matter had already been determined by the District Registrar. He relied on the case of **Dorcas Indombi Wasike V Benson Wamalwa Khisa & Another (2010) Eklr** wherein the court of appeal held that once a dispute is heard and determined by the Land Registrar and his decision is not challenged by way of appeal by the aggrieved party within the prescribed time, the right to question the boundary in issue is spent. He further submitted that the current suit related to the same subject matter as the earlier dispute determined by the Registrar. He cited the decision in **Eutyachus Muthui V Geoffrey Kirima Igweta & Another (2010) Eklr** where the court held that it would be unjust for the court to allow the plaintiff to proceed with the case where the same subject matter had been heard and determined by a court of competent jurisdiction, further the suit related to the same parties as held in **Njoroge Kariuki Michiki V Johnson Robert Kariuki (2007) Eklr** and finally that the plaintiff had sworn a false affidavit as in the case of **Gathungu Gatandungu V Peter Ngugi (2005) Eklr**. In that case a preliminary objection was upheld because the suit was an abuse of the court process, the suit was resjudicata and the plaintiff had sworn a false affidavit.

7. In response, the plaintiff's counsel submitted that the written submissions by the applicant were served upon them outside the prescribed time given by court and further that the preliminary objection was misconceived on the grounds that the defendant did not in his defense mention the suit supposedly determined by the Registrar. He however proceeded to discuss the two rulings by the Registrar and stated " **there are two rulings made by two Land Registrars. One by D.K Nyantika dated 21st July 2005. The plaintiff was not a party to these proceedings and was not the registered owner. In any event the proceedings were not a suit. The ruling of Mrs. G.C Korir dated 23rd October, was set aside**". He then referred to the ruling by Angawa J. giving the impression that according to the learned Judge the suit still had life.

8. The starting point is whether this suit is resjudicata.

Section 7 of the Civil Procedure rules 2010 provides:

" 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."

9. The suit land is registered under the Registered Land Act Cap 300. In 2005 there was a dispute preferred before the Land Registrar for determination of boundaries. The Registrar in exercise of powers conferred on him under **Section 21 (2) of the Registered Land Act Cap 300, (Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary)** heard the boundary dispute and delivered a ruling.

10. After the dispute was determined by the Registrar what was the remedy for a dissatisfied party?

Any dissatisfied party had the right to appeal against the decision. No such appeal was filed. Can the plaintiff now file a new suit under the guise that she was not a party in the earlier suit? I think not. The plaintiff's husband failed to exercise his right of appeal. As held in all the three cases cited by the defendant which I fully agree with, the suit land is the same parcel of land adjudicated upon before, the same cause of action and although the plaintiff was not the registered owner she was still bound by the decision of the District Land Registrar because her husband the previous

owner, was a party to the proceedings.

11. Further there was material none disclosure on the part of the plaintiff about the earlier dispute thus an abuse of the court process. It is also important to note that when the Honorable Angawa J. set aside the report by the District Land Registrar in her ruling dated 16th December, 2008 one of her grounds was that the Registrar failed to inform the court that the matter had already been adjudicated in the year 2005 by another District Land Registrar therefore her report was a nullity. I find that the issues in the current suit had been determined by the District Land Registrar in 2005 and therefore this suit is *resjudicata*.

12. For the above reasons I allow the notice of preliminary objection dated 31st January, with costs.

Dated signed and delivered in open court at Kericho this 27th day of March 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Mutai for the defendant

Mr Kirui holding brief for Mr Onganyi for the plaintiff.

CC:

L N WAITHAKA

JUDGE