



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO.1203 OF 2013

SAKAIWA LANKE OLE LENTO IPLAINTIFF/APPLICANT

VERSUS

PAITA KASAINO1ST DEFENDANT/RESPONDENT

THE ESTATE OF NKOISA ENE TENENA KASINO (DECEASED).....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 30th September 2013 in which the Plaintiff/Applicant is seeking for the following orders:

1. That summary judgment be entered against the Defendants/Respondents herein as prayed for in the plaint and an order for their eviction from the land parcel known as Kajiado/Ildamat/116 (hereinafter referred to as the “suit property”) be issued;
2. That an order be issued directing the District Land Registrar Kajiado to correct the Green Card to reflect the correct acreage of the suit property i.e. to read 59.32 hectares as per the title deed issued;
3. That an order be issued directing the District Land Registrar to remove the restriction placed on the suit property by the Defendants/Respondents;
4. That an order be issued to the District Land Surveyor Kajiado to indicate clearly the exact position of demarcation and beacons and borderlines of the suit property; and,
5. That the costs of this Application be borne by the Defendants/Respondents.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Sakaiwa Lanke Ole Lentoi, sworn on 30th September 2013 in which he averred that he has been issued with a Certificate of Title in respect of the suit property so that this court should take it as conclusive proof that the person named as proprietor is the absolute indefeasible owner thereof and that title should not be challenged in line with the provisions of section 25 and 26 of the Land Registration Act. He pointed out that the issue of the acreage of the suit property was the subject matter of Kajiado Land Dispute Tribunal Case No. 607/02/2011 whose decision was adopted by the Kajiado Resident Magistrates Court and which decision was subsequently quashed in Judicial Review Case No. 271 of 2011. He further stated that the Defendants/Respondents’ case is a sham and has no arguable

defence and raises no triable issues and as such this Application should be allowed to avoid wasting the court's time. He further stated that he wishes to subdivide and sell some parcels of the suit property to cater for his siblings' school fees hence the urgency of this suit.

The Application is contested. The 1st Defendant filed his Grounds of Opposition dated 2nd October 2013 in which he stated as follows:

1. The matter is statutory barred from being heard as it is res judicata pursuant to section 7 of the Civil Procedure Act;
2. The 1st Defendant is not the registered proprietor of the suit property and thus has no capacity to be sued;
3. There are no personal representatives to the 2nd Defendant and there is no evidence of service to the 2nd Defendant;
4. If there were any orders filed that were disobeyed by the Defendants, then the correct procedure would have been contempt proceedings.

Both the Plaintiff/Applicant and the 1st Defendant filed their written submissions which have been read and taken into account in this ruling.

The first issue that I must determine is whether this suit is res judicata. The law pertaining to the doctrine of res judicata is captured under 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 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.”

I have not had the benefit of seeing the proceedings of Kajiado Land Dispute Tribunal Case No. 607/02/2011. However, I have seen the order of the Senior Resident Magistrates Court at Kajiado which adopted the decision of the stated Tribunal and this is a verbatim production of the order:

“Upon reading the ruling of the Kajiado Land Dispute Tribunal Case No. 607/02/2011 land parcel no. KJD/Kiloriti/101 and KJD/Kiloriti/116 dated 24/02/2011 and upon hearing the claimant in the presence of the Objector:

IT IS HEREBY ORDERED

1. *That the District Surveyor do enter into the disputed border of the two parcels KJD/Kiloriti/101 and KJD/Kiloriti/116 to adjust the plan (map) as per the beacons on the ground with the presence of the members of committee which demarcated the group ranch.*
2. *That the both titles be returned to the land Registrar Kajiado for acreage rectification as per the beacons on the ground.*

GIVEN UNDER MY HAND AND SEAL OF THIS HONOURABLE COURT THIS 16TH DAY OF JUNE 2011.”

The Plaintiff/Applicant subsequently filed **Miscellaneous J.R. Cause No. 271 of 2011** where Justice Makhandia issued the following orders:

1. ***An order of certiorari be and is hereby issued to remove into this Honourable Court the proceedings of the Kajiado Central Land Disputes Tribunal Case No. 607/02/2011 and quash the ruling and/or order and/or decision of the said Tribunal as adopted by the Kajiado Senior Resident Magistrate's Court vide its order dated 14th June 2011 directing the District Land Registrar, Kajiado to enter the disputed border of the Land Title Numbers Kajiado/Kiloriti/101***

- and Kajiado/Kiloriti/116 and adjust the plan (map) as per the beacons on the ground with the presence of the members of the committee which demarcated the group ranch.*
- 2. An order of Prohibition be and is hereby issued prohibiting the District Surveyor Kajiado from amending and/or adjusting the Registry Index Map (RIM) in respect of the Land Title Numbers Kajiado/Kiloriti/101 and Kajiado/Kiloriti/116.**
 - 3. An order of Prohibition be and is hereby issued prohibiting the Kajiado Senior Resident Magistrate from taking any proceedings and/or making any orders and/or Rulings and/or any decision directed at amending and/or adjusting the Registry Index Map (RIM) in respect of the Land Title Numbers Kajiado/Kiloriti/101 and Kajiado/Kiloriti/116.**
 - 4. No order as to costs.**

With this background, can this suit be said to be *res judicata*. In answering that question, I will rely on the decision in **Welamondi versus The Chairman, Electoral Commission of Kenya (2002) 1 KLR 486** where Ringera, J. (as he then was) stated as follows:

- “1. Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings.**
- 2. In exercising powers under Order 53, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis*. It therefore follows that it is incompetent to invoke the provision of section 3A and Order 1 rule 8 of the Civil Procedure Act and Rules and section 42, 79 and 80 of the Constitution of Kenya.”**

Going by the foregoing, it is clear that this suit cannot be said to be *res judicata* and I so find.

Should this suit be finalized through the entry of summary judgment as prayed by the Plaintiff/Applicant on the basis of admission of liability on the part of the Defendants/Respondents? I have perused the Statement of Defence and do not see any admission of liability on the part of the Defendants. Accordingly, I find that this is not a suit that can be concluded by way of summary judgment.

The other prayers contained in this Application are prayers of a final nature which cannot be granted in the absence of a full trial. Those are issues for determination when this suit goes for full hearing. Accordingly, the same cannot be granted at this interlocutory stage of the proceedings.

The overall effect of the above is that the Application is hereby dismissed with no order as to costs.

DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE