



IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO. 144 OF 2013

ALFRED WAFULA NAMAEMO..... PLAINTIFF

VERSUS

1. JOSEPH WANYONYI MWEYA
2. MOSES WAMALWA MUKHAMARI.....DEFENDANTS

RULING

1. This is a determination on a preliminary objection raised by the 2nd defendant. The second defendant aver the plaintiff's suit is res judicata as the plaintiff had sued the 1st defendant in Bungoma SPMCC no. 29 of 2002 in which a decree was issued for that defendant to pay cane proceeds of Kshs. 89,423.65/= and vacate L.R. Ndivisi/Ndivisi/1679 within 3 months in default eviction to issue. The 2nd defendant believes it is a mockery of justice for the plaintiff to have joined him in this suit, while the plaintiff was a victim of the Divisional and Western Provincial Land Disputes Tribunal. He urged the court to dismiss this suit.

2. Mrs. Chunge for the plaintiff opposed the objection and submitted the suit is properly before the court. She submitted the 2nd defendant had sold the suit land to both the plaintiff and the 1st defendant. The plaintiff obtained eviction orders and the 1st defendant filed an appeal which is pending. That while the appeal was pending the 1st defendant commenced proceedings before the tribunal against the 2nd defendant. He was not made a party to those proceedings. The 1st defendant used the award of the tribunal to change title into his name. That although the 2nd defendant gave evidence favouring the plaintiff during the tribunal proceedings, it does not bar the plaintiff from holding him to account. She urged the court to allow the suit to proceed to full hearing.

3. I have considered the rival submissions and perused the past pleadings annexed to the objections visa vi the plaint. It is clear the subject matter before the land disputes tribunal case was L.R. Ndivisi/Ndivisi/1679 which is equally the subject matter in dispute before this court. The plaintiff was not a party in those proceedings. Secondly in Bungoma SPMCC no. 29 of 2002, the plaintiff herein had sued the 1st defendant and obtained eviction orders. The 1st defendant appealed and it is submitted that appeal is still pending. The inference to be drawn in my view is that this suit is sub-judice due to the pendency of the appeal.

4. In spite of the above, I have carefully looked at the prayers contained in the plaint to enable me discern whether this suit is a candidate for striking out on basis of res judicata. In the plaint filed on 22nd May 2013, the plaintiff prayed for orders as set out in paragraph 21.

Paragraph 21 reads; “*The plaintiff's claim against the defendants jointly and severally is for;*

(a) *A declaration that the sued lawfully belongs to the plaintiff and that the Ndivisi land disputes tribunal arbitration on L.R. Ndivisi/Ndivisi/1679 then registered in the name of the plaintiff and which led to its cancellation in the name of 1st defendant at the mistake of 2nd defendant was null and void ab initio.*

(b). *An order for restitution of title composed in land parcel number Ndivisi/Ndivisi/1679 in the names of the plaintiff herein.*

(c). *A permanent injunction restraining the defendants, their servants and or authorized agents and or any of their representatives claiming through them from Interfering with land parcel number Ndivisi/Ndivisi/1679.”*

5. My interpretation of the prayers sought by the plaintiff is that he is questioning the jurisdiction of the tribunal. The 2nd defendant was a party to the decision sought to be declared as null and void. In several decided cases, more so the celebrated case of **Motor Vessel Lilian vs Caltex Oil (K) Ltd** the court held that jurisdiction is everything and a court ought not to move an inch without jurisdiction. It follows therefore the doctrine of res judicata would not apply in a matter where the jurisdiction of that court is put to question. See case of **Damaris Kondoro vs. Gachanja Gitere & another Nakuru HCCC no. 27 of 2004 [2005] e KLR** in which Musinga J (as he then was) affirmed that the doctrine of res judicata cannot apply where the tribunal in the former suit did not have jurisdiction.

In the American case of **Lloyd vs. Amenian Motor Inns, Inc 343 S. ED 2d 68 [1986]**, the supreme court held, “*For a prior judgment to preclude subsequent action however the court must have had jurisdiction over the same subject matter in controversy and the precise issue upon which the judgment was rendered.*”

Finally in Mulla, The code of Civil Procedure, 18th edition page 285, it is written;

“A judgment delivered by a court not competent to deliver it cannot operate as res judicata since such judgment is not of any effect.”

6. The 2nd defendant having been sued in those tribunal proceedings cannot be exempted when the orders issued against him are being questioned. The outcome of this case will affect him and to avoid endless litigation, it is imperative that he is made a party to the current proceedings so that all issues between the same parties are determined once. Consequently this court declines to render this suit as res judicata. I find the preliminary objection lacks merit and is hereby dismissed. This suit shall proceed to full hearing.

DATED, SIGNED AND DELIVERED in Bungoma this 17th day of Sept. 2014.

A. OMOLLO

JUDGE