



REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 17 of 2009

ABUBAKAR SALIM MACHIRI PLAINTIFF

VERSUS

FRANCIS JUMA MUTORO 1ST DEFENDANT

SAMUEL SICHANGI 2ND DEFENDANT

GREGORY MUGODO 3RD DEFENDANT

RULING

The application dated 18th April 2011 is brought by the defendants/applicants seeking to have the plaintiff's suit struck out or dismissed with costs. The application is premised on the grounds on the face of it i.e that it is an abuse of the court process, scandalous and frivolous and that the claim is asking the court to validate a fraud.

The application is supported by an affidavit sworn by the 1st defendant **Francis Juma Mutoro**. In the affidavit, the applicants have stated that the claim regarding suit parcel No. **Bungoma/Kamukuywa/2165** was adjudicated and determined in Bungoma HCC No. 55 of 2006. A decree to this suit is annexed.

Secondly the plaintiffs title was cancelled vide a gazette notice **No. 6454 of 1999** and therefore there was no valid title passed to the present plaintiff.

The defendants have filed written submissions in support of their claim which submissions were highlighted orally in court when parties appeared before me on 28th January 2013. Mr. Waswa for the applicant submitted that this court is functus officio as the matter was already determined by Justice Wanjiru Karanja in Bungoma HCC No. 55 of 2006.

The plaintiff/respondent did not lodge any appeal.

According to Mr. Waswa, the facts in the instant case are similar to the previous suit Bungoma 55 of 2006 and therefore urged this court to allow their application and strike out the suit.

The plaintiff/Respondent has opposed the application.

He has filed a replying affidavit. In his affidavit, he says he is absolute owner of the suit land and he was not a party to the civil suit No. **55 of 2006**. He avers further that at the time he purchased the land, there was a valid title deed and has annexed copies of searches and title deed.

The respondent through his advocate Mr. Makali has filed written submission to oppose the application which was also highlighted orally on 28th January 2013. According to Mr. Makali, civil suit No. **55 of 2006** was never heard but was disposed of by an application. He submitted further that the plaintiff was never a party to that suit. That the defendants admit the existence of the title **No. Bungoma/Kamukuywa/2165** except that its registration was void.

Mr. Makali further submitted that there are joinder of issues in the pleadings i.e the plaint raises issues of fraud as regards the existence of civil suit No. 17 of 1999 on whose basis the suit title was cancelled. He has referred the court to rely on the case of **D.T. Dobbie vs. Muchina** annexed to his submissions, **Michael Kimotho vs. Nicholas Mugo civil. Appeal No. 53 of 1995** and also **Nbi. HCC petition No. 154 of 2011** between **Isaac Wanjohi & another vs. A.G. & 6 others**. His final submission is that their case raises substantial issues which ought to be determined only through a full hearing.

The court is therefore requested to find out whether the matter is res judicata. In the cited case of Bungoma HCC No. 55 of 2006, the parties were **WABULULU MULONGO VS. FRANCIS MUTORO & KOROFIA SICHANGI**. The prayers sought in that suit were a declaratory order to the effect that the defendants' occupation on land parcel No. Bungoma/Kamukuywa/2165 is illegal and unlawful, an eviction order against the defendants and or any other persons claiming through or under them and a permanent injunction restraining the defendants from trespassing or attempting to trespass on the aforementioned land. The plaintiffs also claimed for mesne profits".

In the present suit, the prayers sought are;

(a). Eviction order

(b). A declaration that the entries in the second register cancelling title no. Bungoma/Kamakoiwa/2165 are null and void, an order for cancellation of the same and all other subsequent titles, a declaratory order that the plaintiff is the sole owner of L.R. No. Bungoma/Kamakoiwa/2165 and an eviction order to issue against the defendant, their agents, relatives, servants and all persons claiming through or under them from the said parcel of land as they are trespassers. (emphasis mine).

The parties herein are different except for the 1st defendant who was a party in both suits. The subject matter which is land parcel **No. Bungoma/Kamakoiwa/2165** and the reliefs sought mainly eviction of the defendants is also similar as in previous suit quotes as Bungoma HCC No. 55 of 2006.

The present plaintiff allege that his plaint raises different issues which is different to what was pleaded in the previous suit to wit fraud whose particulars are given in paragraph 6A of the plaint. The plaintiffs' submit that the cancellation of title vide a gazette notice is being challenged and which issue was not raised in the former suit. He has cited case law of **Isaac Wanjohi Vs. A.G and 6 others** – Constitutional Petition No. 154 of 2011 at Nairobi.

On perusal of the annexed ruling of the learned judge in Bungoma 55 of 2006, this court notes that the matter was not heard by way of adducing evidence but the suit was struck off at the application stage for failing to disclose any cause of action.

In the case of **Leonard Indiazzi vs. Fanista Omukama Kemi, civil appeal No. 169 of 1996**, the court of appeal held that for res judicata to apply, parties and issues must be the same. Similarly in **Samuel Kiiru Gitau Vs. John Kamau Gitau Nbi. HCC No. 1249 of 1998**, Justice Visram (as he then was) stated

“for a matter to be res judicata, it must be one on which the court has previously exercised judicial mind and has after argument and consideration, come to the conclusion on the contested matter and for this reason a matter is said to have been heard and determined notwithstanding that the former suit was disposed of by a decree or an award. For a matter to be directly or substantially in issue in a former suit, is to be determined by reference to the plaint, the written statement, the issues and the judgment and the test of res judicata is the identity of the issue and not the identity of the property involved in the former suit” (emphasis mine).

While comparing the above cited decision (since it is persuasive), a brief look at the plaint in the Bungoma HCC No. 55 of 2006 and current suit, it is a fact that the issues raised in the present pleadings is not similar. It is the reliefs sought which bear similarity as both seek to evict the defendants. It therefore clearly demonstrates that the issues of fraud raised by the plaintiffs herein was never adjudicated by the learned judge. I am alive to the provisions of explanation 4 that any matter which might and ought to have been made ground of defence/attack in such former is deemed as a matter directly and substantially in issue in such suit. There is a leeway when there is inconsistency and distinction of the issues raised.

This was the holding in **Gurbachan Singh Kalsi Vs. Yowani Ekori (1958) E.A. 450 holding No. (iii)**. The fact that the respondent had previously brought an unsuccessful action based on nonfeasance, did not stop him from bringing a second action based upon mifeasance. The facts to be proved are entirely different (cause of action) in the current suit from the previous suit.

I do therefore find the matter as not res judicata thus not an abuse of the court process. I proceed to dismiss the application dated 18th April 2011 as lacking in merit with costs to the plaintiffs/respondent.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 7th day of February 2013.

A. OMOLLO

JUDGE