



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 53 of 2012

THE INTERNATIONAL CHILDCARE TRUST (KENYA) PLAINTIFF

V

DAVID JAMES MBOGO DEFENDANT

RULING

The Applicant David James Mbogo brought a Notice of Motion dated 31st October, 2012 praying for the following orders:-

- 1) *That the suit herein be struck out with costs for being res judicata.*
- 2) *That the suit herein amounts to flagrant abuse of the due process of this court.*
- 3) *That the plaint be struck out with costs for failure to comply with the mandatory provisions of Order 4 Rule (1)(2) and (6) of the Civil Procedure Rules 2010.*
- 4) *That costs of this application be borne by the Respondent Plaintiff.*

The Applicant contends that the matters in issue in this suit were directly and substantially in issue in Kitale High Court Civil Case No. 121 of 2007. This Kitale HCCC was originally Eldoret HCCC No. 200 of 1994, Kakamega HCCC No. 116 of 1995 and Bungoma HCCC No. 71 of 2000. The Applicant refers to the counter-claim filed in Kitale HCCC No. 121 of 2007 in which it was averred that the Defendants in that suit wanted the court to declare that the Plaintiff held Plot No. 212 Liyavo Settlement Scheme in trust for International Childcare Trust. Judgment in Kitale HCCC No. 121 of 2007 was delivered on 12/11/2010 wherein the Defendants counter-claim was dismissed and the Plaintiffs claims were allowed. The Applicant herein has since then had the land registered in his name pursuant to the decree in Kitale HCCC No. 121 of 2007. The Applicant contends that Oliver Lynton the Country Director of the Respondent in Kenya was involved in the former suit in Kitale HCCC No. 121 of 2007. Affidavits sworn by the said Oliver Lynton filed in Bungoma HCCC No. 71 of 2000 were annexed in support of the Plaintiff's application. The Applicant also contends that the Respondent concealed the fact that there was a previous suit in which it had participated with the Applicants herein. The Applicant therefore contends that this was in breach of Order 4 Rule 1(1) (2) and 6 of the Civil Procedure Rules 2010.

The Respondent opposed the application arguing that it was not a party to the former suit. The Respondent contends that the issues between it and the Applicant were never investigated in the former suit as it was not a party to the former suit. The Respondent points to two instances when its Country Director swore Affidavits in support of applications in the former suit. The Applicant herein opposed those Affidavits arguing that the Respondent herein was not a party to the former suit. One such Affidavit was in respect of Bungoma HCCC No. 71 of 2000. The court indeed found in a ruling delivered by

Justice Serگون that the Respondent herein was not a party to the suit. In another instance, Oliver Lynton swore an application in HCCC No. 121 of 2007. Again the Applicant herein opposed that Affidavit arguing that the present Respondent was not a party to the suit and was therefore a stranger. The court in a ruling delivered by justice Fred Ochieng agreed with the Applicant herein that indeed the International Childcare Trust Kenya was not a party to the suit. It is therefore clear that the Applicant herein has always maintained that the International Childcare Trust was not party to the former suit and he cannot therefore turn round this time and claim that the Respondent herein was a party to the former suit. The judges here agreed with him that the Respondent herein was not party to the former suit. He cannot come out of that finding. The issue of *res judicata* is very well settled. A matter can only be said to be *res judicata* if any issue in which the matter directly and substantially in issue in a case 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 the former suit, the Defendants were sued in their individual capacities and were not litigating on behalf of the Respondent herein. The Defendants were litigating on behalf of Misemwa Community Project which had no capacity to litigate on its own. The Defendants in the former suit only brought in Oliver Lynton to swear an Affidavit in support of their application and this did not mean that the Respondent herein had become a party by that mere fact. This is why the two judges readily found that the Respondent herein was not a party to the former suit. Justice Fred Ochieng held that a party was at liberty to prove his or her case through an Affidavit and that one need not be a party in order to swear an Affidavit in support of ones case. The Applicant herein in his reply to defence and defence to counter-claim specifically denied that Misemwa Village Project was initiated by International Childcare Trust and that the Applicant was an employee of International Childcare Trust. The Applicant cannot therefore turn round and claim that the Respondent herein was a party to the former suit.

The Respondent herein was not a party to the former suit and it was not under any obligation to aver in the Affidavit in support of its claim that there was a previous suit. The Respondent has therefore not breached any provisions of the Civil Procedure Rules. It is clear therefore that the Respondent herein was not a party to the former suit. The Defendants were sued in their individual capacities as trespassers. They were not litigating on behalf of the Respondent herein. When the former suit came up for hearing, the Defendants were not present. It proceeded ex-parte and if the Defendants would have participated, it will then have come out whether they were litigating on behalf of the Respondent herein or not. As the matters stand now, there is nothing which shows that the Defendants in the former suit were litigating on behalf of the Respondent herein. The explanatory notes in Section 7 of the Civil Procedure Act do not therefore apply and the authorities cited by the Applicant are distinguishable as the facts and circumstances were not similar to the present case herein. I therefore find that this case is not *res judicata* and the Respondent has not breached any provisions of the Civil Procedure Rules. I dismiss the application with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 29th day of April, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for Defendant/Applicant and Mr. Barongo for Mr. Onyancha for Plaintiff/Respondent.

CC: Joan.

E. OBAGA

JUDGE

29/04/2013

