



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 82 of 2010

HARRY KEDAHA ANDREW PLAINTIFF

VERSUS

CONSTANCE KHISA1ST DEFENDANT

FUCHAKA KHISA 2ND DEFENDANT

NICHOLAS SIMIYU 3RD DEFENDANT

MARY OKUMU 4TH DEFENDANT

R U L I N G

This is a ruling in respect of a preliminary objection raised on behalf of the Defendants vide notice dated and filed in court on 11th March, 2013. The points raised in the notice are as follows:-

- 1) *That the suit is res judicata hence incompetent and bad in law.*
- 2) *That the suit is time barred.*
- 3) *That the suit offends the mandatory provisions of Cap 21 Laws of Kenya hence invalid and ought to be struck out with costs.*

Mr. Chebii for the Defendants argued that the Plaintiff had brought a claim for one acre before a panel of elders which claim was adopted as judgment vide Kitale Land Case No. 34 of 2001. Mr. Chebii contended that it is the same claim which the Plaintiff has brought before this court. Mr. Chebii further argues that the Plaintiff's claim is statute barred because he has averred in Paragraph 7 and 13 of the statement of claim that he has been deprived the use of the suit land since 1985. Lastly, Mr. Chebii argues that this suit offends the provisions of Section 34 of the Civil Procedure Act. He contends that he Plaintiff should have moved the court for eviction orders in Kitale Senior Principal Magistrate Land Case No. 34 of 2001. He relied on the decision in Civil Case No. 663 of 2007 between Priscilla Njeri Echaria vs Peter Mburu Echaria.

The preliminary objection was opposed by Mr. Gatune for the Plaintiff who argued that the plea of *res judicata* does not lie as the Defendants should have brought a substantive application where proceedings should have been annexed to enable the court to determine whether the present case is *res judicata*. On the issue of this suit being statute barred, Mr. Gatune argued that title to the suit land was issued in favour of the Plaintiff in 2009 pursuant to orders given in a case filed in 2001. This suit was filed in 2010 and therefore is not statute barred.

I have considered the preliminary objection and find that the same cannot be sustained on any of the three grounds set out in the notice. Firstly, the Defendants have not shown that the issues herein were the same issues which were in the former suit i.e. Land Case No. 34 of 2001 and that they were being litigated by the same parties and that all issues in question were finally and conclusively determined. The issue of *res judicata* cannot be determined without the party who pleads it putting facts to show it before the court. In the present case, Mr. Chebii has merely stated that in the former suit, the Plaintiff was seeking one acre and in the present suit, he is also seeking one acre. The court did not have the benefit of looking at the proceedings in the former suit so as to determine whether the issues therein were finally and conclusively determined by a competent court. This is because there were no proceedings attached from the former suit. Secondly, this suit is not time barred. There were orders given in Land Case No. 34 of 2001 which resulted in the Plaintiff being registered as owner of the suit land. The suit herein was filed in 2010. The cause of action arose in 2001 when the court ordered the land transferred into the Plaintiff's name. The Plaintiff would not have started the process of eviction on any earlier date than 2001 when judgment was given in his favour. Thirdly, this suit does not offend Section 34 of the Civil Procedure Act. In the 2001 case, the case was between the Plaintiff and the 1st Defendant. In the present case, the case is not only against the Defendant but also on three others. It cannot therefore be said that this case is between the same parties as was in the 2001. The provisions of Section 34 of the Civil Procedure Act do not therefore apply. The upshot of this is that I find that the preliminary objection lacks merit. The same is hereby dismissed with costs to the Plaintiff.

It is so ordered.

Dated, signed and delivered in Open Court on this 20th day of May, 2013.

E. OBAGA
JUDGE

In the presence of 1st Defendant.

Court Clerk: Joan.

E. OBAGA
JUDGE
20/05/2013