



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 59 OF 2012. (OS)

JOHN KILEI NDIEMA & 26 OTHERS :::::::::::::::::::: PLAINTIFFS.

VERSUS

MATISI CO-OP. SOCIETY LTD. :::::::::::::::::::: DEFENDANT.

R U L I N G.

The defendant in this case brought an application against the defendants praying for an order that the suit herein be dismissed with costs for being res-judicata. The applicant contends that it is the registered proprietor of land parcel known as Kiminini/Kinyoro Block 3/Matise/735 measuring 0.613 hectares. In the year 2000 the applicant filed Kitale HCCC No. 45/2000 against 14 defendants. The said defendants filed a defence in the suit and after a full hearing, the High Court entered judgment in favour of the applicant. There has never been any appeal or application for review of the said judgment. The High Court in that case issued an order of eviction against the defendants from the applicant's land though that decree has not been executed.

The plaintiffs moved to court in this suit claiming that they have acquired the same land which was the subject of Kitale HCCC No. 45 of 2000 by way of adverse possession. The applicant contends that the issues in this case were substantially in issue in Kitale HCCC No. 45 of 2000 and that since HCCC No. 45 of 2000 had been finally dealt with, the filing of the present suit is res-judicata and ought be dismissed.

The plaintiff/respondents opposed the application based on the replying affidavit sworn by Peter Simiyu on behalf of his co-respondents. The respondents contend that they have been residing on the suit property for periods ranging from 1974 to 1997 and that they were not parties to HCCC No. 45 of 2000 and are not related to any of the 14 defendants in the former suit. They contend that they only learnt of the former suit recently and as such their suit against the applicant is not res-judicata and should not be dismissed.

I have considered the application by the applicant as well as the response by the respondents. There is no contention that the subject matter in HCCC No. 45 of 2000 and in the present suit is property known as LR. No. Kiminini/Kinyoro Block 3/Matise/735. The plaintiff in the former suit is the defendant in the present suit. The 14 defendants in the former suit are not the same as the plaintiffs in the present suit. The question which then arises for determination is whether the present suit is res-judicata. The doctrine of res-judicata is meant to avoid a multiplicity of suits being filed arising from the same subject matter and involving same parties or parties through whom they are litigating. The doctrine also brings in people who are litigating for a common interest.

In the former suit, the applicant who was the plaintiff had brought the suit against the 14 defendants seeking orders of eviction. The defendants in that suit filed a defence in which they were contending that they had lived on the land from as early as 1972 and that the 12 years limitation period had barred the

applicant from evicting them. The case was heard and judgment given infavour of the applicant ordering eviction of all the defendants from the suit land. In the present suit, the plaintiff/respondents are contending that they have been on the land from as long ago as 1974 and that they have acquired the land by way of adverse possession. Though the plaintiff/respondents in this suit were not named in the former suit, it is clear that the issue was ownership by virtue of long stay on the land. This is common in both the former suit and the present suit. The issue of ownership of the suit land has been determined and it cannot be allowed to be re-opened in the present suit.

Explanation number 6 to Section 7 of the Civil Procedure Act provides as follows:-

“Where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for purposes of this section, be deemed to claim under the persons so litigating”.

In the former suit, the defendants were contending that they had lived on the land for long periods and that they should be let to continue doing so. In the present suit, the plaintiff/respondents are also claiming that they have been on the land for long. There have been proceedings in suit arising out of an application for injunction by the present respondents. It was contended in those proceedings that the present suit was filed at the instigation of the defendants in the former suit. In a ruling in which the judge granted injunction to the respondents herein, the judge said that the present respondents may have been tenants of squatters who were the subject of eviction orders in HCCC No. 45 of 2000 but went ahead to hold that as they were not named in the suit i.e. HCCC No. 45 of 2000 that cannot affect the prayers they were seeking for injunction in the present suit. It is therefore clear that the defendants in the former suit were litigating on the same issues and they had a common interest with the present respondents. The matters in the former suit are substantially the same in the present suit.

There was an argument by the counsel for the respondents that the matters which are being raised in the present application were dealt with by Justice Karanja in a ruling delivered on 16/10/2012. I have gone through the said ruling and find nowhere where the judge addressed himself to the matters being raised in this application. The respondents herein seem to take comfort in the fact that since they were not named in the former suit, the applicant had thereby conceded to their claim. This is expressly stated so in paragraph 59 of the replying affidavit. If courts were to take such kind of reasoning, courts will be inundated by suits filed one after the other. This is why the doctrine of res-judicata was amplified through explanations to Section 7 of the Civil Procedure Act. I find that the suit herein is res-judicata, the issue of ownership having been determined by a competent court. Eviction orders had been issued against all those who were on the suit land. The respondents cannot merely claim that since they were not named, their suit can stand the plea of res-judicata. The applicant's application is hereby allowed. The plaintiffs suit is hereby dismissed with costs to the defendant/applicant.

It is so ordered.

[Dated, signed and delivered in open court on this 1st day of August, 2013.]

E. OBAGA.

JUDGE.

In the present of M/s. Munialo for applicant.

Court Clerk:- Rumaita.

E. OBAGA.

JUDGE.

1/8/2013.