REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Civil Case 87 of 2007

PETER NDUNGUNYA OLE SONO.....1ST PLAINTIFF
MUSURI OLE RATIA.....2ND PLAINTIFF

ERIONKA OLE ROTIKEN (suing on their own behalfand on behalf of OL-JORAI COMMUNITY MEMBERS).....3RD PLAINTIFF

VERSUS

LANDS LIMITED.....1ST DEFENDANT
SOLAI RUYOBEI FARM LTD.....2ND DEFENDANT

RULING

This Ruling relates to an application by way of a Notice of Motion dated 14th June, 2011 in which the 2nd Defendant seeks but two orders -
That this suit is res judicata,
That costs of this suit be provided for.
The application is premised upon the grounds on the face thereof, and the Supporting Affidavit of Richard Kipkoech Bundotich sworn on 14th June, 2011.
It is opposed by the Plaintiff\'s Grounds of Opposition dated 29th May 2012 and
filed on 30th May 2012.
The Motion was urged before me on 4th June 2012, for the applicants, Mr. Kipkenei argued that there was a Nakuru H.C.C.C. No. 22 of 2004 between the same plaintiffs lead by Peter Ndungunya Ole Sono and others (suing on behalf of the Ol Jorai Community Members) and that the suit was dismissed for want of prosecution on 22-03-2006, again upon the 2nd Defendant\'s application, and that the plaintiffs were ordered to pay, and paid costs in the sum of Ksh 150,000/= and that in dismissal of that suit the applicants had complied with the requirements of Order 16, now Order 17 of the Civil Procedure Rules, and that under Section 8 of the Civil Procedure Act, the Plaintiffs are precluded from filing a similar suit.

Counsel also argued that the plaintiffs had been given leave to file suit in HCCC 22 of 2004 and that leave was limited under the name of Ol Jorai Community, and that the second suit is being used to disturb the 2nd Defendant who has paid Shs 24 million to the 1st Defendant has no further interest in the matter.

On the Grounds of Opposition Mr. Kipkenei argued that if the plaintiffs in the former suit were unhappy or aggrieved with the dismissal of the suit, they should have filed an appeal not filed a fresh suit.

The applicant also, contends that it took over the suit land in consideration of giving up other land, and that the 1st Defendant has no interest in the land and has been joined in the suit to make it look as if it is a new suit, and it is not fair to litigate continuously, and sought that the orders be granted.

Miss Mpaka learned counsel for the plaintiffs relied upon the Grounds of Opposition argued that -
(1) Nakuru HCCC No. 24 of 2004 was dismissed for want of prosecution and the matters in issue were not expressly decided by the court;
(2) the 2nd Defendant is guilty of latches and in-ordinate delay as the present suit was filed way back in 2007;
(3) the application is brought in bad faith and as an afterthought and is not justifiable,
(4) the application seeks to circumvent the process of justice by preventing the court from determining ownership of the suit land,
(5) the 2nd Defendant having averred that it has already sold the land to a third party who are not parties to the suit has no beneficial interest in the suit land to prosecute the application herein.

In reply to counsel for the plaintiff\'s submissions Mr. Kipkenei, learned counsel for the 2nd

Defendant/Applicant submitted that the law was clear, where a suit is dismissed for want of prosecution, the remedy is to apply for setting aside and not to file a fresh suit, that the plaintiffs are bound by the doctrine of res judicata.

I have considered the rival submissions. The doctrine of res judicata is premised upon the principles set out in section 7 of the Civil Procedure Act

"7. No court shall try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

It is noted from explanation (1) to the said section – that expression "former suit" means" - a suit which has been decided before the suit in question whether or not it was instituted before it."

It is also noted for the purpose of this Ruling explanation (6) -

"where persons litigate bona fide 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 the purposes of this section, be deemed to claim under the persons so litigating."

The questions to answer in this application are firstly, if there was a former suit in this matter, secondly, what was the issue in that former suit and thirdly, who were the parties in that former suit? Fourthly was that suit determined!

There is common ground that there was a former suit, Nakuru HCCC No. 24 of 2004. It is also common ground that the former suit concerned the same suit land. Thirdly it was between the same plaintiffs, and the 2nd Defendant. The 1st Defendant is a former owner of the suit land – who sold the suit land to the 2nd Defendant and had no further interest in the lands sold, and was properly not enjoined in the former suit.

Fourthly, that former suit (HCCC 22 of 2004) was determined pursuant to an application by way of a Chamber Summons under Order VI Rule 13(a) (for disclosing no reasonable cause of action against the Defendant (2nd Defendant in this suit), and Order XVI rule 5 of the Civil Procedure Rules (for non-prosecution). It could not have been dismissed under Order XVI rule (6) as the suit was less than three years, in fact it was about one year old having been filed on 20th February 2004, when dismissed.

What the plaintiffs ought to have done under those circumstances was to file an application to set aside the orders dismissing their suit. They did not do so. They bid their time, and about two years later (after dismissal of their first suit), they brought another suit, adding Lands Limited as a 1st Defendant and the 2nd Defendant (which was the sole defendant in the former suit) as Defendant. The question is whether the claim is between the same parties on the same issue and whether that issue was determined in the former suit, and is therefore res judicata.

"Res judicata" means that an issue has been definitely settled by judicial decision. According to Blacks Law Dictionary, 8th Edn. res judicata is -

"an affirmative defence barring the same parties from citing a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and could have been – but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of the same parties, or parties in privity with the original parties."

Having examined the proceedings in the former suit (HCCC 22 of 2004), and in this suit, I am satisfied that both suits were representative suits between Ol\' Jorai Community (represented by the same ex councillor Peter L. Ndungunya Ole Sono and his friends), (in HCCC 22 of 2004) and the same Peter L. Ndungunya Ole Sono and a new coterie of colleagues in this suit (HCCC 87 of 2007). The claim is also substantially over the suit land LR 9581 GILGIL DIVISION.

Firstly, in HCCC 22 OF 2004 the plaintiff\'s claim was for -

"a permanent injunction to restrain the Defendant and/or its agents or servants or employees and/or representatives from entering and or resurveying and/or transferring and/or evicting or in any manner whatsoever interfering with the plaintiff\'s possession, occupation, residence and ownership of land reference number 9581 GILGIL DIVISION."

In this suit (HCCC 87 of 2007) the plaintiffs\' claim is for inter alia -

(a) A declaration that LR No. 9581 now sub-divided into LR NO. 20229/1 and LR NO. 20229/2 belong to the plaintiffs herein and Ol\' Jorai Community and the title held by the 1st Defendant was determined by operation of law and that the 1st Defendant had no good title to pass to the 2nd Defendant in respect of

the said land and the Certificate of Title issued in respect of LR No. 20229/1 to the 2nd Defendant herein ought to be cancelled forthwith,

(b) a perpetual injunction to issue to restrain the 2nd Defendant by itself its agents and/or servants from trespassing, surveying, selling, disposing, dealing and/or interfering with the plaintiffs\' quiet possession of LR NO. 9581 now known as LR No. 20229/1 in any manner whatsoever.

Several conclusions may be drawn from the above claims -

Firstly, that the plaintiffs sought an order of permanent injunction in the former suit (HCCC No. 22 of 2004).

Secondly, the plaintiffs seek an order of perpetual injunction in the second suit; and

Thirdly, a declaration that LR No. 9581 now sub-divided into LR No. 20229/1 and LR No. 20229/2 belong to the Plaintiffs herein and Ol\' Jorai Community and title held by the 1st Defendant was determined by operation of law, and that the 1st Defendant had no good title to pass to the 2nd Defendant in respect of the said land and the Certificate of Title issued in respect of LR No. 20229/1 to the 2nd Defendant herein ought to be cancelled forthwith.

Although the two orders of perpetual/permanent injunction sought in the latter and former suit are similar in nature and can only be granted after a full hearing, the order of a declaration that the 1st Defendant\'s title was determined by operation of law and that the 1st Defendant had no good title to pass to the 2nd Defendant in respect of the suit land, evokes the Maasai Agreements of 1904 and 1911 with the British colonisers, and consequently raises what I consider to be a cardinal constitutional issue, whether under Article 40(6) of the Constitution of the Second Republic a non-state party, Ol\' Jorai Community or any other person, can be allowed, or has the capacity, to question the post-colonial alienation of lands, they consider to be their ancestral lands. I think this is one issue that need to be fully ventilated.

For those reasons, I find and hold that the suit herein is not res judicata.

I dismiss the application herein and direct counsel to set down the suit for hearing and determination on its merits (if any).

Costs shall be in the cause.

Dated, signed and delivered at Nakuru this 31st day of July, 2012
J. ANYARA EMUKULE
JUDGE