



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 123 OF 2009

SAMWEL M. CHUMO & 53 OTHERS.....PLAINTIFFS
VERSUS
MUKUYUINI FARMERS CO. LTD.....1ST DEFENDANT
THE NAROK SOUTH D. O.....2ND DEFENDANT
THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

The 1st defendant's counsel has filed a notice of preliminary objection which is very poorly drafted but which I understand to be seeking that this court declares that this suit is *res judicata*.

Arguing the application, counsel for the 1st defendant submitted that the subject matter in this suit was the subject of litigation in Nakuru H.C. Civil Appeal; No.11 of 2001 which conclusively determined the issues in this suit; that the land, the subject of the said litigation has not changed, except that the group ranch has been dissolved. Counsel submitted that change of entity cannot affect the facts. He cited in support of this, **Sande Investments Limited & others Vs. Kenya Commercial Bank Limited & others**, H.C.C.No.167 of 2004.

In response, counsel for the plaintiff's submitted that the objection was premature and does not amount to a preliminary objection as the court will be compelled to peruse H.C.C.A.No.11/2001 to ascertain facts; that the group ranch having been dissolved and titles issued to the plaintiffs, the parties in the present suit are not the same as those in H.C.C.A.No.11.2001; that H.C.C.A.No.11/2001 was not heard and determined. It is trite learning that preliminary objection must relate only to pure points of law which if argued successfully may dispose of the suit.

It is appoint which is argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained. See **Mukisa Biscuits Manufacturing Co. Ltd. Vs. West End Distributors Ltd** (1969) EA 696.

The issue of *res judicata*, raised in this notice of preliminary objection is clearly a pure point of law which if successfully argued is capable of disposing of the suit. However, the facts pleaded by the 1st defendant in support of the objection are contested with the plaintiffs maintaining the parties in this suit are different from those in H.C.C.A.No.11 of 2001; that the suit property (properties) are distinct; that H.C.C.A.No.11 of 2001 was not determined on merit. **Section 7** of the **Civil Procedure Act** provides that-

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

I have already noted that a preliminary objection does not entail ascertainment of facts. As framed and argued, the point taken has compelled me to call for and peruse H.C.C.A.No.11 of 2001. I have noted that it was an appeal from the decision of the Rift Valley Provincial Land Disputes Appeals Committee, where the appellant was Enoosokon Group Ranch against Mukuyuini Farmers Co. Ltd. (the 1st defendant).

The dispute related to the following parcels of land – plot Nos.:

(i) CIS/MARA/OLOLUNGA 110 (3138-3409),

- (ii) CIS/MARA/OLOLUNGA/198 and
- (iii) 157.

I have also confirmed from that file that on application by the 1st respondent, the appeal was dismissed on 12th May, 2005 for want of prosecution. Whereas the suit property in this matter, CIS/MARA/ OLOLUNGA 110 was the subject matter in H.C.C.A.NO.11 of 2001, there is no nexus between the 54 plaintiffs herein, save for the 1st plaintiff, and H.C.C.A.No.11 of 2001. The 1st plaintiff has sworn affidavits in H.C.C.A.No.11 of 2001 as the chairman of Enoosokon

Group Ranch. A group ranch through its group representatives have powers to sue and be sued on their corporate name. See **section 8(I) the Land (Group Representatives) Act – Cap 287**. It has been averred without being rebutted that the group ranch was dissolved in 1991 way before H.C.C.A. No.11 of 2001 was filed and that in 1996 the members (the plaintiffs) were issued with individual titles.

I have also stated that the appeal was not heard on merit as it was dismissed for want to prosecution. It is clear from the matters stated in the preceding paragraphs that there are issues that are disputed which can only be determined at the trial and H.C.C.A. No.11 of 2001 having not been heard and determined cannot be a basis for the invocation of the doctrine of *res judicata*.

The objection is overruled with costs to the plaintiff.

Dated, Signed and Delivered at Nakuru this 26th day of February, 2010.

W. OUKO
JUDGE