



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 25 of 2008

JAMLECK MURIITHI KITHECE.....PLAINTIFF

VERSUS

SAMSON MBUI OBADIAH.....DEFENDANT

RULING

Samson Mbui Obadia was the plaintiff in Kerugoya SRM CC No. 257/2007. He had sued the Defendant Jamleck Muriithi Kithece. In the present suit, the Rules are reversed and Jamleck Muriithi Kithece is now the plaintiff and the defendant herein is Samson Mbui Obadia. The parties in both suits are therefore the same. The subject matter in Kerugoya SRMCC No. 257/2007 and the present suit are the same i.e land parcels No. **BARAGWI/RAIMU/1500 and 1509**. There is only one prayer. In Kerugoya SRM No.257/2007 which is;

“ An order for removal of the restriction lodged

over L.R. No. BARAGWI/RAIMU/1500 and 1509.

In the present suit, there are 2 prayers i.e

- (a) A declaration that the transfer of land parcels No. BARAGWI/RAIMU/1500 and BARAGWI/RAIMU 1509 from the name of the plaintiff to that of the defendant was fraudulent, illegal and unprocedural and void, AND an order canceling the names of the Defendant from the Register of Land parcel number BARAGWE/RAIMU/1500 and BARAGWI/RAIMU/1509***
- (b) An order restraining the defendant their servants, agents of anybody claiming through them from trespassing, alienating, selling disposing or in any way interfering with the land parcel number BARAGWI/RAIMU/1500 and BARAGWI/RAIMU/1509.***

Counsel for the defendant raise a preliminary objection claiming that this suit is Res Judicata and that the same is vexatious and an abuse of the court process and it calls for dismissal with costs. His contention is that the parties herein are the same as in the Kerugoya suit; the subject matter is the same and the prayers are the same.

Ms Wairimu for the plaintiff herein filed grounds of opposition stating that the issues for determination before this court were never the subject of SRM CC No. 257/2007 and that the issues raised herein were never raised nor determined in SRM CC No. 257 of 2007.

I have considered the preliminary objection along with the grounds of opposition. I have earlier on set down the prayers sought in both suits. Is this matter then Res Judicata? It is not disputed that the parties are the same, and the subject matter is the same. It will also be noted that in his defence, the defendant in SRM 257/2007 outlined the history of the parcels in question and the transactions leading to the restriction being registered against the Titles. He was claiming that the transfer of the parcels to the defendant herein was illegal (see paragraph 7 of the said defence;) and that there was no Land Control Board attended in his presence. He was therefore in not so many words alleging fraud. The issue of the Land Control Board consent was therefore raised (see paragraph 8 of the defence) contrary to what counsel for the plaintiff herein has stated in ground 3 of the grounds of opposition.

Indeed in his Judgment, the magistrate stated ***“The defendant did plead fraud. He did not prove it.....”***

From this finding, it is clear that the magistrate had considered the issue of fraud which had been raised by the defendant in his defence and found it not proved. The doctrine of Res Judicata therefore enstops him from raising the issue of fraud or Land Control Board consent in this suit. Section 7 of the Civil Procedure Act- explanation No. 4 provides.

***“ Any matter which might and ought to have been
made ground of defence or attack in such former
suit shall be deemed to have been a matter
directly and substantially in issue in such suit.”***

In this case, any matter or issue whatsoever that ought to have been raised in Kerugoya SRM CC No. 257/2007 but was not raised is deemed to have been a matter directly in issue and cannot be raised in this suit.

Indeed, the issue of fraud and the Land Control Board consent were directly raised in that suit. The defendant therein who was then acting in person may have been unable to articulate his defence more clearly – but that does not entitle him to file another suit raising the same issues. That is contrary to the provisions of Section 7 of the Civil Procedure Act, and an attempt to circumvent the legal process. I must say that I sympathize with the plaintiff herein because those issues were not comprehensively addressed by the learned trial magistrate. The only recourse open to the plaintiff was nonetheless to file an appeal against that Judgment and not to bring this suit afresh hoping to get a second

chance to prove his case. Unfortunately, the law does not allow him such a cause of action. Having defended the suit before the subordinate court and failed, he cannot now wear the plaintiff's hat and bring the same issues here.

The preliminary objection has merit. I allow the same and dismiss this suit for being Res Judicata. I also award costs of the suit to the defendant herein.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 18th day of Feb 2010

In presence of:- Mr. Igati for defendant
Applicant – present
N/A for Respondent