



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 14 of 2009

RICHARD OMARI NYAMATURA.....PLAINTIFF

-VERSUS-

DANIEL OMBACHI MOGENI.....DEFENDANT

RULING

By an amended plaint dated 3rd February, 2009 and filed in court on the same date, Richard Omari Nyamatura, “*the plaintiff*” sought from Daniel Ombachi Omogeni “*the defendant*” a permanent injunction restraining the defendant, his agents, servants or employees from interfering with West Mugirango/Siamani/2257 “*the suit premises*” A declaration that the houses or developments on the suit premises were illegally demolished by the defendant; An order authorizing full compensation commensurate with the value of the plaintiff’s demolished houses and or developments; compensation for loss of rent amounting to Kshs. 10,500/= per month commencing 1st October, 2008 and costs of the suit.

The suit was informed by the fact that the plaintiff was allegedly the registered proprietor of the suit premises whereas the defendant was the registered owner of the adjacent land parcel Nos. West Mugirango/Siamini/2256 and 2178. Apparently there had been a dispute earlier between them with regard to the said two parcels of land culminating in the HCCC.NO. 349 of 1996. The High Court ruled in that suit that the plaintiff was the proprietor of land parcel nos.

West Mugirango/Siamani/2178 and 2256 whereas the plaintiff was recognized as the proprietor of the suit premises. That notwithstanding, the defendant had subsequently proceeded to the suit premises and without any scintilla of legal justification, demolished the plaintiff's house thereby occasioning him loss and damage to the tune of Kshs. 4,500,000/=

Upon being served with the summons, the defendant duly entered appearance and filed a defence. It was his defence that the suit was *Res judicata*; that in Kisii HCCC.No.349 of 1996, the court made a finding of fact that the plaintiff had built on land parcel *West Mugirango/Siamani/2256* belonging to the defendant. The defendant was therefore compelled to evict him therefrom. During the eviction due process of the law was observed and hence the plaintiff's averments in the plaint regarding destruction of his property and or developments were untrue.

On 16th February, 2010 the hearing of the suit commenced before me. However before the 1st witness could take the stand, the defendant raised a preliminary objection which is the subject of this ruling. The preliminary objection was in terms of paragraph 2 of his defence. He argued that the suit was improperly before this court as it was *Res judicata*. The parties to this suit were the same parties in KISII HCCC. NO. 349 of 1996 "the earlier suit". The issue in dispute in the earlier suit was the same issue in the current suit. The litigation in both suits was with regard to the same suit premises. The earlier suit was heard by *Mbaluto J* and a decree was issued adopting a surveyor's report which found that the plaintiff was occupying the defendant's land and eviction was subsequently issued. The plaintiff was Dissatisfied with the outcome, hence unsuccessfully made two attempts to appeal against the decree. Both attempts in C.A. No. 35 of 1998 and 373 of 1999 were nibbed in the bud when the two appeals were struck out. *Mr. Nyariki*, learned counsel for the defendant concluded his oral submissions on the preliminary objection by stating that by pursuing the instant suit, the plaintiff was inviting this court indirectly to sit on appeal over this court's earlier decision.

The response by the plaintiff was fast and furious. Through *Mr. Mose*, learned counsel for the plaintiff, he submitted that the plaintiff had since 3rd February, 1989 been the registered proprietor of the suit premises. That though the earlier suit had been heard and concluded, it never involved the suit premises. However midway through his submissions he conceded that the earlier suit involved the same parties. That the surveyor's report was in respect of the two parcels of land. The cause of action however was not the same as in the earlier suit. In executing the court order of eviction the defendant had without any legal justification demolished a house belonging to the

plaintiff. Thus according to *Mose* this was a fresh cause of action based on encroachment which had nothing to do with the earlier suit. Hence the doctrine of *Res judicata* was inapplicable.

I have carefully considered the pleadings herein and those in HCC.NO. 349 of 1996, the respective rival submissions and the law. Under *section 7 of the Civil Procedure Act* *Res judicata* arises under these conditions :-

“No court shall try any suit or issue in which 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 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.”

In the circumstances of this case it is common ground that in KISII HCCC 349 of 1996, the plaintiff therein is the same plaintiff in the instant suit. The same goes for the defendant. His claim in the earlier suit just as in the instant suit was that the defendant without any colour of right or any reason whatsoever had trespassed on to his parcel of land, the suit premises. It is also common ground that just as in the earlier suit, the plaintiff too had sought an injunction and damages just as he has done in this suit. The only addition in the instant suit being a claim for declaration and mesne profits.

Taking all the foregoing into account can it be claimed that this suit is not *res judicata*? Counsel for the plaintiff in his oral submissions conceded that the surveyor's report was in respect of the suit premises as well as *West Mugirango/Siamani/2256*. The dispute herein is with regard to the same parcels of land. Though counsel for the plaintiff did submit that the earlier case was not in respect of the suit premises, he was clearly and deliberately misleading the court. Subsequently somewhat he changed his position when he conceded that the parties who litigated in the earlier suit are the same in the instant suit and that the suit premises that they are litigating upon are the same. He also conceded that the court in the earlier suit found that the *West Mugirango/Siamani/2256* belonged to the defendant whereas the suit premises belonged to the plaintiff. His point of departure however was that in executing the court order of eviction, the defendant demolished his house, hence this was a new cause of action not contemplated by earlier suit.

Contrary to what the plaintiff's counsel has submitted, there is no way that the demolition of the plaintiff's house pursuant to a court decree can be termed as a new cause of action. If the plaintiff felt that in executing the eviction order, the defendant went beyond the terms of the same, his remedy lay in moving the court in the earlier suit for appropriate orders rather than instigating this fresh suit. The surveyor's report that subsequently formed the basis of the decree in the earlier suit was categorical that:

“(1) -----parcel No. 2257 is neither occupied by the plaintiff nor the defendant and it measures 0.134 ha approximately.....”

2.) Parcel no. 2256 is occupied by both the defendant and the plaintiff. The plaintiff occupies the area----- measures 0.03 Ha approximately and has constructed a permanent house block there. The rest of the area measuring about 0.317 Ha is occupied by the defendant”

From the foregoing it is quite clear that the plaintiff was in occupation of 0.03Ha of the defendant's parcel of land as determined in HCCC.NO. 349 of 1996. He cannot now be heard to say that what was destroyed was in his suit premises. The surveyor's report was adopted as a judgment of the court pursuant to which a decree in these terms was issued:-

“(a) that judgment is entered in terms of the surveyor's report that the plaintiff do vacate the defendant's land parcel number West Mugirango/Siamani/2256 which he is now occupying forthwith.....”.

The record shows that the plaintiff was not happy with the decision and twice attempted to appeal but without success. That being the case, the issue as to who owns what with regard to the two parcels of land was settled. It cannot be reopened again. By instituting this suit, the plaintiff really wants to re-canvass the same issue that is now clearly settled.

The alleged damage to his property was pursuant to a court decree. Documents on record show that the plaintiff was served with a Notice to Show Cause why he could not voluntarily vacate *West Mugirango/Siamani/2256* failing which he could be evicted. On 10th November, 2008 the Notice to Show Cause came up for hearing and though the plaintiff had been served he failed to appear. Accordingly an order for his eviction was issued in terms that the plaintiff shall be

evicted from the suit premises together with the illegal structures constructed thereon. On the basis of the foregoing it cannot lie in the mouth of the plaintiff to claim that the defendant without any scintilla or legal justification proceeded to demolish his house. That house was on the defendant's land and was the subject of the eviction order issued in the earlier suit. It is also not lost on me that the plaintiff was thereafter granted limited liberty to enter into the parcel of land from which he had been evicted to remove or salvage any of his property within 21 days from the date thereof going by the consent letter dated 28th November, 2008. So when the plaintiff turns around to claim that the demolition was illegal for want of a valid court order, he is being less than candid.

The upshot of all the foregoing is that this suit is *Res judicata* as the dispute herein was directly in issue in the earlier suit and the former suit and the instant suit involved the same parties. Finally the earlier suit was heard and finally determined by a court of competent jurisdiction.

In law any litigation has to come to an end and once a decision has been reached by a competent court cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached if not set aside, can only be challenged on appeal. It cannot be challenged in the same court except perhaps in the case of review. See *Banson Ngugi .V. Francis Kabui Kinyanjui and others C.A.No. 1 of 1986 (UR)*. That is essence of *Res judicata*. Having held that this suit is *Res judicata*, it now falls on me to order that it be struck out on that basis with costs to the defendant. It is so ordered.

Dated, signed and delivered at Kisii this 4th Day of March, 2010.

ASIKE -MAKHANDIA

JUDGE