



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 162 of 2008

AMPANI LEKAKENY.....PLAINTIFF

VERSUS

OLE CHESUSUA KIPUTIT

EMMANUEL OREU KITIARAP

WILLSON KITIARAP CHESUSUA

LEPARAN DICKLACK KITIARAP

JOEL ORAMAT KITIARAP.....DEFENDANTS

RULING

The defendants' application dated 13th February, 2009 seeks to strike out the plaint dated 19th November, 2008 on the grounds that:

- (i) The issues raised in the plaint have been directly and substantially in issue in a former suit namely KISII HCCC.NO.85 OF 2005 KIPTIT OLE CHESUSUA VS AMPANI LEKANENY.**
- (ii) The former suit has been heard and finalized by this court.**
- (iii) The plaintiff herein preferred an appeal to the court of Appeal in the former suit.**
- (iv) This suit is therefore res judicata.**

In Kisii HCCC. No. 85 of 2005 (hereinafter referred to as “**the former suit**”), Kiputit Ole Chosusua, now the first defendant in this case, claimed that he was the registered owner of a parcel of land known as **Transmara/Shartuka/166**, hereinafter after referred to as “**the suit land**”. He claimed that the defendant had invaded the same and prayed for an eviction order against the defendant.

The defendant filed a statement of defence and denied the plaintiff's claim. He stated that the plaintiff had been the registered proprietor of the suit land which was a portion of his (the defendant) land registered as Transmara/Shartuka/943. In paragraph 8 of the defence it was pleaded that:

“8. Consequently the defendant denies that he has trespassed upon and is committing any unlawful acts on the piece of land known as Title No. Transmara /Shartuka /943 otherwise known as

Transmara /Shartuka /166”.

However, for some reasons the statement of defence was struck out. The allegation that the aforesaid two parcels of land are one and the same was not established.

In the former suit, it was established that the first defendant is the registered proprietor of Transmara Shartuka/166 and an eviction order was issued against the plaintiff herein. The plaintiff in this case claims to be the registered proprietor of land known as Transmara/Shartuka/943.

Prima facie, there is evidence to show that these are two different parcels of lands. Transmara/Shartuka/943 measures 22.15 Hectares and is in Registry map sheet No.2

On the other hand, land parcel No. Transmara Shartuka/166 measures 20.64 Hectares and is found in Registry map sheet No. 1. However, the registers in respect of the two parcels of land were opened on the same date.

The connection between the two parcels of land, if at all, has not been established.

Section 7 of the Civil procedure Act defines the concept of **res judicata**. In **UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & OTHERS** Civil Appeal No.36 of 1996, the main ingredients of **res judicata** were set out as follows:

- (a) There must be a previous suit in which the matter was in issue.
- (b) The parties in the former suit must be the same or litigating under the same title as the parties in which the plea is raised.
- (c) The matter in issue must have been heard by a competent court.
- (d) The issue must have been raised once again in a fresh suit.

From the foregoing, it cannot be said that this suit is **res judicata** in view of the decision in Kisii HCCC. NO. 85 OF 2005. Consequently, I dismiss the defendant's application dated 13th February, 2009. The plaintiff shall have costs of the application.

DATED, SIGNED AND DELIVERED at Kisii this 16th day of June, 2009

D.MUSINGA.

JUDGE.