



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 245 of 2005

BENJAMIN KETER.....PLAINTIFF

VERSUS

JOSEPH CHEWEN.....DEFENDANT

RULING

Benjamin Keter the plaintiff herein filed this suit against the defendant seeking for a declaration that there exists a partnership between the plaintiff and the defendant in respect of parcel of land number 10, 14 and 34. He further sought for a declaration that the defendant holds the said parcels of land in trust for the partnership and the same be divided equally between the plaintiff and the defendant. He also sought for an order that monies received from the said land be divided in equal shares.

The defendant filed a defence and denied liability. The defendant further averred that the issue of his partnership with the plaintiff was determined in **Nakuru High Court Civil Case No. 259 of 1978 Joseph Chewen vs. Benjamin Keter.** The defendant therefore averred that the present suit is *res judicata*. Moreover the partnership came to an end many years ago and the plaintiff cannot litigate on a claim which is statute barred.

The defendant raised a preliminary point of law which was argued first and the subject of this ruling.

It was the defendant's case that the present suit is an abuse of the court process and should be struck off. The same issues raised in this suit regarding the dissolution of the partnership and distribution of its assets were determined after a full hearing and a judgment of the court was delivered on 10th May 1994 where the matter was conclusively determined. Counsel further submitted that the plaintiff who was then the defendant in that suit did not file an appeal. If the plaintiff had any claim he should also have filed a counterclaim otherwise he cannot be allowed to litigate his claim in installments.

Moreover the cause of action is said to have arisen in 1964. It is trite law that any claim for recovery of land must be filed within 12 years whilst this suit was filed after 41 years. Counsel therefore urged the court to dismiss the plaintiff's suit while relying on the case of **Willie vs. Michuki and 2 others [2004] 2 KLR** where Kimaru J. while adopting the decision in **Nairobi HCCC No. 1322 of 1993 Caltex Oil Kenya Limited vs. Mohammed Yusaf & others, Bosire J.** (as he was then) held at page 4 of the said ruling that;

“The third and the last issue is one of res judicata. The doctrine is provided for under section 7 of the Civil Procedure Act. For the doctrine to apply three basic conditions must be satisfied. The party relying on it must firstly, show that there was a former suit or proceeding in which the same parties as

in the subsequent suit litigated. Secondly, the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in that former suit.”

On the part of the counsel for the plaintiff, **Mr. Kurgat** submitted that the preliminary objection was without merit. It is premature because there is no evidence before the court to explain the difference between the plots that the plaintiff is claiming and what was declared in the former suit. The plaintiff in this suit was the defendant in the former suit and these are parties who are now litigating under different titles. There is no mandatory requirement for a defendant to file a counterclaim. Counsel further argued that it is only plot No. 34 which was determined in the previous suit and the plaintiff is entitled to claim for the other plots in the present suit. On the submission that this claim is time barred, counsel argued that this suit is a claim under a trust and the Limitation of Actions Act does not apply to properties held in trust, time does not run where a trust is involved. He therefore urged the court to dismiss the preliminary objection.

The principles to bring to bear when determining whether to entertain preliminary objection were stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969]** E.A. 696 where it was held at page 700 E that;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701B it was held that;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

I have taken into consideration the arguments by both the counsel for defendant and the plaintiff. The issue to determine is whether the suit herein is *res judicata*. **Section 7 of the Civil Procedure Act** describes what is *res judicata* as follows:

“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.”

What was in issue in **High Court Civil Case No. 259 of 1978** was the issue of partnership between the same parties in this suit, regarding the ownership of property **Plot No. 34, Plot No. 1067, Plot No. 38 and Plot No. 1131**. These issues were determined by the court and a decree which was issued reads as follows;

“1. That a declaration be and is hereby issued and declared that the defendant holds plot No. 1067, 38 and 1131 as trustee for himself and the plaintiff.

2. That the said trust shall be and is hereby brought to an end.

3. That the said trust properties No. 1067, 38 and 1131 shall be subdivided into two equal parts of each to be owned separately by the defendant and the plaintiff each holding a separate title for his share.

4. That both parties to execute the necessary transfer forms to facilitate the registration of the separate titles failing which there be liberty to apply to either party.

5. That the plaintiff will have costs of the suit.”

The issue of partnership was directly in issue in the above suit and a claim of a *plot No. 34* was specifically determined. In the present suit the plaintiff is also seeking for a determination of the partnership regarding ***plot No. 1014 and 34***. The issue of partnership having been determined I am persuaded that this is the same issue that the plaintiff is re-agitating in the present suit. Under the provisions of **Order 8** of the **Civil Procedure Rules**, a defendant in a suit is supposed to file a counterclaim if indeed he has any claim against the plaintiff so as to enable the court to pronounce a final judgment in the same suit. There is an elaborate procedure set up under the Civil Procedure Rules to avoid a multiplicity of suits and to avoid the abuse of the court process.

I find that if this court were to set out once again to determine the issue of partnership between the plaintiff and defendant that would be against the laid down principles of *res judicata*. In the circumstances I find that the issues raised by the plaintiff in the present suit are directly and substantially the same issues which were raised in the former suit. I accordingly allow the preliminary objection and strike off the plaintiff's suit with costs to the defendant.

It is so ordered.

Ruling read and signed on 25th day of January, 2008

M. KOOME

JUDGE

25/1/2008

Before Koome J.

Mwiti – Court clerk

Ogolla for the plaintiff

Wamasa for the defendant

Ruling read and signed on 25/1/2008.

M. KOOME

JUDGE