



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Civil Case 126 of 2006

KALUME MUMBU DERI

GARAMA DERI CHONDO.....PLAINTIFFS

VERSUS

FUNDI WANJE

OMAR ALI RASSAM.....DEFENDANTS

RULING

Before me is an application by the defendants, Fundi Wanje and Omar Ali Rassam for the main order that the plaintiff's suit be dismissed with costs for being an abuse of the process of the court. The application is brought under Order VI Rule 13 (1) (d) of the Civil Procedure Rules. The main reasons for the application are that the suit is *res judicata* as the issues raised have already been settled by a court of competent jurisdiction. In support of the application the defendants have filed an affidavit sworn by the 2nd defendant.

It is sworn in the affidavit that the 2nd defendant bought the suit property from the 1st defendant and was duly registered as the proprietor thereof. As such registered proprietor, he instituted trespass proceedings against the 2nd plaintiff in Kilifi SRMCCC No. 339 of 2006 which suit was determined by consent in his favour. It is further deponed that the 1st plaintiff took an active role in the Kilifi case and did not at anytime disclose any interest in the suit property. In the premises according to the 2nd defendant this suit is an afterthought and on advise of his counsel he contends that the suit is *res judicata* and an abuse of the process of the court.

The application is opposed and in that regard, there is a replying affidavit sworn by the first plaintiff. The 2nd plaintiff has filed no response to the application. The 1st plaintiff depones that he was not a party to the Kilifi case and that the Kilifi court had no jurisdiction to deal with the matter in dispute. He accordingly swears that the decree that was issued in that case is a nullity and this suit should be determined on merit.

I have considered the application, the affidavits filed and the annexures. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of this matter. The Kilifi SRM decreed as follows by consent that:

“(a) A mandatory injunction be and is hereby issued evicting the defendant by himself, his servants and or agents from the parcel land known as Plot No, KILIFI TOWNSHIP/Block 3/1107 and a further order to demolish the illegal structures and or buildings and or suit property (sic).

(b) A permanent injunction be and is hereby issued restraining the defendant by himself, his servants and or agents from interfering in any way with the plaintiff's land known as Plot No. KILIFI TOWNSHIP/Block 3/1107.

(c) A declaration be and is hereby issued declaring that the said plot No. KILIFI TOWNSHIP/Block 3/1107 is the

property of the plaintiff to the exclusion of all others and a further declaration that the plaintiff is entitled to possession of the said land.

(d) The power of Attorney donated by the defendant to KARUME MUMBU DERI be revoked forthwith.

(e) The defendant confirms that the structure on the suit property is his in consideration of giving vacant possession within thirty (30) days from the date hereof the defendant will be paid by the plaintiff Kshs. 100,000/= payable as follows:-

Kshs, 50,000/= upon recording consent and Kshs. 50,000/= on recording a consent in respect of Mombasa HCCC Case No. 126 of 2006 – Mombasa.

(f) Each party to bear its own costs.”

This suit is in respect of the same land: Kilifi Township/Block 3/1107. The 1st plaintiff Kalume Mumba Deri seeks nullification of the same title or insertion of his name as a joint proprietor and alternatively that the land be valued and the defendants be ordered to pay the 1st plaintiff the assessed value. General damages are also sought. The 2nd plaintiff seeks as against the 1st defendant, ratification of the common boundary as “previously agreed.” His suit as against the 2nd defendant was withdrawn.

It is clear therefore that the question of title to the suit land was settled in the Kilifi case with the consent of the 2nd plaintiff Garama Deri Chondo. It is not surprising therefore that he withdrew this suit as against the 2nd defendant who was the plaintiff in the Kilifi case. The 1st plaintiff, Kalume Mumbu Deri represented the 2nd plaintiff under a power of attorney in the Kilifi case. Indeed an attempt was made to stay the Kilifi Court proceedings without success. Infact the Learned Senior Resident Magistrate specifically held that the suit herein should have been filed in Kilifi Court as the suit property was situated within the local limits of that court’s jurisdiction.

In the end the suit was settled as stated above. The 2nd plaintiff did not appeal against the order refusing stay of proceedings. The 1st plaintiff did not seek to join the proceedings in the Kilifi case. He also did not seek stay of those proceedings in the High Court. Those proceedings are valid unless and until they are set aside by the High Court. Yet the plaintiffs have not set in motion any proceedings to set aside the decree of the Kilifi court.

The doctrine of *res judicata* applies not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but it also applies to situations where either matters which could have been brought in were not brought in or parties who could have been made parties were not joined. That in essence is what Section 7 of the Civil Procedure Act provides. The Section reads as follows:-

“7. 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 other 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.”

AND Explanations (4) and (6) read as follows:-

“4. Any matter which might and ought to have been made a 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.

6. Where persons litigate bona fide in respect of a public right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating.”

The plaintiffs are brothers as can be gleamed from the pleadings and had a common interest in the suit property. The 1st plaintiff could therefore have joined the plaintiff to the Kilifi Suit instead of being the latter’s agent. The 1st defendant Fundi Wanje is the one who sold the suit property to the 2nd defendant. Infact in the defence filed in the Kilifi Court the 1st defendant is specifically alleged to have fraudulently sold a portion of the 2nd plaintiff’s land to the 2nd defendant herein. Yet the 2nd plaintiff did not seek to join him in the suit. The 1st plaintiff is therefore a party who could have been made a party to the Kilifi case.

What the plaintiffs have done in this case is expressly prohibited as Kuloba J. said in Mwangi Ngunu – v – Meshack Mbogo Wambugu [HCCC No. 2340 of 1991](UR):

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he come to a court, then I do not see what use the doctrine *res-judicata* plays.”

From what I have said above, it is clear that I find this suit **res judicata**. Having considered the history of the dispute and the manner in which the plaintiffs have litigated, I am persuaded that these proceedings also amount to abuse of the process of the court. The suit is struck out with costs to the defendants.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:-

Obura H/B for Kariuki for the Respondent.

F. AZANGALALA

JUDGE

20TH MAY 2008