REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 155(OS) of 2001

PHILIP MUREI:.....PLAINTIFF

VERSUS

KIPNGENO A. CHEPKOIMET:.....DEFENDANT

RULING

The defendant **KIPNGENO ARAP CHEPKOMET** has bought this application under Order 7 CAP Order 50 rule 1, Order VA Rule 13 (b), (c) and (d) of Civil Procedure Rules seeking the following orders:-

1. That the suit be dismissed for being res judicata.

2. That in the alternative, the plaintiffs claim be struck out.

3. That the plaintiff bear the costs of the suit.

The applicant deponed, and it was also retaliated by his counsel Mr. Kuloba in his submission, that he bought the land in dispute – LR.NO. NANDI/ITIGO/173 in 1964. In 1968 he rented it to the plaintiff/Respondent for a sum of Shs.300/= per year. In 1977 he issued a Notice to the Respondent to vacate the land. Instead of doing so he filed Eldoret HC.CC.NO.82 of 1977 seeking to be declared as the rightful owner of the land. In 1979 that suit was transferred to lower court and registered as Eldoret/RM.CC.NO. 900 OF 1979. It was deponed and submitted that the said suit was heard on merit and judgement delivered declaring the applicant as the rightful owner of the land. A decree was drawn and an eviction order issued against the respondent/plaintiff. However subsequently the Plaintiff/Respondent filed Eldoret HC.CC.NO.54 OF 1984 (O.S) seeking to be declared owner of the property by way of Adverse possession. The case was referred to arbitration and a decree issued that the plaintiff was entitled to 2 hectares and the Defendant/Applicant to 6.4 Ha. In 1991 the plaintiff yet again filed Eldoret HC.CC.NO. 165 of 1991 claiming ownership of the same land by way of adverse possession. The said suit is still pending. Mr. Kuloba submitted that this case is Res judicata as it was determined conclusively in Eldoret RM. CC. No.900 of 1979. The other suits too, filed after the conclusion of that case are res judicata. the plaintiff has now two cases pending. He filled this case while Eldoret HC.CC.No.165 of 1991 is still pending. That is abuse of courts process and as such this case should be struck out.

In his replying affidavit the respondent denied the applicants' allegation. While conceding there was a suit Eldoret RM.CC.No.900 of 1979 he deponed that the said suit was never heard or concluded. He said

the dispute was referred to arbitration by a Panel of Elders but they failed to file award in time. He was later informed by the presiding magistrate that it had been dismissed. There was no judgement or decree.

Further it was deponed by the respondent and submitted by counsel that there was no decree in Eldoret HC.CC.NO. 54 OF 1984 as the same was set aside on 7TH December,1988.

As for Eldoret H.CC.NO. 165 OF 1991 he said there was nothing wrong in filing another suit. That suit was started by way of plaint and later this suit was filed by way of originating summons due to the nature of the claim. Thus there is no abuse of courts process.

I have carefully considered the application, affidavits and submissions. Section 7 of Civil Procedure Act is very clear. It provides;-

" **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."**

It is clear from those provisions that if a court has decided an issue between parties conclusively then neither of them would be allowed to file another suit over the same issues. In this case court was told that the issue in this case was determined and concluded vide Eldoret RM. CC. No. 900 of 1979 and as such this case is res judicata. If this was so I will find no difficult in holding the same. However that issue does not seem to be clear. Indeed there is no dispute that suit Eldoret RM. CC. No.900 of 1979 did exist and was between the parties in this case. What was not clearly shown to the court is that the issues in that suit are the same as those in this one and indeed the court determined those issues conclusively. The only evidence adduced towards that was exh "**KACI"** allegedly a warrant of removal of the applicant from the suit land. The warrant is not certified by the court as a true copy of the original and its aunthencity had been challenged by the respondent in his replying affidavit. There was no answer to that challenge. The pleadings in that suit, to show what the claim was, were not availed neither was the subsequent judgement. Mr. Kuloba counsel for the applicant said from the bar that they could not be traced. However there was no letter exhibited to show that they requested for the same from the court and what the response of the court was. It is the court who should have confirmed that the documents or the file could not be traced and not the applicant or his counsel. the exhibit warrant of removal on itself cannot be proof that the issues in that case were the same as those in this court and if so what the judgement was. In short, though the applicant has raised a good point, it is nevertheless not supported by any good evidence.

The respondent and their counsel raised a very potent question. If indeed the issues were conclusively dealt with in Eldoret RM.CC. No. 900 OF 1979 why did the applicant participate in the subsequent suits without raising the issue of res judicate? The applicant did not attempt to answer that question and that failure leaves doubts in my mind as to whether indeed Eldoret RM.CC.NO.900 of 1979 was actually concluded. These doubts could only be disparate by evidence to the contrary and sadly there was no such evidence. Thus I am unable to find for the applicant that this case is Res judicata as prayed.

Applicant had an alternative prayer seeking court to strike out the plaintiffs claim. I presume this prayer is based on what is shown on his application as order VIA Rule 13(1) (b) (c) and (d) CPR. I have looked at orders VIA CPR and it does not have any rule as 13(1) (b) (c) and (d). Infact order VIA deals with amendments of pleadings only and the last rule in that order is rule 8. Perhaps the applicant meant Order V rule 13 (a) (b), (c) and (d) CPR but his counsel never told the court so. However even assuming that was the rule he came under the fact that the respondent has two suits in court at the same time over the same subject matter is not a good reason enough to summarily dismiss the suit. The respondent explained that he found that he could not have brought his claim by way of a plaint but an originating summons. What he should have done was first to withdraw the other suit before filing this but failure to do so does not automatically lead to striking out of this suit. He has come to court and the court should not shut him out without hearing him. He should elect to withdraw the other suit. If he does not and fails

to take steps to prosecute it the applicant can always apply for its dismissal for non – prosecution.

From the above therefore I find the applicants application has no merit and the same is dismissed.

Costs in the cause.

Dated and Delivered at Eldoret this 21st day of February,2007.

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF:-

C/C - David

for Applicant

for Respondent