



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 50 of 2002

PETER KINYARI KIHUMBA..... PLAINTIFF/RESPONDENT

VERSUS

GLADYS WANJIRU MIGWI ...1ST DEFENDANT/APPLICANT

JAMES KIHUMBA MIGWI 2ND DEFENDANT/APPLICANT

RULING

1. The Application dated 24/10/2004 is brought under S.3A, and S.63 (e) of the Civil Procedure Act, Order VI Rule 13 (i) (d) and order VII Rule 1(i) of the Civil Procedure Rules. The substantive prayer is that the Plaint dated 24.6.2004 be struck out. The reasons so far as I can gather are that;

2. Firstly, the suit is said to be res - judicata because all the issues now being raised were adjudicated upon in Murang'a SPMCC NO.570/2001 and the parties herein were also the parties there.

3. Secondly, that the suit relates to a claim that the Defendants have trespassed onto the Plaintiff's land and therefore the correct forum for adjudication of the dispute should be the Land Disputes Tribunal of the relevant area.

4. Thirdly, that the suit is an abuse of court process and contravenes Order VII Rule 1(i) (e) in that there is failure to acknowledge and disclose that there have been previous proceedings between the parties herein.

5. Counsel for the Applicant made reference to a number of authorities in support of his client's case. Not out of disrespect but for the sake of brevity I shall refer to them with due relevance at the concluding stages of this Ruling.

6. The Plaintiff who is the Respondent filed a Replying Affidavit and Grounds of Opposition in which he states that SPMCC NO. 570/2001 cannot be a basis for res – judicata to be invoked as the same was withdrawn and was not therefore determined on its merits. Counsel for the Plaintiff therefore argued that S.7 of the Civil Procedure Act if properly applied would vindicate his client's position.

7. As regards the argument that this court has no jurisdiction in view of S.3(1) of the Land Disputes Tribunals Act, Counsel argued that the Constitution of Kenya gives the High Court unlimited original jurisdiction in all Civil matters and S.3(1) aforesaid cannot oust that jurisdiction.

8. Counsel for the Plaintiff also brushes away the arguments on Order VII Rule 1(i) (e) by the simple reason that in his view, the nature of the dispute entitles access to the High Court irrespective of the pendency of, or prior existence of suits in other courts.

9. I have perused the Plaint filed on 24/6/2002. At paragraph 4 thereof, the Plaintiff avers that he is the registered proprietor of land known as Loc.14/Kairo/135 and at paragraph 5 thereof, he states that “*on diverse dates starting on 5/7/2001, or thereabouts the 1st and 2nd Defendants without the consent of the Plaintiff have entered the parcel of land and heaped building material thereon and both intend to build dwelling houses thereon.*”

10. At paragraph 6 he seeks orders that the Defendants do remove the building materials and pay him damages for illegal entry. The twin prayers are repeated at the end of the Plaint.

11. I also note that in Murang’a SPMCC NO. 570/2001 the parties are exactly the same as in this suit but I have only the proceedings to tell me that as no pleading in it has been brought forth by any party. I note however that the final order in that case is in the following terms;-

“The court has perused the pleadings herein and the court finds [that] the issues raised are on trespass and the court has no jurisdiction, the case should be heard by the Land Tribunal, and it appears it has already been heard there. If the plaintiff’s satisfied (sic) then should go (sic) for relief to the High Court. Each party to meet its own costs. Case dismissed.”

12. I have also had sight of the proceedings in Mathioya Land Disputes Tribunal in a case where the Defendants herein were the Plaintiffs and the Plaintiff was the Defendant. The dispute was fully heard but the Plaintiff herein is recorded as having “*completely refused to appear*” although served with summons to appear on five occasions i.e. 21/8/2001, 21/9/2001, 12/10/2001, 19/10/2001, 23/11/2001. The award which was delivered on 23/11/2001 ordered that the suit land be sub-divided into four (4) portions of similar size for three (3) of them i.e. 0.35 acres and 1.05 acres in respect of one (1) of them.

13. On 21/6/2002, the award was recorded as a Judgment of the RM’s court in Kangema L.D.T. Case No. 3 of 2002. I see no challenge either to the award nor the Judgment flowing from it.

14. I must warn myself that when a party seeks striking out of a pleading, the court ought to be careful not to try the matter at that stage. Further, that the pleading must be so hopeless that it cannot be rescuscitated including by the first - aid of amendment.

15. I have no doubt in my mind that the cause of action arising from the Plaint herein is a matter that was litigated upon at Murang’a SPMCC NO. 570/2001. The suit was not withdrawn but was dismissed on the legal ground and challenge that was upheld, that the court had no jurisdiction. Jurisdiction is not in my view an idle matter of process and procedure. It is a substantive issue of law which if raised as a Defence disposes of a suit. This is what happened in that suit. If I am wrong in my proposition then I should refer to the proceedings of the Mathioya Land Disputes Tribunal which concluded the matter and its award made a valid Judgment of the lower court without challenge.

16. Both the above matters are to my mind conclusive of the fact that this suit barred is by fact of res – judicata. I agree with Counsel for the Applicant that where proceedings of a Land Disputes Tribunal if concluded properly and no challenge to them is made, cannot be re-opened in any other court and heard afresh and between the same parties on the same subject matter (see Maura s/o Kamau vs Gatuto s/o Mwangi [1962] E.A. 528, holding no [IV] thereof).

17. I have elsewhere set out the substantive prayer and cause of action in SPMCC NO. 150/2001. It relates to a claim that the Defendants entered the suit land and dumped building materials with a view to

constructing some houses there. Since it is conceded that the Plaintiff is the registered owner thereof, the Defendants actions whether true or not would as framed amount to an act of trespass. S. 3(1) of the Land Disputes Tribunals Act states that at the first instance such a dispute should be heard by the Land Disputes Tribunal. The argument that the High Court has unlimited jurisdiction is of course right but for purposes of good order and to enable parties to access the High Court in an orderly fashion, some statutes without purporting to override S.60 of the constitution do guide parties to commence litigation elsewhere. I would therefore agree with Mbaluto, J. in Mobamba F.C.S.& 24 vs The Chairman, Kisii F.C.U. Ltd, HCCC NO. 110/97 (Kisii) when he stated this;

18. *“While I agree with Mr. Masese’s point about the unlimited nature of this court’s jurisdiction in Civil and Criminal matters as confirmed by S.60 of the constitution, there are many instances one could cite in which jurisdiction of this court is in the first instance limited. One such example is the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act in which this court is denied jurisdiction initially in a dispute relating to a controlled tenancy.”*

Where therefore in this matter a party brings a claim in trespass, the right forum would be the Land Disputes Tribunal and if parties are dissatisfied, then the matter can shoot upwards to the High Court. As it is therefore and coupled with the holding on *res – judicata*, the Plaintiff is in the wrong court once again.

20. I need not make too much of the submission on Order 7 Rule 1 (i) (e) but suffice it to say that the Applicant’s contention is merited but it would not by itself have led me to the conclusion I am about to arrive at.

21. For the two prior reasons that I have enumerated above, I think that the suit herein should not be allowed to stand a minute longer. Its substratum being so weak, and there being no saving grace for it in any other way that I know, I should and hereby strike it out as prayed.

21. Costs thereof shall be paid to the Defendants/Applicants.

Orders Accordingly

Read and delivered in Open Court on 31st day of January 2005.

I. LENAOLA

JUDGE

In the presence of;

Mr. Utuku holding brief for Kareithi for Respondent

N/A for Applicant

I. LENAOLA

JUDGE

31/1/2005