REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL DIVISION

CIVIL CASE NO. 38 of 2003

KIPRONO ARAP BIEGON………………..………..PLAINTIFF

VERSUS

JOHN ARAP BII…………………...……..……1ST DEFENDANT

COUNTY COUNCIL OF KIPSIGIS……...…2ND DEFENDANT

RULING

The 1st defendant, John Arap Bii, has made an application under the provisions of Order VI Rule 13(1)(b) and (d) of the Civil Procedure Rules, Section 7 and 3A of the Civil Procedure Act and Section 4(2) of the Limitation of Actions Act seeking the orders of this court to have the suit filed by Kiprono Arap Biegon, the plaintiff herein, struck out with costs. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the 1st defendant. The application is opposed. The plaintiff has filed a replying affidavit in opposition to the 1st defendant's application. Although the 2nd defendant did not file any pleadings either supporting or opposing the 1st defendant's application, at the hearing of the application, the 2nd defendant made submissions adopting the position of the 1st defendant.

At the hearing of the application, Mr Rono Learned Counsel for the 1st defendant basically reiterated the contents of the application and the affidavit filed in support therefore. He submitted that the plaintiff's suit should be dismissed because it was res judicata. He stated that the parties to this suit had earlier litigated over the same subject matter before the Kericho Principal Magistrate's Court vide Kericho CMCCC No. 284 of 1992. The said case had been conclusively determined by a judgment of the said court. He further submitted that the plaintiff's claim which is based on fraud had been time barred by the provisions of the Limitation of Actions Act. It was contended that over three years had elapsed since the plaintiff allegedly discovered the fraud which he is seeking to have adjudicated upon by this court. The 1st defendant further argued that by filing another suit after the previous suit had been conclusively determined, the plaintiff was abusing the due process of the court. The 1st defendant prayed that the said suit be struck out with costs. Mr Siele, Learned Counsel for the 2nd defendant associated himself with the submissions made by the 1st defendant. He added that the suit filed by the plaintiff against the 2nd defendant was barred by the provisions of Section 3 of the Public Authorities Limitation Act. He argued that the suit was brought more than one year after the accrual of the cause of action complained of. He submitted that the prayers sought could not therefore be granted. He urged the court to strike out the suit with costs.

Mr Orina, Learned Counsel for the plaintiff opposed the application. Apart from relying on the contents of the replying affidavit sworn by the plaintiff, he submitted that the suit filed by the plaintiff was not

barred by the provisions of the Limitation of Actions Act. He argued that the plaintiff became aware of the fraud when he filed the suit against the defendants. He submitted that the fraud complained of being continuous, could not be barred by the provisions of the Limitation of Actions Act. In any event, the plaintiff submitted that the suit land was still registered in the name of the 2nd defendant, who was thus still holding the said parcel of land in trust for the plaintiff. He submitted that Section 4(2) of the Limitation of Actions Act did not apply to trust land. The plaintiff further argued that the suit land was still in the possession of the 1st defendant and therefore could not attract the time limitation imposed by the Limitation of Actions Act.

The plaintiff further submitted that the suit was not res judicata. In his opinion, the Principal Magistrate did not have jurisdiction to hear or determine the suit which was filed before it. Learned Counsel for the plaintiff further argued that the counsel who appeared on record for the 1st defendant ought not to have acted for the 1st defendant because the said counsel had in the previous suit acted for the plaintiff. The plaintiff further submitted that the suit herein could not be res judicata as the parties to the previous suit were not the same as the parties to this suit. The plaintiff urged this court to dismiss the application with costs.

I have carefully considered the submissions made before me by the parties to this application. I have also read the pleadings filed by the parties to this application. Several issues have emerged for the determination of this court; The first issue is whether the plaintiff’s suit is res judicata. It has not been disputed that the plaintiff sued the 1st defendant over the suit land before the Principal Magistrate’s Court Kericho in Kericho PMCCC No. 284 of 1992. It is further not disputed that the said court heard and determined said suit. The said court dismissed the plaintiff’s suit with costs to the defendant. The plaintiff did not appeal to the High Court against the said decision. The Principal Magistrate thus did determine the ownership of the suit land known as Plot No. 9 Kapsoit Market. It determined that the plaintiff could not have a legitimate claim over the said suit land. In the year 2003, the plaintiff filed this suit. He again raised the issue of the ownership of Plot No. 9 Kapsoit Market. To add more strength to his claim, the plaintiff enjoined the 2nd defendant as a party to the suit. He also made allegation of fraud as regards the way possession of the suit property was given to the 1st defendant.

Having read the judgment of the Principal Magistrate and the plaint filed by the plaintiff in this suit (which he later amended) I do hold that this suit is res judicata. Section 7 of the Civil Procedure Act provides that:

“No court shall try any suit or issue in which the matter 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.”

In Greenfield Investments Limited –v- Baber Alibhai Mawji C.A. Civil Appeal No. 160 of 1997 (Nairobi) (unreported), Gicheru J. A. (as he was then) quoted with approval the holding of Wigram V.C. in Henderson v. Henderson (1843)3 Hare 100 at page 115 where he stated that:

“… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

In the present case, the plaintiff filed suit before the Principal Magistrate’s Court claiming ownership of the suit land. The 1st defendant did participate in the said proceedings. The said Principal Magistrate’s Court had jurisdiction to hear and determine the issues that were put before it for determination. The said

court did make a determination specifically declaring that the plaintiff did not have any right of ownership of the said suit land. In the evidence adduced before the said court, the fact that the said parcel of land was nominally held by the 2nd defendant pending the issuance of titles was not disputed by either the plaintiff or the 1st defendant.

Indeed it was accepted then, that the dispute was between the plaintiff and the 1st defendant. All the points for determination, or issues which ought to have been determined were placed before the said court which gave its due consideration and conclusively determined the matters in dispute. The plaintiff in this case did not file appeal against the said decision. Seven years down, the plaintiff has again filed suit seeking to litigate on the same suit land. This time the plaintiff filed the suit in the High Court. Also this time, the plaintiff enjoined the 2nd defendant to these proceedings. The plaintiff has made a clever, but ultimately futile attempt to distinguish between the matters raised in this suit and that which was raised in the previous suit which was conclusively determined. This suit is therefore res judicata. This court cannot give its opinion on the matters in dispute without embarrassing the Principal Magistrate who conclusively determined the matters in dispute.

The plaintiff's suit is therefore struck out with costs for being res judicata. It will be unnecessary for this court to consider the other issues raised as regard whether or not the plaintiff's suit was barred by the provisions of the Limitation of Actions Act and the Public Authorities Limitation Act because to do so would be superfluous in the circumstances of this case, this court having declared this suit to be res judicata. The 1st defendant's application is therefore allowed with costs. The plaintiffs suit is ordered struck out. The defendants shall have the costs of the application and the costs of the suit.

DATED at NAKURU this 21st day of July 2005.

L. KIMARU

JUDGE