



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 127 of 2004

DAMARIS KONDORO.....
.....PLAINTIFF

VERSUS

GACHANJA GITERE.....1ST
DEFENDANT

THE LAND REGISTRAR NAKURU.....2ND
DEFENDANT

RULING

The plaintiff's suit came up for hearing on 22nd September, 2005 and the first defendant raised two preliminary objections which had been stated in his statement defence. They were as follows:-

- (1) That the suit was *res judicata*, a similar dispute as in this matter having been determined in RMCC No. 245 of 1984 at Nakuru
- (2) That the suit was statute barred as per the provisions of Section 7 of the Limitation of Actions Act.

Submitting on the first limb of the preliminary objection, Mr. Kamanga for the defendant stated that the subject matter of this case was a parcel of land known as **Bahati/Bahati Block 1/317** and the plaintiff had sued the defendant in **RMCC No. 245 of 1984** at Nakuru over the same parcel of land. That dispute was then referred to the District Officer, Bahati Division in accordance with the provisions of the Magistrates Jurisdiction (Amendment) Act 1981 and the same was registered as Land Dispute Case No. 3 of 1985. The District Officer and a panel of elders heard the said dispute and made an award on 26/2/85 in favour of the defendant. The said decision was forwarded to court on 1/3/85 and the same was read and adopted as a judgment of the court. That judgment has never been appealed against.

On the second limb of the preliminary objection, counsel for the defendant submitted that the title deed in respect of the suit property was issued in September, 1984 and since then more than 12 years had lapsed with the defendant being in quiet possession and therefore the plaintiff's suit was time barred.

Mr. Oumo for the plaintiff submitted that for a matter to be *res judicata*, the issues in the subsequent matter must be the same as those in an earlier suit that was determined and the parties must be the same and the determination must have been made by a court which was competent. He said that **RMCC No. 245 of 1985** was not between the same parties as are before court in the present matter.

Mr. Oumo further submitted that the panel of elders had no jurisdiction to entertain a dispute relating to ownership of land and equally Section 159 of the Registered Land Act shows that the Magistrate's court does not have such jurisdiction.

Replying to the second limb of the preliminary objection counsel submitted that the suit was not time barred as it involved trespass to land which is a continuing cause of action and added that there had been litigation between the parties although those cases were a nullity. He further added that in May 1987, the plaintiff lodged caution in the Lands Registry and that was a step which the plaintiff had taken to nullify the defendant's title to the suit land.

In determining the first preliminary objection, I have no difficulty in holding that the Resident Magistrate's Court as well as the panel of elders did not have jurisdiction to determine the issue of ownership of the land in question because from the documents on record, as at the time when **RMCC No. 245 of 1984** was being filed in the Resident Magistrate's Court, the defendant had already been registered as the proprietor of the suit land and had already acquired a land certificate thereto. The Magistrates Jurisdiction (Amendment) Act did not give power to the panel of elders to determine issues of ownership of registered land and to that extent, the panel of elders exceeded their jurisdiction. Equally, the Resident Magistrate's Court in referring the said dispute to the panel of elders and its subsequent adoption of the decision of the said panel was not proper. When an incompetent court purports to determine a dispute in an issue, the defence of *res judicata* is not available in the circumstances.

Section 7 of the Civil Procedure Act states as follows:-

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly or 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."

I therefore overrule the first preliminary objection.

As regards the second preliminary objection, the defendant has been in occupation of the suit premises since 1984 or thereabout. Apart from the aforesaid **RMCC No. 245 of 1984** which was decided in favour of the defendant, though by a court without jurisdiction, the only other suit which the plaintiff attempted to institute against the defendant over the suit property was **CMCC No. 397 of 2004** but which was withdrawn. More than 12 years have lapsed since the time the defendant acquired certificate of ownership of the suit premises. From 1985 when the said suit was determined, the plaintiff did not file any other claim over the said parcel of land until 2004 when he filed **CMCC No. 397 of 2004** but which suit he subsequently withdrew. It is not correct that this suit involves trespass which is a continuing cause of action. The dispute is over ownership of a parcel of land known as **Bahati/Bahati/Block 1/317** which is registered in the name of the defendant and over 12 years have lapsed since the defendant acquired title and settled on the suit premises. The caution that was registered against the title in 1987 was of no consequence as it did not amount to an action aimed at nullifying the defendant's title.

Section 7 of the Limitations of Actions Act states as follows:-

"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

I find that the plaintiff's suit is time barred and I must therefore uphold the second preliminary objection with the result that I strike out the plaintiff's suit with costs to the defendant.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of October, 2005.

D. MUSINGA

JUDGE

14/10/2005

Ruling delivered in open court in the presence of Mr. Ngure holding brief for Mr. Kamenga for the defendant and N/A for the plaintiff.

D. MUSINGA

JUDGE

14/10/2005