



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 30 OF 2019 (O.S)**

**JOHN MAKOKHA BARASA.....PLAINTIFF**

**VERSUS**

**JOSEPH WANGILA WANJALA...DEFENDANT**

**R U L I N G**

By an Originating Summons dated 9<sup>th</sup> December 2019 and which is not premised upon any provisions of the law **JOHN MAKOKHA BARASA** (the plaintiff herein) sought the following orders against **JOSEPH WANGILA WANJALA** (the defendant herein): -

1. The sub – division of the land title NO KIMILILI/KIMILILI/415 to create titles NO KIMILILI/KIMILILI/3447 and 3448 was unlawful as it was done pursuant to an incompetent order and during the pendency of a lawful stay order in a competent appeal.
2. The registration of the defendant as a proprietor of KIMILILI/KIMILILI/3448 be declared null and void or to have been defeated by effluence of time as the defendant did not occupy and has never occupied the land comprised therein from 1999 to – date.
3. Land titles NO KIMILILI/KIMILILI/3447 and title NO KIMILILI/KIMILILI/415 be reinstated.
4. Upon reinstatement of title NO KIMILILI/KIMILILI/415 it be registered in the names of the plaintiff as Administrator of the Estate of the late MARTIN SIFIRINA.
5. The costs of the summons be borne by the defendant.

The summons was supported by the plaintiff's affidavit in which he has averred, inter alia, as follows: -

- That he is the son and Administrator of the Estate of the late MARTIN SIFIRINO who during his life – time owned 10 acres of land comprised in the title NO KIMILILI/KIMILILI/415.
- That in January 1997, the defendant filed a claim against MARTIN SIFIRINO a the KIMILILI LAND DISPUTES TRIBUNAL (the Tribunal) which decided in the defendant's favour and MARTIN SIFIRINO's appeal to the PRIVINCIAL LAND DISPUTES COMMITTEE was dismissed.
- That MARTIN SIFIRINO filed an appeal to the HIGH COURT and pending the hearing of the appeal, he obtained a stay of execution on 21<sup>st</sup> July 1999.
- However, MARTIN SIFIRINO died before the appeal could be heard and notwithstanding the order of stay, the defendant caused the sub – division of the land parcel NO KIMILILI/KIMILILI/415 to create KIMILILI/KIMILILI/3447 and 3448 which he has registered in his names.
- That inspite of registering the title NO KIMILILI/KIMILILI/3448 in his names, the defendant has never occupied that parcel of land.
- That the register should be rectified by cancelling the title to land parcels NO KIMILILI/KIMILILI/3447 and 3448 and the same to revert to KIMILILI/KIMILILI/415.

In opposition to the Originating Summons, the defendant filed a replying affidavit dated 23<sup>rd</sup> January 2020 in which he averred that the same is bad in law, defective and should be struck out for being res – judicata since this dispute had already been resolved in **KIMILILI COURT CASE No 29 of 1997** involving the plaintiff's father and the defendant. That following a decree issued by the **KIMILILI COURT**, the land parcel NO KIMILILI/KIMILILI/415 was sub – divided to create parcels NO KIMILILI/KIMILILI/3447 and 3448 and the latter was

registered in the defendant's name. That following the dismissal of **MARTIN SIFIRINO**'s appeal, no other appeal was filed otherwise the plaintiff would have cited the number of that appeal. That the plaintiff has continuously encroached upon the defendant's land and if there was any disobedience of a Court order, the aggrieved party should have filed contempt proceedings instead of filing another case. That this claim cannot even pass as one for adverse possession since the plaintiff has not had peaceful occupation of the land. That the plaintiff has no cause of action and at the appropriate time, the defendant would be raising a Preliminary Objection to have this suit struck out.

On 8<sup>th</sup> July 2020, the plaintiff sought directions in this matter and on 14<sup>th</sup> July 2020, directions were issued that the Originating Summons be the Plaintiff and the Replying Affidavit the defence and the suit be canvassed by way of viva voce evidence.

By a Notice of Preliminary Objection dated 30<sup>th</sup> August 2020 and filed herein on 1<sup>st</sup> September 2020, the defendant sought an order that this suit be struck out with costs for being res – judicata and therefore frivolous, vexatious and an abuse of the process of this Court since the issues herein have been litigated upon and a decree issued by another Court.

When the Preliminary Objection was placed before me on 26<sup>th</sup> October 2020, I directed that it be canvassed by way of written submissions which were to be filed and exchanged by 23<sup>rd</sup> November 2020 when the matter would be mentioned to confirm compliance.

By 23<sup>rd</sup> November 2020, however, only **MR J. S. KHAKULA ADVOCATE** for the plaintiff had filed submissions. **MR KITUYI** for the defendant sought and was granted a further 14 days to comply but had not done so by 10<sup>th</sup> December 2020. I have therefore not had the advantage of any submissions by the defendant.

I have considered the Preliminary Objection raised by the defendant, the rival affidavits and annexures thereto as well as the submissions by **MR J. S. KHAKULA** Counsel for the plaintiff.

The preliminary Objection is hinged on the claim that this suit is res – judicata as the issues raised have been the subject of previous litigation in another suit. Re – judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms: -

**7: "No Court shall try any suit of 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 the above that before a plea of res – judicata can properly be invoked to terminate any proceedings, the following must be proved: -

- 1: The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.**
- 2: The former suit must have been between the same parties or parties under whom they or any of them claim.**
- 3: The parties must have litigated under the same title.**
- 4: The Court which decided the former suit must have been a competent Court.**
- 5: The former suit must have been heard and finally decided by that Court.**

It is not in dispute that the land parcel **NO KIMILILI/KIMILILI/415** was first registered in the names of **MARTIN SIFIRINO** on 10<sup>th</sup> August 1965 following the Land Adjudication process and after a complaint by the defendant's father **WANJALA NEBOLOLA**. The defendant then filed a suit at the Tribunal against **MARTIN SIFIRINO** which was decided in his favour. **MARTIN SIFIRINO** appealed to the **PROVINCIAL APPEALS COMMITTEE** but the appeal was dismissed. According to the plaintiff, **MARTIN SIFIRINO** filed an appeal to the **HIGH COURT** but died before the same could be heard and determined. However, no evidence was produced to show that indeed an appeal was filed to the **HIGH COURT** as no appeal case number was availed. The bottom line however is that **MARTIN SIFIRINO**'s quest for the land parcel **NO KIMILILI/ KIMILILI/415** ended at the **KAKAMEGA PROVINCIAL APPEALS COMMITTEE**. The Tribunal's award was adopted as a Judgment of the **RESIDENT MAGISTRATE'S COURT KIMILILI** in **LAND CASE No 29 of 1997** and a decree was extracted on 9<sup>th</sup> July 1999 directing **MARTIN SIFIRINO** to re – open a road which served as a boundary and granting 2½ acres which he had encroached onto the defendant. There is evidence that on 21<sup>st</sup> July 1999 **J. N. KIREMBUI – RESIDENT MAGISTRATE KIMILILI** granted a stay of execution of that decree pending an appeal. However, there is no evidence to suggest that any appeal was filed. There is however a Vesting Order directing that a portion measuring 2½ acres be curved out of the land parcel **NO KIMILILI/ KIMILILI/415** and transferred to the defendant. That was done and on 24<sup>th</sup> September 1999 title **NO. KIMILILI/KIMILILI/3448** was registered in the names of the defendant.

The dispute over the ownership of land parcel **NO KIMILILI/ KIMILILI/415** was therefore heard and determined by the Tribunal pursuant to the provisions of the then **LAND DISPUTES TRIBUNAL ACT** (now repealed). **MARTIN SIFIRINO** appealed but his appeal was dismissed by the **PROVINCIAL APPEALS COMMITTEE**. Under **Section 8(9) of the repealed law**, an appeal lay to the **HIGH COURT** within 60 days of the decision of the **PROVINCIAL APPEALS COMMITTEE**. Although the plaintiff has deponed in paragraph 6 of his supporting affidavit that **MARTIN SIFIRINO** filed an appeal to the **HIGH COURT**, there is no evidence that any appeal was filed. Even if one was filed., it was never heard and determined. That means that the decision of the **TRIBUNAL** as affirmed by the **PROVINCIAL APPEALS COMMITTEE** is still in place. From the documents annexed to the Originating Summons, that appeal was determined on 16<sup>th</sup> December 1998. The Green Card to the land parcel **NO KIMILILI/KIMILILI/415** shows that it ceased to exist on 31<sup>st</sup>

August 1999 when the title was closed to give rise to parcels **NO KIMILILI/ KIMILILI/3447 and 3448**. It is clear that the interest which the plaintiff is pursuing in this suit is the same interest that his late father **MARTIN SIFIRINO** was pursuing in the **TRIBUNAL and PROVINCIAL APPEALS COMMITTEE**. It is therefore caught up by **EXPLANATION No 6 of Section 7** of the **CIVIL PROCEDURE ACT** which reads: -

**EXPLANATION (6): “Where persons litigate bona fide in respect of a public right or of a private 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.”**

If there was any doubt that the plaintiff is pursuing his later father’s interest in the land parcel **NO KIMILILI/KIMILILI/415**, that has been made clear by the fact that in paragraph 3 of his supporting affidavit, he has deposed as follows: -

**“That I have brought this case in my capacity as administrator of the Estate of the late MARTIN SIFIRINO.”**

The doctrine of res – judicata binds both the parties to a suit and their privies. In **LOTTA .V. TANAKA & OTHERS 2003 2 E.A 556 (CAT)** the Court of Appeal of Tanzania said the following with regard to the doctrine of res – judicata: -

**“It’s object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit. Further, that a person does not have to be formally enjoined in a suit but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.”** Emphasis added.

It has not been suggested that the **TRIBUNAL** was not competent to determine what was clearly a claim of trespass and boundary dispute between **MARTIN SIFIRINO** and the defendant. The proceedings of the **PROVINCIAL APPEALS COMMITTEE KAKAMEGA** dated 16<sup>th</sup> December 1998 in which **MARTIN SIFIRINO** was the Appellant and the defendant herein was the Respondent reads as follows as far as is relevant to this ruling: -

**“The Appellant had illegally encroached on his (RESPONDENTS) land NO KIMILILI/KIMILILI/408 bordering (sic) the Appellant’s land KIMILILI/KIMILILI/415.**

**He destroyed the demarcation separators i.e. sisal plantations that formed the boundary on both sides of the two pieces of land with a road or path in between. Both were up – rooted and the road blocked.”**

Under **Section 3 of the repealed law**, the jurisdiction of the **TRIBUNAL** included determining disputes relating to boundaries and trespass to land.

The dispute between the parties herein in relation to the land parcel **NO KIMILILI/KIMILILI/415** has therefore been heard and determined by a competent Court. The defendant’s plea that this suit is res – judicata is well merited. This Court must uphold it and strike out this suit.

But that is not all. The plaintiff’s suit is clearly statute barred and although this was not raised in the Preliminary Objection, Limitation is a matter of law which this Court can raise suo moto as it goes to the jurisdiction of this Court.

The plaintiff seeks the main order that the titles **NO KIMILILI/ KIMILILI/3447 and 3448** be cancelled and to revert to title **NO KIMILILI/KIMILILI/415**. Those titles were created on 31<sup>st</sup> August 1999 and this suit was filed on 10<sup>th</sup> December 2020 some 21 years later. **Section 7 of the Limitation of Actions Act** provides that: -

**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.”**

This suit is therefore barred by the statute of limitation.

It is instructive to note that although commenced by way of an Originating Summons which was later converted to a Complaint, the plaintiff was not seeking the land parcel **NO KIMILILI/KIMILILI/415** through adverse possession. This Court is also not seized of any appeal from the decision of the **PROVINCIAL APPEALS COMMITTEE**.

The up – shot of the above is that this suit is not only res – judicata but is also statute barred.

It is accordingly struck out with costs.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> January 2021.**

Ruling dated, signed and delivered at **BUNGOMA** this 21<sup>st</sup> day of January 2021 by way of electronic mail in keeping with the **COVID – 19**

pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> January 2021.**