REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 145 OF 2001

NGURUMAN LIMITED …….....……PLAINTIFF

VERSUS

SHOMPOLE GROUP RANCH &

3 OTHERS …….....…… DEFENDANTS

R U LI N G

By an application by way of Notice of Motion dated 16th April, 2002, the applicant seeks orders orders that:-

1. that the court be pleased to review its ruling and order delivered on 5thJanuary, 2002 and be pleased to strike out the defendant's statement of defence and enter judgment in favour of the plaintiff as prayed in the plaint.

2. that costs be provided for.

The application is based on the grounds that:-

a. The defendants admit in their statement of defence at Paragraph 5 that the plaintiff is a registered proprietor of the suit property.

b. The defendants admit trespassing on the suit property at Paragraph 6 and 10 of the defence.

c. The defendants admit at paragraph 3 of the defence that the issue of ownership of the land was settled in Civil Appeal No. 52 of 1993 which overturned the ruling of the High Court in the Miscellaneous Application No. 930 of 1991 thereby restoring the orders of Narok RMCC No. 15 of 1991.

d. In the circumstances the defendant's statement of defence is therefore scandalous, frivolous and vexatious.

e. The defendant's statement of defence will delay the fair trial of the action.

f. The defendant's statement of defence is otherwise an abuse of the process of the court.

The application is predicated upon the annexed affidavit of Moses Loontasati Ololouaya sworn on 16th April, 2002.

For the applicant, it was argued that the only issue which was res-judicata was that of ownership. In essence the defendant could not raise res-judicata as a defence to the plaintiff's claim. That therefore there is an error on the face of the record in holding that the doctrine applies to the injunction issued in NAROK RMCC No. 15/91 since the said injunction was in respect of the acts of trespass committed in 1991. That subsequent acts of trespass constitute distinct and separate causes of action for which the applicant is entitled to sue afresh hence this suit.

It was argued further for the applicant that the doctrine of resjudicata would not be applicable as against Olkiramatian Group Ranch in HCCC No. 146 of 2001as the said Ranch was not a party to the Narok RMCC 15/1991. Hence the application of the doctrine of res-judicata to RMCC 146/2001 resulting in the ruling in HCCC 145/2001 applying with equal forces to HCCC No. 146/2001 is an error on the face of the record.

That the only issue in HCCC No.146/2001 which would be resjudicata was that of ownership. Olkiramatian would not sustain a similar line of defence in the face of the evidence adduced in Narok RMCC 15/1991. Hence the defendant's defence should have been struck out as prayed.

It was also argued for the applicant that HCCC 145/2001 and HCCC 146/2001 were consolidated because they concerned one plaintiff and same suit property. The defendant also gave an identical statement of defence. However, the issues for trial were different in respect of both defendants. That it was therefore wrong for the court to make a ruling as if the issues involved in the two suits were similar.

The respondents opposed the application and relied on the grounds of opposition dated 17th May, 2002 and filed on the same day.

For the respondents, it was argued that there are two suits which were consolidated at the specific request of the plaintiff i.e. HCCC No. 145/2001 and HCCC No. 146/2001.

The consolidation order was made by Aganyanya J. on 26th July, 2001. That order of consolidation has not been appealed from; reviewed, set-aside or vacated. That order therefore still stands.

For the respondents, it was further argued that the defence of res-judicata is tenable in law. That finding on res-judicata does not lend itself to review. There is already an eviction order in RMCC 15/1991, which stands.

It was also argued for the respondents that in both suits HCCC 145/2001 and HCCC 146/2001 the parties are the same save for the fact that the defendants are different. However, the issues are the same. The issues of facts and law are similar. The issues deal with the same subject matter and arise from the same transaction. The ruling sought to be reviewed touches on all issues which if narrowed down boil down to ownership of land which has already been determined.

In those circumstances the doctrine of res-judicata applies to the current suits HCCC 145/2001 and HCCC 146/2001. Hence there is no mistake or error apparent on the face of the record. There is no new and important matter or evidence which, after the exercise of due deligence, was not within the knowledge or could not be produced by the applicant when the decree was passed or the order made. The applicants are seeking a permanent injunction which they already have. They should execute on the basis of the order of Narok RMCC 15/1991.

I have carefully listened to, understood and digested the rivaling arguments by respective counsel.

Order XI Rule 1 of the Civil Procedure Rules provides:-

"Where two or more suits are pending in the same court in which the same or similar questions of law or facts are involved the court may either, upon the application of one of the parties, or of its own motion at its discretion, and upon such terms as may seem fit:-

(a) order a consolidation of such suits, and

(b) direct that further proceedings in any such suits be stayed until further order."

On 26th July, 2001 a chamber summons dated 22nd May 2001 came before Aganyanya J. for hearing. By consent HCCC 145/2001 and HCCC 146/2001 were consolidated. It was further ordered that the two suits be heard together. That order is still in force todate.

In my view consolidation pre-supposes that similar questions of facts or law are in issue in the two suits. The consolidation was done by consent of the parties. By this application the applicant is now trying to resile from the consent order. The applicant now argues that the issues for trial are different in the two suits. That it was wrong for the court to give its ruling as if the issues involved in the said suits were similar. That argument to my mind is an afterthought. The law regarding consent judgment order is now well settled. See ***Flora Wasike v Destimo Wamboko (1982 – 88) 1 KAR 625.*** A consent judgment/order can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. Moreover, the applicant is now estopped from claiming that the issues involved in the two suits are dissimilar. If that was the case the applicant could not have possibly consented to the order of consolidation in the first place. I therefore reject that argument.

Assuming that I am wrong, on my first holding on the merits of the application, it seems to me from the pleadings that there is HCCC No. 146 of 2001 seeking and covering similar reliefs sought against the defendants herein. That is the reason why consolidation was sought for and obtained. The plaint in both suits are substantially similar and the reliefs sought are identical. In those circumstances the filing of the present suit seeking prayers of eviction and injunction while the decree in Narok RMCC 15/1991 stands makes the defence of res-judicata as alluded to in paragraph 3 of the respondent's defence in HCCC 145/2001 and HCCC 146/2001 tenable in law.

The application for review, thereby fails and is dismissed with costs to the respondents.

This ruling applies with equal force to NRB HCCC No 146 of 2001 by virtue of the order of D.K.S. Aganyanya J. dated 26th July, 2001. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of JANUARY 2003.

N.R.O. OMBIJA

JUDGE