



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

.AT MOMBASA

ELC. NO.128 OF 2018

MOHAMED SWALEH FUMO.....PLAINTIFF

AND

1. BAKARI FARAH

2. FATUMA FARAH.....DEFENDANTS

RULING

1. This ruling is in respect of the defendants' notice of preliminary objection dated 19th September, 2018 seeking to have the suit struck out and/or dismissed on the points of law that the court lacks jurisdiction by virtue of Article 17 of the Constitution of Kenya and that the matter is res judicata. The preliminary objection was canvassed by way of written submission which were duly filed by the advocates for both parties.

2. It was the defendants submission that the matter now before this court has been litigated upon at the Kadhi's court in Succession Case No. 21 of 2006 **between Mohamed Swaleh Fumo –v- Mohamed Farah, Bakari Farah & Fatuma Farah**. That the Kadhi, Hon. Twalib B. Mohamed delivered his judgment on 17th March, 2010 in which he distributed the estate of SAADA MUHAJI MASUD who was the mother to the plaintiff who was the petitioner in the said Succession cause. The defendants submitted that the matter was therefore concluded on 7th July 2010 when the Kadhi made a ruling on how the estate of the deceased was to be distributed. The defendant urged the court to find that this matter is already determined by the Kadhi's Court. Secondly, the defendants submitted that all the parties being Muslims and having submitted themselves to the Kadhi's Court, this court has no jurisdiction as this is a matter of personal law which falls under the purview of the Kadhi's Court. That any issue concerning the estate of the deceased including any boundary dispute, should be dealt with and determined by the Kadhi's Court. The defendants cited the provisions of Article 170 of the Constitution of Kenya and Section 7 of the Civil Procedure Act and urged the court to strike out or dismiss the suit with costs.

3. On his part, the plaintiff submitted that the Kadhi's Court did its work of distributing the property of the deceased to the rightful heirs whereupon it downed its tools. That since the defendants have encroached into the plaintiff's property, the matter is a land dispute which falls for determination by this court. The plaintiff submitted that this court is the one with the jurisdiction on matters of ownership and trespass to land and that the Kadhi's Court lacks jurisdiction. The plaintiff relied on the case of **Ismail Fundi Reje –v- Fatuma Ibrahim Suliman Civil Appeal No.5 of 2014**. The plaintiff further submitted that the preliminary objection lacks merit as the issue raised will require production of evidence to prove whether the defendants are trespassers on the plaintiff's land and the ownership thereto. The plaintiff relied on the case of **Mukisa Biscuits Manufacturing Company Limited –v- West End Distributors (1969) EA 697** and urged the court to dismiss the preliminary objection with costs.

4. I have considered the pleadings filed, the preliminary objection raised and the rival submissions made. The main grounds of objection are that the plaintiff's suit is res judicata and that the court lacks jurisdiction to determine the dispute herein.

5. Section 7 of the Civil Procedure Act provides as follows:

7. No court shall try any suit 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."

6. Section 28 of the Environment and Land Court also bars the court from adjudicating over disputes between the same parties relating to the same issues previously and finally determined by any court of competent jurisdiction. The res judicata principle is meant to lock out from the court system a party who has had his day in court of competent jurisdiction from re-litigating the same issues against the same opponent.

7. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR**, the Court of Appeal stated that the ingredients of the doctrine of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar, secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title, and lastly, that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.

8. For me to determine if the current suit is res judicata, the only two questions that I have to ask myself are; firstly, whether the issues which are before this court and in Kadhi's Court Succession Cause No. 21 of 2006 at Mombasa are the same; secondly, whether there is a final determination on those issues by the previous court. There is no dispute that the parties are the same in all these proceedings.

9. The Kadhi's Succession Cause No.21 of 2006 was a petition to determine the legal heirs and the distribution of the estate of the deceased in accordance to Mushim law of Succession. Under Article 170 (5) of the Constitution of Kenya, the jurisdiction of a Kadhi's court is limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Muslim religion. It is not in dispute that the Kadhi's Court rightly invoked its jurisdiction by determining the legal heirs of the estate of the deceased and went ahead to distribute the estate to the rightful beneficiaries. I have perused the dispute now before this court. The plaintiff claims that the defendants who own plot No. 6400/I/MN have trespassed into his Plot No. 6401/I/MN. The issues before the Kadhi's court and those now before this court no doubt are not similar in form. The statutory provision under Section 7 of the Civil Procedure Act cannot be said to bar the court from hearing the suit or issue as the same was not and could not legally be determined by a Kadhi's court. It is therefore my finding that the suit is not barred by the doctrine of res judicata because the issues raised in the suit did not receive a final judgment on merits before the Kadhi's court. Moreover it is doubtful that the Kadhi's court could have competent jurisdiction to determine issues such as those raised in this suit.

10. The other issue for determination relates to the jurisdiction of this court. The Environment and Land Court is a creation of Article 162 (2) (b) of the Constitution which mandated parliament to establish courts with the status of the High Court to "hear and determine disputes relating to the environment and the use and occupation of and title to land." Under sub-article 3, Parliament was mandated to legislate on the jurisdiction and functions of the courts contemplated in Clause 2. Parliament indeed enacted the requisite legislation which spelt out the jurisdiction of this court titled the Environment and Land Court Act No. 19 of 2011. The jurisdiction of the court is provided for in Section 13 of the ELC Act which states that "the court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable to Kenya relating to the environment and land." The dispute before this court relates to alleged trespass on Plot No. 6401/I/MN. Section 13 of the ELC Act is clear that in exercise of its jurisdiction, the court shall have power to hear and determine disputes relating to, inter alia, boundaries and the court shall have power to make any order and grant any relief as the court deems fit and just, including interim or permanent preservation orders including injunction. I do not therefore agree that this court has no jurisdiction over the matter. It is my finding that this court has jurisdiction to entertain the dispute.

11. For the foregoing reasons, I am inclined to dismiss the preliminary objection dated 19th September, 2018 and decline to strike out or dismiss the suit as requested. The plaintiff shall have costs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 1st day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant