REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 50 OF 2020

SANIAKO N. KIBIWOTT.....PLAINTIFF

VERSUS

STANLEY TANUI.....1ST DEFENDANT

JOHN TANUI KOSGEI

(Sued as the Administrator of the Estate of KIPTANUI KIMAGET).....2ND DEENDANT

THE LAND CONTROL BOARD, MARAKWET DIVISION.....3RD DEFENDANT

THE COUNTY LAND SURVEYOR, ELGEYO MARAKWET.....4TH DEFENDANT

THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET.....5TH DEFENDANT

RULING.

1. By an application dated **22/1/2021** the 1st and 2nd defendants applied to have the instant suit struck out with costs for the reasons that it is *res judicata* **Kitale ELC Land Case No 16 Of 2012**; that the judgment in the latter case was not appealed; that the suit is barred by limitation; and that the doctrine of estoppel applies in respect of the instant suit.

2. The respondent who is the plaintiff filed a sworn replying affidavit on **15/2/2021** denying that the suit is *res judicata*, and asserting that the applicants have concealed material facts from the court. Though admitting that **Kitale ELC Land Case No 16 of 2012** was filed, she denies that the plaintiff therein was her son and exhibits a copy of his birth certificate; that the issue of fraud was never litigated upon in that case; that she was not a party to that litigation; that the instant suit was filed with leave of court; that the plaintiff is not trying to re-litigate the matters in **Kitale ELC Land Case No 16 Of 2012** and that the claim in the instant suit is in respect of matters that occurred *ex post facto* **Kitale ELC Land Case No 16 Of 2012.**

3. Leave having been granted to file the instant suit out of time this court can not revisit it at this interlocutory stage. It is trite now that where such leave has been granted it can only be revisited at the hearing through cross-examination of the person granted leave to establish if he or she deserved it.

4. The only issue that remains for determination is whether the instant suit is *res judicata*.

5. It is not in controversy that Kitale **ELC Land Case No 16 of 2012** was filed by a person other than the plaintiff and heard and determined.

6. The doctrine of *res judicata* is intended to curtail the lodging of a multiplicity of suits on the same subject matter. In **Lotta vs. Tanaki [2003] 2 EA 556** the court observed as follows:

> **"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have**

litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

7. In the Kenyan legal system the doctrine of *res judicata* is embodied in **Section 7** of the **Civil Procedure Act** which provides as follows:

"7. No Court shall try any suit or 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."

8. In the case of **Samuel Njau Wainaina V Commissioner Of Lands & 6 Others [2012] eKLR** it was stated as follows:

"17. The doctrine of res judicata has three ingredients. First, the issue in the first or previous suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and Another v Attorney General and Others [2005] 1 EA 83, 89)."

9. The outstanding question is whether this suit is *res judicata* that suit and in this court's view, the answer to that question may be obtained by confirming whether the plaintiff therein was an agent of the plaintiff herein. In the light of the statutory provisions and the decisions from various courts cited above this court must therefore examine this suit and **Kitale ELC Land Case No 16 Of 2012** in order to determine whether:

a. The issue in the previous suit must was decided by a competent court.

b. The dispute in the former suit was between the same parties or parties under whom they or any of them claim, litigating under the same title as those in the instant suit.

c. the matter in dispute in the former suit is directly or substantially in dispute between the parties in the instant suit.

10. Regarding the first issue it is not in doubt that **Kitale ELC Land Case No 16 of 2012** was filed before a competent court and finalised.

11. With regard to the second issue the plaintiff avers that she was not party to **Kitale ELC Land Case No 16 of 2012** either by herself in her name or by agent. She exhibits a faint and almost illegible copy of a birth certificate to prove that the plaintiff in that case is not her son or agent. She states that had the applicants been keen to establish the alleged relationship between her and the plaintiff in that case existed, then they should have approached the court under **Section 34** of the **Civil Procedure Act**. The averments of the plaintiff in this case have not been controverted by the 1st and 2nd defendants who only make a conclusory statement in their supporting affidavit as follows:

"7. That Barnabas Mungo Longit the plaintiff in the previous suit is a step son to the present plaintiff."

12. This court is not able to take that statement to be true at its face value. When a relationship by way of kinship is denied, it is upon the alleger to prove that it exists. The law as per **Section 108 and 109** of the **Evidence Act** is as follows:

"108.Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

13. In the case of **Serraco Limited v Attorney General [2016] eKLR** the court observed that:

"Proof is by evidence because averments are merely matters, the truth of which is submitted for investigation."

14. More evidence to prove the existence of a mother-son relationship between the current plaintiff and the plaintiff in the previous suit should have been provided for the purposes of this application especially after the denial, but it was not. I therefore find that it has not been established by the 1st and 2nd defendants in this application the suit **Kitale ELC Land Case No 16 of 2012** was not between the same parties as this suit or their agents. However, as I have already stated, the plaintiff's annexture of an illegible copy of a birth certificate alleged to be that of ***Barnabas Mungo Longit*** leaves this court in doubt as to whether or not he was her son. In the case of **In Re: GERISHON JOHN MBOGOH[2001] eKLR** the court observed as follows regarding a document:

"The objector stated that she was previously married to one Bernard Njiru Robson. She stated that they got married in 1971 at the DC's Office. She went on to say that they separated in 1977and further stated that she initiated Nyeri divorce cause number 5 of 1992 which was finalised. To support this, she produced a copy of a Certificate of Making Decree Nisi Absolute.

The said Certificate is not certified and does not contain any signature of the Magistrate who issued the same….

….The objector, in her supplementary submissions has asked me to exercise the discretionary powers conferred on this court by the provisions of sections 83 and 84 of the Evidence Act chapter 80 of the Laws of Kenya to presume both the genuineness and the existence of the Nyeri divorce cause number 5 of 1982. I am however constrained not to exercise the discretionary powers under section 83 and 84 for the following reasons.

Firstly, the Certificate produced in court does not purport to have been certified by the magistrate. Secondly, the signature is very faint and is illegible and for those reasons I cannot consider the said documents."

15. This court can not rely on an illegible copy of a document and purport to fill in the gaps therein for itself to arrive at a conclusion as it may be completely wrong and lead to great embarrassment. Further it may promote sloppiness on the part of litigants who may be encouraged to dump all kinds of illegible and therefore useless documents before court. This court must adopt a very unassuming stance on such on occasions. When such a document is exhibited the only resort of this court is to consider it as a document that lacks crucial information and ignore it as though it were never exhibited.

16. Finally this court has to determine whether the matter in dispute in the former suit is directly or substantially in dispute between the parties in the instant suit.

17. Having already found that the two suits are not between the same persons for the purposes of **Section 7** of the **Civil Procedure Act,** it is vital to note that the plaintiff in the former suit sought to establish that he had acquired the land known as **Cherangany Kapkanyor/55** by way of adverse possession; the claim in this suit is that the plaintiff's husband was the original owner of the **Cherangany Kapkanyor/23** which land was bought during the pendency of their marriage and that it was fraudulently and illegally subdivided into **Cherangany Kapkanyor/54** and **Cherangany Kapkanyor/55.**

18. I therefore find even at a cursory glance the two suits contain entirely different claims and raise different issues. It is the opinion of this court that the present suit should proceed to hearing to determine the said issues.

19. The objection by the 1st and 2nd defendants at this stage that the instant suit is time barred is premature. The applicants' allegation that it is *res judicata* the former suit therefore has no basis and it is hereby rejected.

20. The application dated **22/1/2021** is hereby dismissed. Costs of the application shall be in the cause. This suit shall be mentioned on **13th April 2021** for confirmation of compliance.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MARCH, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE