



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. 13 OF 2019

NASHON SEWE OKETCH.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

By plaint dated 28/6/2018, the Appellant approached the Chief Magistrates Court at Kisumu claiming to have been at all material times the owner of L.R. No. 2659 at Manyatta “A” within Kisumu Municipality. The suit was filed against the Attorney General acting on behalf of the Government of Kenya. The Plaintiff ‘s claim was based on acquisition of the suit property. The Plaintiff’s prayer was to be awarded a reasonable compensation of the suit property and precisely compensation for an area measuring 260m².

The Defendant raised a Preliminary Objection that the matter was res-Judicata as the issue had been adjudicated and a determination made in Kisumu H.C.C No. 176 of 1984. According to the Respondent, the cause of action was similar to the cause of action in Kisumu H.C.C.C. No. 176 of 1984. The subject matter was the same thus plot no. 2659 Manyatta “A”.

In Kisumu H.C.C.C No. 176 of 1984, the plot was owned by the Plaintiff’s father who claimed that he had not been compensated for the plot. The case was dismissed and Judgment entered for the defendant.

According to the defendant the suits were similar and therefore the latter was to be struck out. The Appellant argued that the suit was a fresh suit as he was the successor of Oketch Ambat (deceased).

The Honourable Court considered the objection and found that the subject matter being compensation for compulsory acquisition of Land Parcel 2359 Manyatta “A” was the same in HCCC no. 176 of 1984 and Kisumu CMCC no. 357 of 2018.

Judgment was delivered in Kisumu HCCC No. 176 of 1984 on 14/1/1992 when the suit was dismissed. The parties were the same in both suits as the Plaintiff in the HCCC no. 176 of 1984 was the father of the plaintiff in CMCC no. 357 of 2018 and the later suit the plaintiff was suing as the Successor of the estate of the deceased.

The appellant has appealed on grounds that the Learned Magistrates erred in failing to consider that there was an award of Kshs. 12,235 for acquisition that was not adequate for land and improvement on it and that there was a delay of 2 years for valuation report.

That the Learned Magistrate erred in failing to evaluate the entire evidence.

The Appellant contends that the Learned Magistrate erred by failing to evaluate the evidence before her and that failed to give the appellant the opportunity to be heard so that she could reach a fair and just decision.

This being a first appeal, the court needs to evaluate all evidence on record to reach an independent decision.

The facts of this matter are that the appellant’s father one Okech Ambet filed suit Kisumu H.C.C.C no. 126 of 1994 claiming to be the legal owner of plot No. 2659 Manyatta ‘A’ within Kisumu Municipality on which he had erected five rooms of semi-permanent house.

According to the appellant’s father the property was compulsory acquired by the state without compensation.

The honourable Judge found that the appellant’s father was aware that his piece of land was to be acquired by the Government. The Plaintiff was told to go for compensation from the office of the D.C. but he refused because according to him, it was less the value of the land.

The appellant’s father did not complain to the District Commissioner and did not file an appeal but chose to file a plaint in court.

The appellant's father was obstinate and his property was destroyed by the contractor who had been contracted by the Government to do a road.

The court found that the suit property was legally acquired by Government on behalf of the Municipal Council of Kisumu. Compensation was made but the appellant's father refused to take the money from the D.C. and did not appeal. He sued the A.G. but withdrew the case against the A.G.

In the lower court, the appellant who was the plaintiff and son of the deceased was still praying for compensation for the same parcel of land.

I have perused the proceedings of Kisumu HCCC no. 176 of 1984 plus the Judgement therein and I do find that the issue there was whether the appellant's father was adequately compensated for compulsorily acquisition of the portion of suit property. The subject matter, which is the suit property, was Kisumu Manyatta "A" 2659.

The court determined the issue by stating that the appellant's father was obstinate by refusing to follow the procedure he was required to follow when his neighbours and other followed. He was to blame for what he got. The appellants filed a suit in the footsteps of his father.

"The rule or doctrine of **res judicata** serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.

The principles of Res Judicata in Kenya are made in the provisions of Section 7 of the Civil Procedure Act which states:

"No court shall try any suit 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 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."

10. Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

The doctrine of res judicata has stated has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017)eKLR**, the Court of Appeal held as follows:

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.***
- b) The former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

The court explained the role of the doctrine thus:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice."

The res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. the facts of this case.

I do find that the Preliminary objection was merited as the parties in the suit in the lower court and the former suit in the High Court were the same and that the issues were the same and that subject matter was the same and that the same was determined on merit by the court and therefore Honourable Magistrate did not misdirect herself in striking out the suit for being res-Judicata. I do dismiss the appeal with costs to the respondent. Orders accordingly.

DATED AT KISUMU THIS 24th DAY OF MARCH., 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE