



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 33 OF 2019

PETERSON G. MBURATI.....PLAINTIFF

VERSUS

JOSEPH K. MWANGI.....DEFENDANT

RULING

Introduction

By a Notice of Preliminary Objection dated 14th November 2019, the Defendant seeks to have the plaintiff's suit struck out with costs on the following grounds:-

- (1) That the entire suit herein is bad in law and fatally defective by breaching the principles of RES-JUDICATA vide the orders of the Honourable Court issued on 23rd March 2015 vide Kerugoya E.L.C.C No. 166 of 2014 – Peterson Gitari Mburati versus Joseph K. Mwangi between the same parties herein and over the same subject matters.*
- (2) The entire suit is an abuse of Court process and the Honourable Court is not properly seized of the matter as Court order dated 23rd March 2015 issued vide Kerugoya E.L.C.C No. 166 of 2014 can only be legally challenged by way of Appeal to the Court of Appeal or filing for a Review under the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010 and NOT by instituting a fresh suit herein.*

The Defendant's written submissions

In his written submissions dated 16th November 2020, the defendant through the firm of Kiguru Kahiga & Co. Advocates averred that the plaintiff herein had sued him vide ELCC No. 166 of 2014 between Peterson Gitari Mburati Vs Joseph K. Mwangi wherein the plaintiff alleged that the defendant had fraudulently obtained title to the suit land parcel No. BARAGWE/THUMAITA/3630 and sought for the following orders:-

- (a) That the Kirinyaga, Kerugoya District Land Registrar be ordered to reinstate the plaintiff's name in the Register to wit PETERSON GITARI MBURATI in land parcel No. BARAGWE/THUMAITA/3630 and delete the names of the respondent that has been inserted in entry of record.*
- (b) Costs of this suit together with interest thereon at such rate and period of time as this Honourable Court may deem fit to grant.*
- (c) Any such or further relief this Honourable Court may deem appropriate.*

The defendant further contends that the parties herein negotiated for an out of Court settlement and exchanged correspondences and draft copies of consents in terms of documents contained in the defendants list of documents items 9, 10 and 11 thereof. The defendant also averred that eventually a final order of the Court was recorded fully settling the dispute in controversy between the parties by **Hon. Mr. Justice Boaz Olao Judge** dated 2nd July 2015 in the following terms:-

- (1) That the entire suit herein be and is hereby marked as settled.*
- (2) That each party to have vacant and peaceful possession over the parcel of land registered in own names that is L.R. BARAGWE/THUMAITA/3630 and L.R BARAGWE/THUMAITA/3631.*
- (3) That the prohibitory orders issued on 16th June 2014 registered over L.R Nos. BARAGWE/THUMAITA/3630 and BARAGWE/THUMAITA/3631 be and are hereby vacated or lifted accordingly.*

(4) That each party to bear own costs.

The defendant further observed that four (4) years after compromising the said suit, the plaintiff has initiated the present suit vide his plaint dated 14th August 2019 seeking the following orders:-

(a) A declaration that the consent order dated 23rd March 2015 be set aside as it was entered under material misrepresentation and anchored on an illegally obtained subject titles to with BARAGWE/THUMAITA/3631 or in the Alternative setting down ELC No. 166 of 2014 for hearing to its logical conclusion.

(b) Costs of the suit with interest.

The defendant also submitted that in the previous suit, the plaintiff had sought for orders of cancellation of the defendant's title deed for land parcel

No. BARAGWE/THUMAITA/3630 on grounds that the same was obtained fraudulently and set out particulars of fraud therein. According to him, the previous suit was duly compromised by the parties in terms of the Court orders dated 23rd March 2015 which the plaintiff is very well aware and has even pleaded them in the plaint and also in his written submissions as per ELCC No. 166 of 2014 (Kerugoya). The defendant avers that in the present case, the plaintiff pleads that the orders issued on 23rd March 2015 be set aside as the same were entered under material misrepresentation and anchored on an allegation since the title deeds for L.R. BARAGWE/THUMAITA/3630 and BARAGWE/THUMAITA/3631 were fraudulently obtained and prays in Alternative that the previous Suit No. ELCC No. 166 of 2014 (Kerugoya) between the same parties over the same subject matter be set down for hearing to its logical conclusion.

The defendant submits that from the documents and pleadings filed by the parties, the plaintiff's suit herein is Res-judicata in that all issues in respect to the suit lands parcel No. BARAGWE/THUMAITA/3630 and L.R. BARAGWE/THUMAITA/3631 including ownership status were duly determined as between the same parties vide a consent order dated 23rd March 2015 in ELCC No. 166 of 2014 (Kerugoya) and that matter was duly

concluded. As such, this Honourable Court therefore lacks the requisite jurisdiction to deal with a matter that was duly settled by a competent Court of equal jurisdiction and that it is an abuse of the Court process for the plaintiff to file a fresh suit in respect of a matter duly settled five (5) years ago over the same parties and the same subject matter in clear breach of the provisions of *Section 7 of the Civil Procedure Act Cap. 21 laws of Kenya*. He cited the decision by this Honourable Court in *ELCC No. 138 OF 2017 (Kerugoya) between Wanjohi Kamau & Another Vs Paul Kangangi Munene & 4 Others*.

In conclusion, the defendant submitted that the right procedure for the plaintiff to follow would have been to file an application for review against the orders of the Court dated 23rd March 2015 under the provisions of Section 80 and Order 45 of the Civil Procedure Act Cap. 21 Laws of Kenya in the previous suit ELCC No. 166 of 2014 and not instituting a new suit.

Written submissions by the Plaintiff

The plaintiff through the firm of Macharia Wambui & Co. Advocates submitted that ELC No. 166 of 2014 (Kerugoya) was determined through a consent order whose validity and legality are subject to challenge in the instant suit and therefore does not fall under the ambit of Res-judicata. He also submitted that no party has ever been heard and no issues raised and resolved save for purported determination of consent which prima facie negates plaintiff intention and that fraud and illegality if proved negates the principle of Res-judicata.

The plaintiff further submitted that no Court can fortify an illegality through a claim of Res-judicata and where consent order is disrupted on grounds of misrepresentation and illegality, particulars of the same must be specifically pleaded through a normal plaint as per *Section 19 of the Civil Procedure Act, Order 3 (1), Order 4 (1) of the Civil Procedure Rules*.

In conclusion, the plaintiff submitted that *Section 80 and Order 45 of the Civil Procedure Act* do not encourage particulars of misrepresentation of illegality vide an affidavit and invoked *Article 159 (2) (d) of the Constitution* and prays that the Preliminary Objection dated 14th November 2019 be dismissed with costs. He cited the case of *East African Portland Cement Co. Ltd Vs Superior Homes Ltd (2017) e K.L.R.*

Legal Analysis

The applicable law in regard to Res-judicata is found under **Section 7 of the Civil Procedure Act** which provides as follows:-

“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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was initiated before it.

Explanation (2) – For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

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”.

The doctrine of resjudicata has been explained in a plethora of decided cases. In the case of the **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) e K.L.R.**, 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 not distinctive but conjunctive terms:-

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) The former suit was between the same 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 went further and explained the role of the doctrine thus:-

“The rule or doctrine of res-judicata serves the solutary 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 indrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at least 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 resjudicata thus rest in the public interest for swift, sure and certain justice”.

From the pleadings and submissions by the parties, it is not in dispute that the subject matter in the previous suit ELC Case No. 166 of 2014 is the same as in the present suit. It is not also in dispute that both the former suit and the present suit are between the same parties. The arguments by the plaintiff is that the consent which the parties entered into compromising the former suit is disrupted on grounds of misrepresentation and illegality.

I agree with counsel for the defendant that if the plaintiff had an issue with the consent which compromised the former suit, his remedy does not lie with filing a fresh suit. The process of challenging a consent order is better addressed in the same suit where the consent in controversy was recorded and not in a separate suit. In the case of **E.T.V. Vs Attorney General & Another (2012) e K.L.R.**, a similar issue had come up before **Majanja J.** where he stated as follows:-

“The Courts must be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form a new cause of action which has been resolved by a Court of competent jurisdiction”.

I agree with the decision of the Court in the above decisions. The plaintiff in bringing the subsequent suit is trying to re-litigate a concluded matter by purporting to challenge the consent order which compromised the former suit. That remedy in my view is not available to the plaintiff by introducing a new suit. In the result therefore, I find the Notice of Preliminary Objection dated 14th November 2019 merited and the same is hereby upheld. In the upshot, this suit is struck out with costs to the defendant. It is so ordered.

READ DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 19TH DAY OF MARCH, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wanjiru Waweru holding brief for Kahiga for Plaintiff
2. Plaintiff /Advocate – absent
3. Kabuta, Court clerk – present.