



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E.L.C NO. 35 OF 2020

WILLIAM KITUR TUWEI.....PLAINITFF

VS

KIPTANUI NGOSOSEI.....DEFENDANT

RULING

This is a ruling is in respect of a preliminary objection dated 6th October 2020 raised by the defendant on the grounds that the suit is res judicata and that the suit is time barred by dint of section 4 of the Limitation of Actions Act;

The plaintiff filed a plaint contemporaneously with an application under certificate of urgency seeking for the following orders:

- a) An order declaring the actions of the defendant's trespass, unlawful and illegal and admitting that the plaintiff is the registered owner of land known as **Mogobich/ Cheptilik Block 2/58**.
- b) An order of permanent injunction restraining the defendants either acting in person or through their agents/servants from trespassing into, wasting, constructing, transferring, interfering with the plaintiff's quiet and peaceful ownership of the suit property, remaining on or continuing in occupation of the suit property and any other way or manner whatsoever on whoever is dealing with the plaintiff's land known as **Mogobich/ Cheptilik Block 2/58**
- c) General damages.

The defendant raised a preliminary objection and counsel agreed to canvas the objection vide written submissions which were duly filed.

DEFENDANT'S SUBMISSIONS

Ms Kipseii, counsel for the defendant submitted that the suit herein is res judicata having been litigated previously before Kapsabet Land Dispute Tribunal, Kapsabet Principal Magistrate's court LDT No. 57 of 2001 and Eldoret High Court Misc. Application No. 91 of 2001 over the subject of land known as **Mogobich/Cheptilik Block 2/58**.

Counsel further relied on the provisions of Section 7 of the Civil Procedure Act on res judicata and cited the case of **Henderson -vs- Henderson (1843)67 ER 313** where res judicata was described as follows

"...where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole

case and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from genuine, inadvertence or even accident omitted part of their case. The pleas of res judicata applies except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time"

Ms Kipseii also cited the case of **Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR** where this court held as follows:

"Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit."

Counsel further submitted that this suit is time barred as the plaintiff has brought this case after the expiry of 12 years as the cause of action arose in the year 2000 or thereabouts hence the plaintiff is guilty of laches as he states in his pleadings that that he does not agree with the verdict passed in the year 2000 by the Kapsabet Land Disputes Tribunal.

Counsel relied on Section 7 of the Limitations of Actions Act which provides that;-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person"

Ms Kipseii submitted that the plaintiff has filed this suit to challenge Land Disputes verdict without giving reasons for the delay or considering the law and the procedures thereto. Counsel stated that limitation of actions is not a procedural question but a jurisdictional one hence a court of equity ought not to entertain suits brought out of time. Counsel therefore urged the court to uphold the preliminary objection with costs.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the plea of res judicata cannot be sustained because the facts on which the plaintiff is relying on were not in existence at the time of the former suit. Counsel relied on the case of **Saifudeen Abdulla Bahai & Hussein Bhai Vs Zainabu Mwinyi (2014) eKLR**

Counsel submitted that the Tribunal lacked jurisdiction to handle the matter and relied on **M'Marete v Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR** where the court held-

In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.

Counsel also cited the case of **Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & another, Nairobi, High court, JR 370 of 2013 [2014] eKLR** where Odunga J held as follows-

"In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land".

On the issue as to whether the suit is time barred, counsel submitted Section 4(4) of Limitation of Action Act applies to judgments and as such as at the time the suit was filed in 2020, the award given on 26th February 2001 had lapsed.

As to whether the plaintiff is guilty of laches, counsel submitted that the defendant cannot execute the decree in a matter that was dismissed over five years ago for want of prosecution.

Counsel prayed that the preliminary objection be dismissed with costs.

ANALYSIS AND DETERMINATION.

The preliminary objection by the defendant raises two issues as to whether the suit herein is res judicata and whether it is time barred. In the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** and stated:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.” [Emphasis added]

The court has to establish that the preliminary objection is based on points of law. The basis of the doctrine of res judicata is to have finality to litigation and not to burden litigants with issues that have been litigated before in competent courts. This is also to weed out vexatious litigants who will bring such cases endlessly wasting time for both the court and the parties sued. See the Supreme Court’s decision in the case of **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR**.

The issues raised by the defendant are purely points of law that would not require the court to look elsewhere for facts but rely on the law relating to such issues. Further the rationale for res judicata was enunciated in the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

Litigants must have confidence in the courts that there can be finality to litigation whether where a party loses or wins. If the doctrine of res judicata is not adhered to then there would be erosion of the rule of law and might result into anarchy.

The defendant’s case is that that this matter had already been determined by a competent court of the same jurisdiction vide Kapsabet Principal Magistrate’s Court LDT No. 57/2000 and Eldoret High Court Misc. Application No. 91 of 2001 as the subject matter and parties in the current suit are directly and substantially in issue with the instant case.

The pleadings and the documents in this suit are that they are challenging the decision of the Land Disputes Tribunal. Paragraph 5 and 6 of the plaint specifically challenges the Land Disputes Tribunal Verdict in Case No 57 of 2000. The plaintiff further filed Eldoret Misc Application No 91 of 2001 challenging the verdict of the Tribunal and the Kapsabet Principal Magistrates court which was dismissed for want of prosecution.

The issues raised in this current suit are substantially similar, involving the same parties same issues and the same subject matter. Why did the plaintiff decide to file another suit instead of following up with the revival case in the High Court to challenge the jurisdiction of the tribunal to handle the matter? This matter was dismissed for want of prosecution in 2015 and the plaintiff never took any action till 2020.

What is the effect of a matter dismissed for want of prosecution? In the case of **Njue Ngai Vs Ephantus Njiru & Anor CA 29 of 2015 , Nyeri** the court in finding that a dismissal is a judgment stated as follows:-

“18. Another issue may arise as to whether a dismissal of a suit for non attendance of the Plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the Plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a Court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the Plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends Court on the day fixed for hearing, after the suit has been called on for hearing outside the Court, the Court May dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the Plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a Plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a Plaintiff from applying for the dismissal to be set aside under Rule 8.”

It therefore follows that the dismissed case in the High Court in 2015 involving the same parties was a judgment that has not been appealed against. The plaintiff should have taken steps which he failed to do so.

I have perused the pleadings and the documents furnished by the respective parties, and come to the conclusion that this suit is similar to the one that was decided before the Kapsabet Dispute Land Tribunal and the Eldoret High Court in Misc. Application No. 91 of 2001 as they related to the ownership of the suit land in issue and as such this matter is res judicata.

The question other question raised by the defendant on whether **Section 4 (4) of Limitations of Action Act** Cap 22 applies to decrees and judgments.

Section 4 provides,

“ an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, in respect of a

judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

The Court of Appeal in the case of **Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (2014) eKLR** held that Section 4(4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows:-

“In other words the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms-

“4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered”.

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008”.

It should be noted that counsel for the respondent argued the application as if this suit was challenging the jurisdiction of the Tribunal to hear and determine the case. The decree in issue was issued on 2nd May 2001 and the same remained unexecuted for over 12 years and by 2019 it expired by dint of Section 4(4) of Limitation of Actions Act. Having said that I find that the preliminary objection has merit and therefore upheld with costs to the defendant. Accordingly, the suit is struck out with costs.

DATED and DELIVERED at ELDORET this 4TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE