



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.148 OF 2013

LUCIA WAITHERA MAINA.....PLAINTIFF

VERSUS

JAMES GAKURE KAMAU.....1ST DEFENDANT

NORMAN P.MUHORO MUCHORI.....2ND DEFENDANT

RULING

(Application to strike out plaintiff's suit as being res judicata; plaintiff having been sued by 1st defendant at Land Disputes Tribunal; Tribunal holding that suit land belonged to the 1st defendant; plaintiff filing suit before the High Court claiming that 1st defendant holds the land in trust for the plaintiff; the high Court suit struck out; plaintiff now filing this case, plaintiff arguing that issue of trust has never been decided thus case not res judicata; High Court already rejected the case of trust; avenue of plaintiff was to appeal that decision; if this court entertains the case, it will be sitting on appeal of the High Court decision; suit struck out).

1. The application before me is that dated 8 February 2018 filed by the defendants. The application is brought pursuant to the provisions of Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 2 Rule 15 (i) (d) of the Civil Procedure Rules, 2010, and seeks orders to have this suit struck out for being res judicata. The application is opposed and before I go to the gist of it, I will give a little background to this suit.

2. This suit was commenced through a plaint that was filed on 1 March 2010 against one defendant, namely James Gakure Kamau. In the original plaint, the plaintiff/respondent pleaded that sometimes between the years 1967 and 1983, her husband, one Maina Kamau Karugu (deceased), bought a share in Deffo Company Limited and acquired a Plot No. 1494. She averred that the defendant conspired with the area Chief to somehow get the title deed in his name despite not being a shareholder of Deffo Company. She pleaded that her husband died before the issue of the title deed was resolved. She mentioned that she and her family have been involved in several cases of trespass between them and the defendant, the last one being the case Bahati Land Disputes Tribunal No.25 of 2005 which decision was adopted in Land Dispute Case No. 27 of 2007. In the suit, she asked for a declaration that the defendant holds title to the land parcel Bahati/Kabatini Block 1/1494 in trust for the estate of Maina Karugu Kamau and herself, and an order of transfer of the said title to herself as administrator of the estate of the late Karugu. The original sole defendant filed defence where all the allegations of the plaintiff were denied. It was also pleaded that the parties had a previous suit, Nakuru HCCC No. 116 of 2008 which was struck out.

3. On 12 April 2010, the plaintiff filed an amended plaint wherein she included Norman P. Muhoro Muchori as the 2nd defendant. It was pleaded that during the pendency of the suit Nakuru HCCC No. 116 of 2008, the 1st defendant illegally transferred the suit property to the 2nd defendant. She added prayers for the cancellation of the title of the 2nd defendant and a permanent injunction to restrain the defendants from the suit land. The 2nd defendant filed defence vide which he averred that he purchased the suit land on 5 September 2009 after paying due consideration.

4. In this application, the defendants/applicants contend that this suit is res judicata, as the issues in the suit were determined in the suits Nakuru HCCC No. 49 of 2010 and Nakuru HCCC No. 116 of 2008; and Nakuru Chief Magistrate's Court Land Disputes Tribunal Case No. 27 of 2007 and Bahati Land Dispute Case No. 25 of 2005. The supporting affidavit is sworn by the 1st defendant who has deposed that the subject matter in this suit was heard by the Bahati Land Disputes Tribunal in the Tribunal's Case No. 25 of 2005. He has stated that an award was made on 26 January 2007 and no appeal was preferred. The award was then adopted by the Magistrate's Court on 21 May 2007 and no action by way of judicial review to quash the award was filed. The respondent then filed the suit Nakuru HCCC No. 116 of 2008 which was struck out with costs on 26 February 2010. It is said that she then filed the suit Nakuru HCCC No. 49 of 2010 which was dismissed.

5. In her reply, the respondent has deposed inter alia that at the Tribunal, the 1st defendant was the claimant. She admits filing the suit Nakuru HCCC No. 116 of 2008 which was struck out. She has averred that the claim before this court is one of trust which has never been heard before. She has contended that the Land Disputes Tribunal was not a competent court as it lacked jurisdiction to hear the dispute before

it. She has mentioned that the suit Nakuru HCCC No. 116 of 2008 was struck out for non disclosure of the Tribunal case and thus is not res judicata.

6. Both Mr. Ikua, learned counsel for the applicants and Mr. Katithi, learned counsel for the respondent, filed written submissions which I have taken note of.

7. The application before me is premised upon Section 7 of the Civil Procedure Act, which provides as follows :-

7. Res judicata

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.

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

8. The above provision of the law embodies the common law doctrine of res judicata, which bars a court from hearing a matter that has already been decided before by a competent court. There is no contest that where one has presented a case before a competent court and such court has pronounced itself on the dispute, the litigants ought not to present the same dispute for fresh litigation. That, as I have mentioned is not in controversy.

9. Under Order 2 Rule 15, a court is empowered to dismiss a suit if the same is scandalous, vexatious and an abuse of the court process. The said provision of the law is drawn as follows :-

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

10. In my view, a pleading which introduces a matter which has been litigated before is a vexatious pleading and/or is a pleading which is an abuse of the process of court and is liable to being struck out summarily.

11. What I need to determine is whether, through the cases that have been mentioned by the applicants, the respondent's case is actually res judicata. I can only reach this determination after going through the past litigation that has been mentioned.

12. I have seen that there was indeed a dispute presented before the Land Disputes Tribunal (the Tribunal) over the suit property. The claimant at the Tribunal was James Gakure Kamau, the 1st defendant herein. He did sue, Lucia Waithera, the plaintiff in this suit, claiming that the respondent was illegally occupying this land. At the Tribunal, the 1st applicant testified that he purchased this land together with his brother (Maina Kamau, the deceased husband to the plaintiff), and that following a dispute, they agreed that the deceased would keep a parcel of land in Kabazi and he (Gakure) would have ownership of the land in Engoshura (the suit land). He then sought out the respondent to have transferred to him the suit land but the respondent said that the documents are lost. He was then given a letter by the Chief to take to

the directors of Ndeffo Company so as to transfer the same to his name and he got title in his name. At the Tribunal he complained that the respondent and her sons were still in active use of the land. On her part, the respondent testified that the land in dispute belongs to her late husband as he is the one who purchased the shares at Ndeffo Company. After hearing the dispute, the Tribunal was of opinion that the deceased transferred his shares to James Gakure (the 1st defendant). It ruled in favour of the 1st defendant and stated as follows :-

"The panel of elders has ruled in the favour of Mr. James Gakure Kamau who is the title holder of Bahati/Kabatini Block 1/1494 to retain that parcel of land which is in Engoshura. Lucia Waithera Maina be ordered to remain in Jumatatu Farmers Cooperative where she was left with her late husband. The late Maina Kamau Karugu together with her sons and daughter... (sic)."

13. This award was filed before the Chief Magistrate's Court at Nakuru in the suit Land Dispute No. 27 of 2007 and was adopted as a judgment of the court on 21 May 2007. The parties were given 30 days to appeal. No appeal was filed and the respondent then filed the suit Nakuru HCCC No. 116 of 2008, Lucia Waithera Maina vs James Gakure Kamau. In the suit, the plaintiff averred that she has brought the case on behalf of the estate of Maina Kamau Karugu. Her claim was that Mr. Karugu owned shares at Deffo (or Ndeffo) which entitled him to the suit land. She pleaded that in the year 1984, the defendant took out a title in his name. She sought an order for a declaration that the suit land belongs to her and for a declaration that the defendant holds the said title deed in trust for the estate of the late Karugu. She asked that the title deed be transferred to her. I have seen an order dated 26 February 2010, which shows that the said suit was struck out by Ouko J (as he then was).

14. The respondent then filed the suit Nakuru HCCC No. 49 of 2010. The pleadings are similar to what was pleaded in the suit Nakuru HCCC No. 116 of 2008 and the prayers sought were more or less the same, as she sought for orders that it be declared that the defendant holds the suit land in trust for the estate of Maina Karugu Kamau and herself and for an order that the land be transferred to her. I have seen an order dated 26 February 2010 showing that this suit was again struck out by Ouko J (as he then was).

15. I took the trouble of perusing the file Nakuru HCCC No. 116B of 2008. I also called for the file Nakuru HCCC No.49 of 2010 but the same could not be traced. It is apparent that the pleadings in Nakuru HCCC No.116B/2008 are similar to the pleadings in this suit. A preliminary objection was raised on the jurisdiction of the court in Nakuru HCCC No.116B of 2008. In dealing with the preliminary objection, the learned judge was of opinion, that following the award of the Tribunal, the recourse of the plaintiff was either to file an appeal or apply for judicial review to quash the award. The learned judge stated as follows in his ruling of 26 February 2010 :-

"The parties having invoked and submitted themselves to the jurisdiction of the Land Disputes Tribunal, the plaintiff was expected to pursue her remedy under the Land Disputes Tribunal Act. The Tribunal having rendered its award in favour of the defendant, the only two routes open to the plaintiff were either to exhaust the appellate process under the Act, or seek, by certiorari, to quash the decision of the Tribunal."

16. The court found that since the plaintiff did not pursue either, the suit before him was an abuse of the court process and proceeded to strike it out.

17. Now, I cannot sit on appeal over the above decision of Ouko J and it matters not whether I agree or disagree with the above dicta. The High Court already decided that the plaintiff's suit for the trust ought not to have been presented in court, and if the plaintiff thought that the judge was wrong, and ought to have entertained her case, her recourse was to appeal the decision of Ouko J, and argue that despite there being an award made by the Land Disputes Tribunal, she was properly before the High Court for the determination of the question of trust. She did not do that but instead filed a more or less similar case.

18. The way I see it, it is an abuse of the court process, for a party to file a new suit, where it has already been held in the previous suit, that such suit is an abuse of the court process. In other words, the issue of whether or not the plaintiff could present a case of trust before the High Court, has already been determined, with the High Court holding, whether rightly or wrongly, that it cannot entertain the suit. If I entertain the new suit, then in essence I will be sitting on appeal from the earlier decision of which I do not have jurisdiction, and entertain the same cause of action which was rejected.

19. That is precisely what the respondent has done in this case. She has proceeded to file the same case that was rejected by Ouko J. I cannot proceed to hear the suit for I will be overturning the decision of Ouko J. The option that the respondent had was to appeal the decision of Ouko J, and try to argue before the Court of Appeal that despite the award of the Tribunal, she could still have recourse to the High Court to argue a case of trust. As I have mentioned, if I entertain this case, I will be circumventing the decision of Ouko J, and bring into embarrassment the administration of justice.

20. I am therefore of opinion that this suit is an abuse of the process of court and therefore liable to be struck out.

21. I allow this application and do proceed to strike out this suit as being an abuse of the process of court. The defendants shall have the costs of the suit.

22. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 3rd day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Macharia holding brief for Mr. Ikua for the defendants/applicants.

Mr. L. M. Karanja holding brief for Hari Gakinya for the plaintiff/respondent.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU