



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NUMBER 78 OF 2020

SOLOMON SOMO & 120 OTHERS.....PLAINTIFFS

VERSUS

THE BOARD OF TRUSTEES, METHODIST CHURCH IN KENYA.....1ST DEFENDANT

REGIONAL POLICE COMMANDER, COAST REGION.....2ND DEFENDANT

RULING

1. Before me for consideration and determination is the 1st defendant's undefended Notice of Motion dated 2nd March 2021 that seeks to strike out the plaintiff's suit with costs. The application is premised on the grounds on the face of the application and supported by the affidavit of Rev. Joshua M'Kiao.

2. The deponent avers that he is the trustee of the 1st defendant. He further avers that the plaintiffs instituted ELC No. 589 of 2011 in this Honorable Court vide a plaint dated 8th November 2011. The plaint prayed for inter alia that the subdivision carried out on the suit property 162/V/MN CR. No.6348 to be declared valid and enforced. He further averred that on 16th December 2019 this court delivered its judgement which dismissed the plaintiff's suit and ordered that the plaintiffs to be assigned plots as per the approved plans presented by the church on the basis of their relationship with the church and subject to them proving payments of the agreed charges.

3. Mr. M'Kiao further deponed that after the judgement the plaintiffs made an application for stay pending appeal, and this court ruled that each plaintiff to deposit Kshs 100,000 within 45 days as deposit for security failure to which the church would be at liberty to execute the decree. He further deponed that the plaintiffs did not comply with the orders of court but moved court again for a further stay. The deponent concluded by asking court to hear this application and allow it on merit.

4. On 15th June 2020, when the matter came up for hearing of this application, Mr. Siminyu for the 1st defendant was present but there was no appearance by the plaintiffs or the 2nd defendant. Mr. Siminyu informed court that he had served both parties but had not received any response and prayed to the court to allow the application. The Court was satisfied that service was duly effected and set the matter down for ruling.

5. The applicant had previously filed a Notice of Preliminary Objection on 31st August 2020 to the plaintiffs' suit for being res judicata. On 25th February 2021, the court dismissed the Notice of Preliminary and ruled that it needed to consider factual evidence to determine if the requirements of res judicata had been met. The applicant then proceeded to make this application before court to support its argument that the suit is res judicata to ELC 589 of 2011 and hence an abuse of the court process.

6. The law on res judicata is provided for by Section 7 of the Civil Procedure Act which states that:-

“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.”

7. In the case of **E.T V Attorney General & Another (2012)eKLR** it was held that:-

“For the operation of the doctrine of res judicata, first the issue in the first 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 & another V the Attorney General and others (2005) 1 EA 83, 89)”

8. I will now delve right into the comparison of the two suits in order to make a determination as to whether the instant suit is res judicata. I have scrutinized each and every plaintiff in ELC 589 of 2011 in contrast with the 121 plaintiffs in this instant suit. I note that all the plaintiffs are the same in both suits, save for the 87th plaintiff in ELC 589 of 2011 who is missing in the present suit and the 1st plaintiff in the instant suit missing in the former suit.

9. The second issue for consideration is whether parties are litigating under the same title. In ELC 589 of 2011, the suit property was L.R 162/V/M.N while in the instant case, the suit property has been named as Plot No. 162/V/MN, Title No. CR No. 6348. In ELC 589 of 2011 the plaintiffs sought inter alia orders to have the suit property transferred into their names, while in the present suit the plaintiffs are seeking permanent injunction to restrain the defendants from interfering with the suit property. The former suit, i.e. ELC 589 of 2011 was heard and determined on merit by a court of competent jurisdiction which proceeded and made a determination on 16th December 2019, where the suit was dismissed.

10. Having perused the pleadings and determination in the former suit ELC 589 of 2011, it is my finding that the present suit is res judicata. The plaintiffs in the former suit merely gave a face lift to their suit and are back again in court litigating on the same issues. Parties cannot evade the doctrine of res judicata by merely adding or removing other parties or cause of action in a subsequent suit. Parties are forbidden from litigating in instalments. If allowed parties will forever re-litigate the same issues with the same opponent before court of competent jurisdiction.

11. Litigation must come to an end and parties will not be allowed to litigate matters already settled under different names and reopen closed matters. The court must remain cautious against such parties who are out to abuse the process of court by litigating endlessly on new cause of actions yet seeking the same remedies. I do find that the plaintiffs have misused the procedure of court in order to reopen an already decided case.

12. I do take note that the plaintiffs did not respond neither did they challenge any fact that were put across by the 1st defendant. In my view, the actions of the plaintiffs to institute the present suit which is res judicata to ELC 589 of 2011 is an abuse of the court process.

13. The upshot of this ruling is that the 1st defendant's application has merit and is hereby allowed. I proceed to strike out the plaint dated 13th July 2020 which constitute the entire suit of the plaintiffs with costs to the defendants.

14. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 21st Day of July, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

Sininyu counsel for the 1st defendant

N/A for Kithi for the plaintiff

N/A for the 2nd defendant