



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 394 OF 2017

JAMES KISWA MURKUK.....1ST PLAINTIFF

ANNAH CHEKERUI MURKUK.....2ND PLAINTIFF

VERSUS

JOHANA KIPLANG'AT KOROS.....1ST DEFENDANT

SARAH SEKENTO KIMEL.....2ND DEFENDANT

STEPHEN SALATON.....3RD DEFENDANT

LAND REGISTRAR TRANSMARA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The 1st Defendant/Applicant herein filed two Notice of Motion dated 16th September, 2019. Both Applications are supported by the Affidavit of the 1st Defendant/Applicant herein sworn on 16th September, 2019. At the outset, I wish to categorically state that the 1st Defendant/Applicant filed Written Submissions on both Applications on 9th December, 2019. The Plaintiffs/Respondents on the other hand filed Written Submissions on the 1st Application on 10th January, 2020. For that reason, I will proceed to deliver my Ruling on the 1st Application only.

1st Defendant/Applicant's Case

The 1st Defendant/Applicant filed a Notice of Motion Application dated 16th September, 2019. The same is supported by a Replied Affidavit filed on even date. The Application is brought under Section 7 of the Civil Procedure Act and the inherent jurisdiction of this court and other enabling provisions.

The 1st Defendant/Applicant is seeking the following Orders:-

1. That this Honourable court do certify this application as urgent and service be dispensed with in the 1st instance.
2. That the present suit is *res judicata* and should be struck out in limine since the issues raised herein was finally and conclusively decided by a competent Minister's Appeal vide Appeal Case No. 135 of 1997 ruling delivered on the 11th November, 2003 and the former suit instituted by the 1st Plaintiff's mother and brothers being HCCC No. 129 of 2003 dismissed on 18th May, 2009 for want of prosecution.
3. That the suit herein be dismissed with costs to the Defendant.
4. That the costs of this application be provided for.

The 1st Defendant/Applicant relies on the grounds that the subject matter herein and the issues raised is the same as in the earlier two suits, that the Plaintiffs must have raised all these issues in the Minister's appeal case and former claim and for those reasons whether the Plaintiffs raised the issues or not the suit remains *res judicata* for the reasons that a ruling was delivered on the 11th November, 2003 by the Minister's

Appeal Committee and that the Plaintiffs did not challenge the Kisii High Court Order issued on 18th May, 2009 with respect to HCCC No. 129 of 2003.

In his Supporting Affidavit, the 1st Defendant/Respondent avers that the suit in dispute was litigated upon by the Minister's Appeal No. 135 of 1997 and HCCC 129 of 2003 dismissed for want of prosecution. He further avers that the Minister's decision being final, this court lacks jurisdiction to entertain this present suit. That the Plaintiffs in this suit knew very well what transpired in the Minister's Appeal Committee decision, owing to their family relations as being that of mother and sons. That the Minister's decision touched on the same issues in this suit, same title and same parties. That the essence of the principles of *res judicata* is to not only protect the court from disrepute but also to bring an end to litigation.

Before the Plaintiffs/Respondent replied to the application, the 1st Defendant/Applicant filed a Supplementary Affidavit on 9th October, 2019 in which he further buttresses his allegations as raised in both the applications.

Plaintiffs/Respondents Case

The 1st Plaintiff/Respondent with the authority of the 2nd Plaintiff filed a Replying Affidavit on 9th December, 2019 in which he opposes the application on the grounds that his mother and brother filed Kisii HCCC No. 129 of 2013 seeking cancellation of titles Trans-Mara/Olchani/238,239 and 241 and 212 obtained through fraud. He also avers that the Plaintiffs/Respondents were not a party to Kisii HCCC No. 129 of 2013 and even if it were, a matter cannot be *res judicata* on basis of suit dismissal for want of prosecution. That the Minister's decision is not final but subject to adjudication before court. He also disputes Judicial review as an avenue for relief of Adjudication proceedings. That the preliminary objection raised by the 1st Defendant is unsustainable and should be dismissed with costs.

Issues for Determination.

I have considered the Application, the Responses and Submissions filed by Counsel for both parties. The issues for determination are as follows:-

1. Whether the Minister's decision dated 21st October is final.
2. Whether the present suit is *Res Judicata*.
3. Who is to be awarded costs.

I will now proceed to determine each of the issues separately.

1. Whether the Minister's decision dated 21st October is final.

I have had the chance to peruse the exhibits contained in the Application, more particularly the Appeal to the Minister, Appeal Case No. 135 of 2007-Parcel No. 238.

I wish to reproduce the quorum in that proceedings as follows:-

JOSEPH OLE BASI MURUGUK-APPELLANT (A1)

KISAKAI MURUGUK-APPELLANT (2)

KIPLANGAT KOROS-RESPONDENT(R)

J.M. MATHENGE-DC CHAIRMAN (C)

PIUS OLE NAIRENKE-ELDER ONE (E 1)

ALEXANDER KOSKE-ELDER TWO (E 2)

SHIROI OLE NASHA-ELDER THREE (E3)

RICHARD LEKINA-INTERPRETER

WITNESSES FOR APPELLANTS(AW)-JAMES MESOPIR(AW1)

JAMES MURUGUK(AW2)

WITNESS FOR RESPONDENT-KOSIKA OLE YIASI

It appears that a Hearing took place in which a ruling was delivered on 11th November, 2003 in which the Appeal was dismissed and a

direction that parcel number 238 to remain in the 1st Defendant/s/Applicant and the Appellant to have a share in parcel 37.

I have also perused the Minister's decision on Appeal case No. 135 of 1997 in which the Director of the Land Adjudication and Settlement confirmed the Ruling dated 11th November, 2003 as final in all respects. The Minister's decision was to the effect that Parcel No. 238 to remain registered in the name of the 1st Defendant/Applicant. A further look at the 1st Defendant/Applicant annexure 'JKK4' being copy of certificate of Official Search indicates the 1st Defendant/Applicant as the registered owner of parcel of land Title No. Transmara/Ololchani/239 with a caution lodged on 18th November, 2010 by one Mangere Ole Nawangas.

It is my considered opinion that the Appellant's in the Minister's Appeal Committee, being dissatisfied with the decision of the committee and that of the Minister may opt to file an application court through Judicial Review proceedings for the setting aside, quashing or even varying the decision of the Minister. I say so since I am guided by **Order 53, rule 2 of the Civil Procedure Rules** which provides that, 'Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. I also stand guided by **Section 29 of the Land Adjudication Act, Cap 284** which provides 'Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, **and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final**' (emphasis mine).

2. Whether the present suit is Res Judicata.

It is the 1st Defendant/Applicant assertion that this matter is *res judicata* for the reason that the same was dismissed in Kisii HCCC 129 of 2003. I have perused the annexures of Steven Salaton dated 17th August, 2017 in which the parties are:-

NAAMPOOLUA KITAANA MURKUR.....PLAINTIFF
OLE BASI MURKUR.....PLAINTIFF
FRANCIS KISAKAI.....PLAINTIFF
VERSUS
KIPLANGAT KOROS JOHANA.....DEFENDANT
STEPHEN SALATON.....DEFENDANT
JOHNATHAN KIMEI.....DEFENDANT
MANGERE.....DEFENDANT

The claim in this suit is for fraud/Mistake as relates to Ololchani/238/239/249 and 212. The prayers sought in this suit is for an Order of rectification of the land registration in respect of the above parcels of land, a cancellation of the defendants' name from the said registers and the registers and the registration of the Plaintiffs as the proprietors in absolute of the said land. The Plaintiff also seeks for costs of the suit and any other relief that the court may deem fit.

This suit was dismissed by an Order of the court issued on 24th November, 2010 for want of prosecution. Therefore, the same matter was not heard and determined.

In this present suit ELC 394 of 2017 parties to this amended Plaintiff are:-

JAMES KISWA MURKUK.....1ST PLAINTIFF
ANNA CHEPKERUI MURKUK.....2ND DEFENDANT
VERSUS
JOHANA KOROSI KIPLANGAT.....1ST DEFENDANT
SARAH SEKENTO KIMEI.....2ND DEFENDANT
STEVEN SALATON.....3RD DEFENDANT
THE COUNTY LAND REGISTRAR.....4TH DEFENDANT

In this suit, the Plaintiffs claim is for damages and the prayers sought is as follows:-

- a. A declaration that the suit property lawfully belongs to the Plaintiffs
- b. An Order directed to the 4th Defendants to cancel title Numbers LR. TRANSMARA/OLOLCHANI/238,239,241 and 412 and revert the same to Transmara/Ololchani/37.
- c. An Order of eviction of the 1st, 2nd and 3rd Defendants from parcels of land TRANSMARA/OLOCHANI/238,239,241 & 412.
- d. Costs of and incidental to this suit and interest at Court rates.
- e. Any other or further relief the Honourable court may deem fit and just to grant.

It is very clear from the foregoing that the two suits are very distinct and separate for the reasons that they have separate, parties, separate claims and issues and separate prayers.

The principles of *res judicata* are well set in a plethora of cases which I cannot exhaust at this point. Section 7 of the **Civil Procedure Act on Res judicata** provides 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 (emphasis mine)**, 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.(emphasis mine)**

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.”

It is very clear to me that Kisii HCCC 129 of 2003 was never heard and determined but the same was dismissed.

In the case of **Republic v Ministry of Roads & another Ex-Parte Vipingo Ridge Limited & another [2015] eKLR** the court held that for an order to operate *res judicata*, **it must be shown to have been a determination of an aspect of the controversy before the court** (emphasis mine) In my view, an order as to the mode of hearing, production of evidence by affidavit or viva voce, cross-examination of deponents of affidavits, and such like matters are directions on the manner of process of fact finding and proof of the parties’ respective cases and not a determination on any issue before the court and cannot, therefore, operate *res judicata*. *The present suit therefore is not res judicata and I therefore decline to grant the prayers as sought in Notice of Motion dated 16th September, 2019.*

3. Who is to be awarded costs.

I hereby direct each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 1ST DAY OF JULY, 2021

MOHAMED N. KULLOW

JUDGE

1/7/2021

In the presence of:

CA:Chuma

Ms Mogere for the Plaintiff

N/A for the 2nd defendant

N/A for the 3rd defendant

N/A for the 4th and 5th defendants