



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 27 OF 2021

HASSAN NGOKA DZOMBO.....PLAINTIFF

VERSUS

1. RUWA KOPE

2. SALIM MWERI.....DEFENDANTS

RULING

The Defendant filed a Notice of Preliminary Objection dated on the 2nd June 2021 which seeks the suit to be dismissed, withdrawn and or stayed inter alia;

1. THAT the court lacks jurisdiction since the subject matter herein relates to un surveyed and or parcel of land under adjudication thus offends Articles 61(2), 64 and 67(2) (a) of the Constitution, 2010, and that the present suit further offends provisions of Section 30 of the Land Adjudication Act-Section (cap. 284) and Sections 7 and 8 of the Land Consolidation Act (cap. 283) on ascertainment and recording of rights and interests in land.

2. THAT the matter is Res judicata thus offends Section 7 of the civil procedure Act (Cap 21) Laws of Kenya.

The plaintiff submitted that they brought this matter vide a Plaint dated 29th September, 2020 instituted a suit against the Defendants jointly seeking a declaration that the suit property belongs to the Dzombo family/clan, a permanent injunction restraining the Defendants from trespassing and/or developing the suit land parcel and for any illegitimate structures thereon to be destroyed. The Defendants have through their Advocate raised a preliminary objection dated 2nd June, 2021 seeking to have the suit dismissed on grounds that this Honourable Court lacks jurisdiction to entertain this suit due to the provisions of articles 61(2), 64 and 67(2)(a) of the Constitution of Kenya 2010 and further, the provisions of Section 30 of the Land Adjudication Act (CAP 284) and Sections 7 and 8 of the Land Consolidation Act (CAP 283) and further, stated that the suit is res judicata.

On the issue of this suit being res judicata, the Defendants Advocate has raised the said issue due to the previous suit i.e. Kwale MC ELC No. 001 of 2020; Hassan Ngoka vs. Ruwa Kope and Salim Mwero which was on the 13th day of January, 2021 withdrawn by the Plaintiff with no orders as to costs, as the said Magistrate Court at Kwale lacked the relevant jurisdiction to entertain the said cause. That the said cause was not determined, it was in fact, before a Court with no proper jurisdiction to entertain it and as such, it is their submission that the claim by the Defendants Advocate that this suit is res judicata does not meet the description of a suit being res judicata as contemplated by section 7 of the Civil Procedure Act, which provides; “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. It is further their submission that the constitution of Kenya 2010 under Section 61(2) has classified the various categories of land in Kenya, from the said categorization and from the Plaintiff’s claim in his plaint, it is evident that the Plaintiff is claiming for rights on a community land, hence his claim that the suit land parcel be declared to belong to the Dzombo Family/clan not him individually. We they submit that from the description of community land as described by section 63(d) of the Constitution of Kenya 2010. This suit is ripe for determination before this honorable Court, which derives its’ authority from article 162 (2)(b) of the Constitution of Kenya, 2010 to specifically deal with matter of the use and occupation of community land.

That the Defendants seek to rely on the provisions of Section 30 of the Land Adjudication Act (CAP 284) and Sections 7 and 8 of the Land Consolidation Act (CAP 283), however, it should be noted that the said acts and provisions are applicable only to areas gazetted by the relevant Minister. This is contemplated by Section 2(1) of the Land Consolidation Act (CAP 283), which provides; “Whenever at the request of a local authority it appears expedient to the Minister that the ascertainment of rights and interests in, and the consolidation of, and the registration of title to, any area of Trust land (other than land to which the Land Adjudication Act (Cap. 284) applies) should be carried out, the Minister may, by order direct that this Act shall apply to such area of Trust land as is specified in the order, and upon publication of such order this Act shall apply to such area accordingly.”

That the provisions of Section 3 of the Land Adjudication Act (Cap. 284) provide;

(1) The Minister may by order apply this Act to any area of Trust land if—

a) the county council in whom the land is vested so requests; and

b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and

c) the Land Consolidation Act (Cap. 283) does not apply to the area:

Provided that this Act may be applied to an area to which the Land Consolidation Act (Cap. 283) applies where a record of existing rights has not been completed and certified under Section 16 of that Act, and in such case, where anything has been done in the course of or for the purpose of adjudication under that Act, the Minister, if he is satisfied that those things have been done substantially in accordance with the principles of this Act, may, by order, order that those things shall be deemed to have been done under the corresponding provisions of this Act.

(2) An order under this section shall define the area to which it relates either by description or by reference to a plan or both. They submit that from the facts and evidence before this Honourable Court, the Plaintiff has filed and produced documents confirming that this dispute was first attempted to be settled at the local level before being escalated to this Honorable Court for determination, the Defendants have on their part failed to produce any document to support the position of the preliminary objection and the ground that it is based on. This position was reiterated in the case of Said Sadika Adballa (Suing on behalf of Estate of the Late Swadiki Abdalla Kofik) vs. National Land Commission and Another (2020) eKLR. They therefore humbly submit that the preliminary objection dated 2nd June, 2021 be dismissed with costs to the Plaintiff and for this matter to be heard to its logical conclusion.

This court has considered the preliminary objection and the submissions therein. The issues for determination herein are one, whether this matter is res judicata and two, whether or not this court has jurisdiction to entertain the same. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this suit is res judicata and of jurisdiction is therefore properly raised as a Preliminary Objection and the court will consider the same. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

I have perused the pleadings referred to in the preliminary objection that is Kwale MC ELC No. 001 of 2020; Hassan Ngoka vs. Ruwa Kope and Salim Mwero which was on the 13th day of January, 2021 which was withdrawn by the Plaintiff with no orders as to costs, as the said Magistrate Court at Kwale lacked the relevant jurisdiction to entertain the said cause. Parties are the same and so is the subject matter

however the matter was not heard and determined but was withdrawn for lack of jurisdiction. I find that this matter is not resjudicata as provided for under section 7 of the Civil Procedure Act and the objection is hereby over ruled.

On the issue of jurisdiction of this court, it is a finding of fact that the subject matter of the current suit is land which has not been surveyed or adjudicated upon.

In the case of “The MV Lilian “S” (1989)KLRI, the court stated as follows;

“ Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment that it holds the opinion that it is without jurisdiction”.

In the instant case the plaintiffs/applicants have not shown to this court that they hold the suit land under a freehold or leasehold tenure or that the suit land has been declared private land by parliament. The Land Adjudication Act provides a procedure for ascertainment and recording of rights and interests in Trust land. The Land Consolidation Act, Cap 283 provides for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas. It also provides for registration of title and of transactions and devolution affecting such land and other land in the special areas.

In the case of Peter Kabete M’nkanyauga vs Jacob Mutegi Mwathi (2017) eKLR, which was similar to this one the court held as follows;

“I find that this court has no jurisdiction to handle matters concerning unadjudicated land unless when dealing with questions concerning the integrity of the adjudication process.”

Section 30 of the Land Adjudication Act provides that: -

“(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act. [Rev. 2012] Land Adjudication CAP. 284 L5 - 17 [Issue 1].

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.”

I am persuaded by the authorities that were referred to me by the Defendants. The upshot of the foregoing is that the Preliminary Objection on the issue of jurisdiction has merits and I proceed to strike out the suit with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7TH DECEMBER 2021.

N.A. MATHEKA

JUDGE