



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 733 OF 2017

SAMSON MARIKO MAKUBO.....PLAINTIFF

VERSUS

JOSEPH MWITA RAGITI.....1ST DEFENDANT

ROBI MWITA.....2ND DEFENDANT

RAGITA MWITA.....3RD DEFENDANT

BUCHORO MWITA.....4TH DEFENDANT

RAGITA MWITA.....5TH DEFENDANT

RULING

1. The present ruling is with regard to a preliminary objection raised at paragraph 11 of the defendants' statement of defence amended and dated 24th June, 2019 further to leave of the court granted on 5th February, 2019. The defendants are represented by the firm of M/S Oguttu, Ochwangi, Ochwal and company Advocates.

2. Notably, paragraph 11 of the amended statement of defence reads;

- i. The jurisdiction of the Honourable Court is ousted vide the provisions of Article 162(2) of the Constitution, 2010.
- ii. The plaintiff lacks the requisite locus-standi to mount and/or maintain the instant suit.
- iii. The plaintiff's suit herein is sub-judice and hence barred by the provisions of section 6 of the Civil Procedure Act, Chapter 21, Laws of Kenya.
- iv. The suit herein is pre-mature, misconceived and bad in law.
- v. The plaint herein does not disclose any reasonable cause of action against the defendants.
- vi. The instant suit amounts to and/or constitutes an abuse of the due process of court.
- vii. The plaint herein is deficient and/or defective and violates the provisions of Order 3 Rule 2 of the Civil Procedure Rules, 2010.
- viii. The plaintiff is non-suited.

3. The instant suit was originally filed at Migori Chief Magistrate's Court. The same was commenced by way of a plaint dated 15th September, 2015 which was amended and filed on 29th November 2019. The plaintiff who initially appeared in person and presently represented by Apondi and company Advocates, is seeking the following reliefs;

- a. Permanent injunction restraining the defendants, their agents, family members and assigns or anybody acting on their instructions from causing interference, tres-passing into the said Land Parcel Title No Bukira/Buhiringera/359 (the suit land herein) or unleasing

any threat to the plaintiff in a manner likely to cause breach of the peace and terror within the plaintiff's family.

b. Declaration that the plaintiff is the lawful registered proprietor of the suit land LR. NO. Bukira/Buhiringera/359.

c. Special damages as pleaded for in paragraph 5 of the plaint.

d. Cost of this suit.

e. Interest on (c) & (d) above at court rates.

f. Any other relief the court would deem fit to grant to the plaintiff.

4. Briefly, the plaintiff claims that the defendants jointly and severally trespassed into the suit land and uprooted there from the plaintiff's trees valued at Ksh 12,500/=. The particulars of special damages are set out at paragraph 5 of the amended plaint. That on 10/9/2015 the defendants stopped him from working on the suit land. The plaintiff reported the incident at Kehancha Police Station under O.B number 20/11/09/2015. That the defendants continue to threaten the plaintiff with death hence precipitating the present suit.

5. In their amended statement of defence, the defendants denied the plaintiff's claim and sought that the suit be struck out and or dismissed with costs. They stated that the suit land did not exist and that the alleged uprooted trees could not be planted thereon hence termed the alleged particulars of special damages imaginary. That the creation and registration of the suit land is informed by fraud perpetrated by the plaintiff and they pleaded particulars of fraud thereof.

6. The defendants further stated that the plaintiff is not entitled to the orders sought in the plaint. That there exists proceedings namely Kisii HCC Petition No 4 of 2011 concerning the same subject matter thus provoking the instant preliminary objection.

7. On 2nd October, 2019, this court directed that the preliminary objection be argued by written submissions and that the same be exchanged between the parties herein. Accordingly, learned counsel for the defendants filed submissions dated 28th October 2019 while learned counsel for the plaintiff filed submissions dated 9th December, 2019.

8. It was the submission of the defendants' counsel that the instant suit is res judicata and or sub-judice. That by virtue of Kehancha Land Disputes' Tribunal's award which was the subject of judicial review proceedings in Kisii HCC Misc Application No 52 of 2000 (JR) which was heard and determined this suit is res judicata pursuant to **section 7 of the Civil Procedure Act (Cap 21)**. That in the alternative, the suit is sub-judice in view of Kisii HCC Petition No 4 of 2011 which is still pending hearing and determination.

9. To buttress his submissions, counsel relied on **Kamunye and others -vs- The Pioneer General Assurance Society Ltd (1971) EA 261, Daniel Kirui and another v Monicah W Macharia & another Civil Appeal No 261 of 2001 (CA)** at Nakuru and R. Kuloba on Judicial Hints on Civil Procedure volume 1 in respect of res judicata. Counsel also did rely on **Rev Madara Evans Okango Dondo -vs- Housing Finance Company of Kenya (2005) eKLR, Muchanga Investments Ltd -vs- Safaris Unlimited (Africa) Ltd and 2 others (2009) eKLR** and **Virani T/A Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Ltd (2004) 2KLR 269** regarding abuse of the court process and that special damages should be strictly pleaded and proved in a suit.

10. Counsel further urged this court to dismiss the suit with costs and relied on the observations of the Lord Chief Justice of the Court of Common Pleas (Sir William de Gray who referred to the decision of Lord Walsingham in the English case of the Duchess of Kingston, collected in Volume 2 of Smiths leading cases, 13th Edition (1929) at page 645 where the court set out the conditions for the application of res judicata thus;

a. The matter directly and substantially in the issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

b. The former suit must have been the suit between the same parties or between parties under whom they or any of them claim.

c. Such parties must have been litigating under the same title in the former suit.

d. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

e. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

11. On the other hand, learned counsel for the plaintiff referred to **section 7 (supra)** on res judicata, **Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates v Salama Beach Hotel Ltd and 3 others(2017) eKLR** that res judicata elements are rendered in conjunctive and not in disjunctive terms. Counsel submitted that the plaintiff was an interested party in Kisii HCC Misc Application No 52 of 2010 (JR) and that not all defendants were applicants therein.

12. Counsel also submitted that in Kisii HCC No 4 of 2011, the plaintiff was the respondent while the petitioner was the third defendant therein. That whereas the subject matter is the same, the cause of action between the parties in the instant suit is different from that in the alleged Kisii HC Misc Application No 52 of 2010. That on 15th July 2011, Makhandia J (as he then was) did determine Kisii HCC Petition No 4 of 2011 which was dismissed for being subjudice. Counsel urged this court to dismiss the preliminary objection with costs to the

plaintiff.

13. I have duly considered the preliminary objection together with the entire pleadings as well as the rival submissions including authorities cited and issues identified therein. Thus, is the preliminary objection tenable?

14. At paragraph 12 of their amended statement of defence, the defendants denied the jurisdiction of this court and the cause of action. They maintained that this court is devoid of jurisdiction over the suit by virtue of **Article 162 (2) (supra)** which donates jurisdiction to this court.

15. It is trite law that jurisdiction of a court or tribunal flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is prescribed; see **Samwel Kamau Macharia & another –vs- Kenya Commercial Bank Ltd and others (2012) eKLR (SCK)**.

16. In the case of **Republic –vs- Karisa Chengo and 2 others(2017) eKLR**, the Supreme Court of the Republic of Kenya, held, inter alia;

“As we know, jurisdiction goes to the root of any litigation.”

17. In **Chengo case (Ibid)** the Supreme Court further observed as follows:-

“Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable...”

18. It is well settled that jurisdiction is everything. That without it, a court cannot make one more step; see the locus classicus decision of Nyarangi J.A in the celebrated case of the **Owners of Motor Vessel Lilian “S” –vs- Caltex Oil Kenya Ltd (1989) KLR 1**.

19. It is noted that the plaintiff stated at paragraph 11 of his amended plaint thus:-

“That the plaintiff avers that there is a case No. 52 of 2010 and No. 4 of 2011 Miscellaneous case pending determination at Kisii High court involving him and the 1st defendant.”

20. The contents of the said paragraph 11 were admitted by the defendants at paragraph 9 of their amended statement of defence. In particular, the defendants stated that there exists proceedings vide Kisii HCC Petition No. 4 of 2011 concerning the same subject matter.

21. Quite plainly, to the sub judice nature of the instant suit by dint of **section 6 of Cap 21 (supra)** is demonstrated by the aforesaid paragraphs of the respective pleadings. To that extent, it is common base line that the instant suit is pointedly sub judice.

22. Notably, the defendant’s bundle of documents dated 10th December 2015 were simultaneously filed with the statement of defence on 11th December 2015. Specifically, document number 6 relates to a ruling rendered in Kisii HCC Petition No. 4 of 2011 dated 15th July, 2011 whereby Asike Makhandia, J (as he then was) dismissed the petition with costs to the 4th respondent, Samson Marigo Makubo (the plaintiff herein).

23. In dismissing the petition the learned Judge reasoned , inter alia:-

“ Then there is the question of res- judicata. It is conceded by both parties that subsequent to the award by the 1st respondent, the petitioners challenged the award by way of judicial Review proceedings in the nature of certiorari and prohibition in Kisii HC Misc. Application No. 52 of 2010. The application involves same parties and same issues” (emphasis added)

24. The court further remarked that:-

“As it is, this petition may as well be sub judice.”

25. It is common ground as discerned from pleadings and accompanying copies of documents that the parties including the plaintiff and the 1st defendant were the same parties in Kuria West Land Dispute Tribunal (Kehancha Division) case file number 15 of 2007 and Kisii HCC Petition No. 4 of 2011 which were heard and determined. I am conscious of the prescribed definition of the term “**sub judice**” and “**res judicata**” as provided for under **sections 6 and 7 of the Civil Procedure Act Cap 21 (supra)**.

26. This court also takes into account all the cited authorities which include **Kenyariri, Kamunye, Muchanga and Rev Madara Evans Okango Dando** cases (**supra**) herein. All in all , it is quite clear and not hotly disputed that the instant suit is res judicata, bad in law and amounts to an abuse of the court process.

27. The present dispute has been before the Land Disputes Tribunal and the courts since the year 2007. The same was heard and determined. It is a cardinal principle that litigation has to come to an end; see **Halsbury’s Laws of England (9th Edition) volume 22 page 273 and Article 159 (2) (b) of the Constitution of Kenya, 2010**.

28. It is the finding of this court that the preliminary objection raised by the defendants at paragraph 11 of their statement of defence dated 10th December 2015 and amended on 24th June 2019, is full of merits. I proceed to uphold the same.

29. A fortiori, I dismiss the instant suit originated by way of a plaint dated 15th September 2015, amended and filed on 29th November 2019, with costs to the defendants.

DATED, SIGNED and DELIVERD at MIGORI this 15th day of JANUARY 2020.

G.M.A ONGONDO

JUDGE

In the presence of:-

Mr. Philemon Ochwangi, learned counsel for the defendants

Court Assistant – Tom Maurice