



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC CASE NO. 163 OF 2016**

**BENJAMIN GWALIAMBA GODIA.....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF NANDI.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR – KAPSABET.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**CHAIRMAN, CHEBARIA CATHOLIC CHURCH.....INTERESTED PARTY**

**JUDGMENT**

By a plaint dated 25<sup>th</sup> April 2016 the plaintiff herein sued the defendants jointly and severally seeking the following orders;

- a) A declaration that the Plaintiff is the genuine and rightful proprietor of the suit land and the plaintiff acquired the suit land procedurally and legally from the late Elias Kinangoi Mulekani (deceased)
- b) An order of permanent injunction restraining the 1<sup>st</sup> defendant and interested parties or their servants/agents from interfering with the plaintiff's quiet possession of the suit.
- c) An order of cancellation of land title numbers Nandi/Koibarak/B/608 in the name of the 1<sup>st</sup> defendant as reserved for the interested party and issuance of the title deed to the plaintiff.
- d) Costs of the suit.
- e) Any other relief the court orders.

**PLAINTIFF'S CASE**

PW1 testified that he purchased the suit property from Elias Kinangoi Mulekani for a sum of kshs. 42,000/- vide a sale agreement dated 10<sup>th</sup> March 1984. He took possession of the suit land and has been in occupation ever since. He produced the sale agreement as Exhibit 1.

It was PW 1's evidence that at the time of purchasing the property it was L shaped and a portion thereof was sold to him and the remainder sold to other persons as demonstrated by exhibit 2. He further testified that in the year 1999-2000 the interested party began lobbying government officials to assist them take over the subject property claiming it was a gift from the deceased. That when he approached the chairman of Chebara catholic church who intimated on 21<sup>st</sup> June 2001 that the church was not situated in the property vide exhibit 4 at page 17.

PW 1 stated that he discovered in 2004 that the title deed in relation to the suit property had been given to Nandi county council reserved for Chebara Catholic Church. He pursued the matter with the survey department and noted that the adjudication process on Kemoloi Location 24 commenced in 1980-1982 and the land belonging to the deceased had been mapped out and details captured in the first adjudication register as an L shaped property demonstrated by exhibit 25.

It was further PW1's evidence that the suit parcel of land was fraudulently allocated another parcel no. 608 which has been superimposed on his plot. He prayed that judgment be entered as prayed in the plaint.

On cross examination by Mr. Magare the PW1 confirmed that Nandi/Koibarak B 608 is registered in the name of Nandi County and plot No. 581 in the name of Elias Kinangoi Mulekani. He also confirmed that he is not related to Elias Kinangoi and that he has not sued the administrators of the estate.

PW1 further stated that he is not aware whether a succession Cause was filed in respect of the estate of Elia Kinangoi as the allocation of plot No. 581 was done during land adjudication. He confirmed that the 1<sup>st</sup> entry in the land register is Nandi county council reserved for Chebara Roman Catholic church and plot No. 581 in the name of Elias Kinangoi and that he did not file any objection during the adjudication process as he bought the land in 1984 after the process was over.

PW1 also stated that he filed a complaint at the Aldai Land Disputes Tribunal which resolved that the land belonged to the Catholic Church and the claimant to be evicted. He stated that the court gave an order for his eviction and he later filed a case in Kakamega vide a Misc application 47 of 2013 which was dismissed. He later filed RMCC No 338 of 2004 which was dismissed on 17<sup>th</sup> November 2009.

On cross examination by Mr. Odongo, he stated that it's been 32 years since he entered into a sale agreement for the suit land. And that he has never engaged a surveyor to ascertain the acreage and that the acreage was not included in the agreement. He also stated that the verdict of Kapsabet court in case No 338 of 2004 was not set aside and that the Land Registrar gave a verdict that the land belongs to the county council.

PW2 a daughter of the deceased Elias Kinangoi gave evidence and stated that she does not know the exact acreage of plot No 581. It was also her evidence that they have not filed any succession cause for the late father's estate.

PW 3 a Land Adjudication and Settlement Officer produced the rough book for plot Nos 606 to 611 and plot nos 576 to 581 of which he stated that the rough books do not contain sketch maps.

On cross examination by Mr Magare, he confirmed that the rough book is the final document and that plot No 608 belongs to Nandi county Council reserved for Chebara Catholic Church. Further that the records do not show that plot No 581 was allocated to the plaintiff. Further that the rough books are translated to RIMs and that they did not receive any objections. PW3 also confirmed that plot No 608 was not superimposed on plot No. 581.

#### **DEFENDANT'S CASE**

DW1 Nandi County Land Registrar produced an original adjudication registered which confirmed that plot No 608 was registered in the name of Nandi County Council and reserved for Chebara Catholic Church. That the adjudication was completed on 25/2/83

On cross examination she stated that this was a 1<sup>st</sup> registration and that there were no objections or appeals noted in the register.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants adopted the evidence of DW2 the Land Registrar. The interested party also adopted the evidence of PW2, DW1 and 2.

#### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff submitted that the court has jurisdiction to handle the suit. Further, that the suit is not time barred or res judicata as the matter was not dealt with to a finality as the initial judicial review proceedings were dismissed on a technicality.

Counsel submitted that the District Land Adjudication officer assured the plaintiff in writing that he had to wait until first registration of the title deeds so that his issue could be addressed. The title was issued on 20<sup>th</sup> July 2004 as per page 66 of the bundle of documents. It was Counsel's submission that given that the title was issued on 2004 the cause of action arose then this being a dispute as to recovery of land and cancellation of title. The 1<sup>st</sup> defendant was issued with title on 20<sup>th</sup> July 2004 and it is only then that the cause of action arose. The suit is therefore not time barred.

Counsel submitted that the suit was not res judicata as the plaintiff filed a judicial review Misc. 47 of 2013 which was due to the claim that arose in the land disputes tribunal being LDT 38 of 2008 and award adopted in the Magistrates Court Kapsabet which was dismissed. He filed CMCC no. 338 of 2004 and the same was dismissed. The claim at the tribunal was for a claim over the L shaped Nandi/Koibarak/B/581 land and the award given indicated that Nandi/Koibarak/B/608 belongs to the church and Nandi/Koibarak/B/581 belongs to the deceased Elias Kinangoi.. The award was entered in favour of both parties as stated above.

It was Counsel's submission that the tribunal misunderstood the case and it should be noted that the award granted was not issued by a competent tribunal as the dispute was on title and ownership and the tribunal had no basis of making any findings.

Counsel further submitted that the judicial review was dismissed for reasons that the pleadings were defective and the plaintiff had a right in law to file for declaratory orders. Counsel relied on the case of **Peter Gicharu Ngige v Kiiru Chomba & 3 others (2004)** he further submitted that the Kapsabet CMCC No. 338 of 2004 was a suit against Simon K. Tarus, Chairman Kapkemich Catholic Church and not the defendant herein. He therefore urged the court to grant the prayers as prayed in the plaint.

#### **DEFENDANT'S SUBMISSIONS**

Counsel submitted that the plaintiff has had various suits on the same cause of action and some have already been determined which included Land Dispute Tribunal Case No. 57 of 2007, Land Dispute Tribunal Case No. 38 of 2008 – Kapsabet, Kakamega Misc. Application No. 47 of 2013 and Kapsabet PMCC No. 338 of 2004.

Counsel submitted that in 2013 the plaintiff filed a Judicial Review proceedings against the award of the tribunal seeking to have it quashed and the court dismissed the application on 27<sup>th</sup> April 2015. The suit Kapsabet PMCC No. 338 of 2004 is still pending. The other suits listed have been determined in favour of the plaintiff.

Counsel cited section 7 of the Civil Procedure Act and the case of **IEBC vs Maina Kiai & 5 others, Nairobi CACA No. 105 of 2017** on res judicata. He also relied on the case of **Peter Ngugi Kaburi v Esther Wangari Githinji & Another (2013) EKLK**.

It was Counsel's submission that the plaintiff lacks locus standi in this matter as the title for Nandi/Koibarak/B/581 is not registered in his name and he is not the administrator of the estate of the late registered owner. The registered owner was not sued and the plaintiff did not obtain a Land Control Board Consent.

Mr. Magare submitted that from the evidence of PW2, the land parcel no. Nandi/Koibarak/B/608 arose from adjudication and the same process gave rise to Nandi/Koibarak/B/581. PW2 confirmed that both parcels were a result of adjudication and there was no objections or appeal filed.

Under section 29 of the Land Adjudication Act an aggrieved party can raise an objection within 60 days and no objection was raised. It was common ground that the parcel of land Nandi/Koibarak/B/608 is public utility reserved for Chebara Catholic Church. Further, there is, in situ, an eviction order against the plaintiff, which has not been set aside to date.

The defendant prayed that the court recommends that the ruling be served upon the Attorney General for purposes of initiating proceedings under section 2 & 3 of the vexatious proceedings act to have the plaintiff declared a vexatious litigant.

### **INTERESTED PARTY'S SUBMISSIONS**

Counsel for the interested party submitted that the court has jurisdiction to determine this dispute. It was Counsel's submission that the plaintiff has had various suits heard and determined before courts of competent jurisdiction involving the same cause of action with the same issues and parties as indicated above. That the court found in favour of the 1<sup>st</sup> defendant and no appeal was preferred.

Counsel relied on section 7 of the civil procedure act and urged the court to dismiss the case with costs. Further that the plaintiff has not proved his case on a balance of probabilities. Counsel cited the case of **Joseph Chepkong'a Rotich v Michael Cheronno (2005) eKLR** and submitted that the land adjudication is the process of final and authoritative determination of the existing rights and claims of people to land.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this suit are as follows:

- a) Whether the suit is res judicata
- b) Whether the plaintiff is the genuine proprietor of the suit land
- c) Whether the court should issue a permanent injunction against the defendant and interested parties
- d) Whether the court should order the cancellation of the land title no. NANDI/KOIBARAK/B/608

### **WHETHER THE SUIT IS RES JUDICATA**

Section 7 of the Civil procedure Act 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.**

***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.**

In Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

- “(a) the former judgment or order must be final;**
- (b) the judgment or order must be on merits;**
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and**
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”**

In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR the court held:

**Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;**

- (a) The suit or issue was directly and substantially in issue in the former suit.**
- (b) That former suit was between the same parties or parties under whom they or any of them claim.**
- (c) Those parties were litigating under the same title.**
- (d) The issue was heard and finally determined in the former suit.**
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

This court had dealt with this issue at a preliminary stage and allowed the plaintiff to proceed with the case so that the issues could be determined during a full hearing. It is noticed that the plaintiff had filed several cases which were ruled against him.

The plaintiff also filed a judicial review proceedings and the determination arising therefrom do not amount as a bar to file a suit for declaratory orders in a declaratory suit. The suit was dismissed on a technicality and this does not amount to a determination in finality. In Peter Gicharu Ngige v Kiiru Chomba & 3 others [2004] eKLR the court held;

**I agree with counsel for the respondent that a declaratory suit is an alternative to review proceedings. As I have noted earlier the decision of Justice Gacheche was on preliminary points. If it was on substantive points and the merits of the application, I would be persuaded that this Court cannot entertain this suit. However, as that application was dismissed on preliminary points, the two alternative reliefs still existed, i.e. filing a fresh application or this declaratory suit. In the case above where Justice Nambuye made a ruling, the plaintiff had already been granted conditional leave to file for judicial review, but chose to file a declaratory suit, possibly because the time of six months allowed by law had lapsed. In that situation therefore, just like in our situation, the two alternatives were open to the plaintiff. As Eldoret High Court Miscellaneous Application No 17 of 2002 was not dismissed on the merits, I come to the conclusion that the plaintiff had the two options open to him i.e. pursuing judicial review proceedings by filing another application for leave of the Court, or coming to court through a declaratory suit.**

In the present suit, the judicial review proceedings were dismissed on a preliminary point therefore it is in tandem with the authority above that the declaratory suit filed herein is an adequate alternative remedy and thus is not *res judicata*.

One of the requirements for a suit to be *res judicata* is that the former suit must be between the same parties. Kapsabet CMCC No. 338 of 2004 was a suit against one Simon K. Tarus, chairman Kapkemiah Catholic Church as per the proceedings in the 1<sup>st</sup> defendant's list of documents. I therefore find that the suit is not *res judicata*.

#### **WHETHER THE PLAINTIFF IS THE GENUINE PROPRIETOR OF THE SUIT LAND**

The plaintiff produced a sale agreement dated 10<sup>th</sup> March 1984 as Exhibit 1 which shows that he purchased the suit land for kshs. 42,000/- from the deceased. Notably, the sale agreement does not contain the title of the suit land. A perusal of the register, exhibit 26 shows that parcel 581 was registered in the name of the deceased and 608 in the name of the county council.

The certificate of search produced by the plaintiff shows that the deceased was the registered owner of Nandi/Koibarak/B'581 which had an approximate area of 2.32 Ha. From the titles it is clear that the two parcels were registered in the names of two different parties. There is no proof that the plaintiff is the rightful owner of the suit land as the Land Adjudication and Settlement Officer and the Land Registrar confirmed that plot Nos 608 and 581 belong to the County Council reserved for Chebara Catholic Church and Elias Kinangoi respectively.

PW2 confirmed that they had not taken out any letters of Administration for the estate of the deceased who is the registered owner. It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representative are set out under Section 82 of the Law of Succession Act, Cap 160 of the Laws of Kenya which provides as follows:

**82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-**

**(a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;**

**(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:**

**(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**(ii) No immovable property shall be sold before confirmation of the grant;**

**(c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;**

**(d) .....**

Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration.

There was also no proof that the parcel numbers were superimposed as alleged by the plaintiff. The plaintiff's case must fail on all fours.

**WHETHER THE COURT SHOULD ISSUE A PERMANENT INJUNCTION**

Having found that the plaintiff is not entitled to be an owner of the suit land, it therefore follows that he is also not entitled to a permanent injunction is sought over parcel number Nandi/Koibarak/B'608. The said parcel is registered in the name of the county council of Nandi. The plaintiff has not shown that he purchased that particular parcel and therefore an injunction cannot issue as he has no proprietary rights over the same.

**WHETHER THE COURT SHOULD ORDER CANCELLATION OF TITLE FOR THE PARCEL NO. NANDI/KOIBARAK/B'608**

As the plaintiff has not proven that that he purchased parcel number 608. He admitted that the parcel of land that he purchased was number 581. The court cannot order for a cancellation and the plaintiff has not proved his case against the defendants. The plaintiff's case is therefore dismissed with costs to the defendants.

**DATED and DELIVERED at ELDORET this 12<sup>TH</sup> DAY OF FEBRUARY, 2020**

**M. A. ODENY**

**JUDGE**

**JUDGMENT** read in open court in the presence of Mr.Kipkurui holding brief for Chenge for Plaintiff, Miss Mudho holding brief for Magare for 1<sup>st</sup> Defendant and Miss.Chelashaw holding brief for Lamayan for Interested Party.

Mr. Yator – Court Assistant