



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 37 OF 2018

LIYAVO FARMERS COOP SOCIETY.....PLAINTIFF

VERSUS

ROSEMARY WAMBOI KAMAU

PIUS MUKANZI KOKO AND

JACKYLINE CHIMOLI LITALA

(BEING SUED AS TRUSTEES OF

INTERNATIONAL CHILDCARE

TRUST KENYA).....DEFENDANT

CHILD RESCUE KENYA

DAVID JAMES MBOGHO

THE COMMISSIONER OF LANDS

SETTLEMENT TRUSTEE

THE LAND REGISTRAR TRANS NZOIA COUNTY

MINISTRY OF AGRICULTURE

THE NATIONAL LANBC COMMISSION

THE HON ATTORNEY GENERAL.....DEFENDANTS

AND

THE AREA MEMBER OF PARLIAMENT

KWANZA.....INTERESTED PARTY

COUNTY GOVERNMENT OF

TRANS NZOIA.....INTERESTED PARTY

RULING

1. The application dated 27/11/2019 has been brought by the 3rd defendant. She seeks an order that the suit be dismissed with costs for being statutorily time barred under **Cap 22** of the laws of Kenya and it is an abuse of the process of the court.

2. The respondent filed a replying affidavit jointly sworn by two persons **Stephen Kamau and Erustus Omurimi** who describe themselves as the chairman and secretary general respectively of the respondent.

3. The third defendant filed her submissions on **3/3/2010** and the plaintiff files its submissions on **2/2/2020**.

4. It is urged by the applicant in the application and supporting affidavit that the plaintiff became a registered cooperative society on **1/4/1971**, that the plaintiff has revealed at **paragraph 31** that the plaintiff became aware that the land was illegally and fraudulently invaded by the 1st, 2nd and 3rd defendants in the year 2000, that the title in the plaintiff's list of documents shows that it was issued to the 1st defendant on 29/12/2000, about 17 years ago; that the claim is for general damages and mesne profits for trespass to land; that the rights of the parties have been adjudicated by the court in various suits filed at Kitale and Eldoret courts; that the filing of this suit by the plaintiff while fully aware of those suits is a flagrant abuse of the process of the court.

5. The plaintiff's response in the replying affidavit states that the plaintiff's suit hinged on trespass to land; that the trespass has been a continuous tortious activity to date and is not subject to **CAP 22**; that the land was in use as public land and trespass to such land is not subject to limitation; that originally the land was originally vested in the Settlement Fund Trustees; that the same could not be allocated to a private person or a non-governmental organization; that the negotiation aimed at getting the 2nd defendant to vacate the suit land failed in 2017 and it is only upon failure of negotiations that one may file suit; that the suit is not res judicata as the plaintiff has never been a party to the cited litigation.

6. The issues arising for determination in this application are as follows”:

a. Is the suit statutorily time barred?

b. Is the suit an abuse of the process of the court for being res judicata?

c. Who should pay the costs of the suit?

7. It is agreed between the parties that the claim is in trespass to land and that the 1st, 2nd and 3rd defendants are still in occupation of the land. Trespass is defined as:

“In the strictest sense, an entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property.”

8. In the case of **Msa. Civil Suit No. 84 of 2005 Janendra Raichand Shah -vs- Mistry Walji Naran Murji [2014] eKLR** the court stated as follows:-

“Nevertheless in fairness to the plaintiffs their argument that their cause of action arose on each day that the defendant was in wrongful occupation may be valid. On this, the court draws an analogy from continuing trespass”.

Clerk and Lindsell on Torts 17th Edition at paragraph 17.02 states:-

“Every continuance of a trespass is fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues..

The defendant was in continuous wrongful possession from 1st January, 1990 (a day after the lease determined) upto after 24th November, 2004 when the plaintiffs sold the premises to Vantage yet in respect of the plaintiffs their cause of action first arose in June, 1985 when they became owners of the property. So from June 1985 to 24th November, 2004 a new cause of action arose each day the defendant continued to be in wrongful possession. However for purposes of the Limitation of Actions Act, any cause of action that arose three years before the date of filing of the suit would be statute barred. The suit was filed on 12th May, 2005 and so any cause of action that arose prior to 12th May, 2002 is time barred.”

9. I am persuaded that in view of the facts pleaded regarding trespass as set out above **Limitation Under Cap 22** can not apply in this case.

10. The applicants have stated that the suit is res judicata. **Paragraph 17** of their defence states that vide **Kitale ELC 53 of 2012** the court held that the suit land lawfully belonged to the 1st defendant and the said judgment was not appealed against by any person including the plaintiff.

11. I have noted that the effect of the judgment in **Kitale ELC 53 of 2012** is that the 3rd defendant in the present suit was holding the suit land in trust for the 1st defendant, and that the trust should terminate and the land be registered in the name of the 1st defendant. despite the plaintiff's claim that it noted the encroachment on the suit land way back in the year **2000** and that it was engaged in negotiations with the 1st, 2nd and 3rd defendants up to the year **2017** it was not involved in that litigation.

12. **Section 7** of the **Civil Procedure Act** provides as follows:

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.

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.

13. In this court’s view the rights of the 1st defendant have already been declared by a court of competent jurisdiction, but the suit in which that was done did not involve the plaintiff or its agents.

14. In the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR –Nairobi Civil Appeal No. 107 Of 2010** the Court Of Appeal observed as follows:

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(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.

See Mulla, Procedure Code Act of 1908 16th Edition.

Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR,**

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

15. As observed from the court of appeal judgment cited above the five factors that determine *res judicata* must all be present at any one given time in the instant suit to enable this court pronounce this suit as *res judicata*.

16. From an analysis of the pleadings it is clear that the factors (a), (b), (c) and (e) in the passage from the judgment set out herein above do not apply to this case. Therefore, in my view where the applicant has failed to prove as crucial a factor as that the plaintiff or his agent was litigating in the previous suits, he can not claim that the instant suit is *res judicata*.

17. Consequently, I find that the application dated 27/11/2019 has no merit and the same is hereby dismissed with costs.

Signed, dated and delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.