



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.14 OF 2019

AGNES KIVINDU KISILU.....1ST PLAINTIFF

DOUGLAS KAKUNGU MUNYAO.....2ND PLAINTIFF

NYAMAI MUSEBI.....3RD PLAINTIFF

VERSUS

STEVEN KIVEVO.....1ST DEFENDANT

COSMAS KIILU KIVEVO.....2ND DEFENDANT

THE COUNTY LAND REGISTRAR – MAKUENI...3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

R U L I N G

1. What is coming up for ruling before this Court is the 1st and 2nd Defendant's Notice of Preliminary Objection dated 27th May, 2019 and filed in court on 29th May, 2019.

2. The two Defendants contend that: -

a) **The suit is res judicata as per the Minister's Land Appeal Case No.63 of 1984.**

b) **The dispute over the subject parcel of land was exhaustively heard in a series of cases and finally determined in the said Appeal, whose orders have never been objected to.**

c) **The dispute was determined by a court with competent jurisdiction and orders subsequently issued.**

d) **The determination of the Appeal and orders issued on 20th December, 1985 was final.**

e) **The suit is an abuse of the court's precious time as massive resources and time were injected into the former suit to final determination.**

f) **The suit does not raise any new issues and concerns the same parcel of land by beneficiaries of the parties of the former suit.**

3. The Preliminary Objection was disposed off by way of written submissions. By the time of writing this ruling it is only the 1st and 2nd Defendants who had filed their submissions.

4. The Counsel framed four (4) issues for determination namely: -

(a) What is the matter in issue in the instant suit?

(b) What is the matter in issue in Minister's Land Appeal Case No.63 of 1984?

(c) Are the parties in the two suits the same?

(d) Is the Preliminary Objection properly pleaded?

5. Regarding the first issue, the Counsel for the 1st and 2nd Defendant's submitted that the issue in dispute concerns the rightful ownership of land parcels number Kiteta/Kasuswi/459 and Kiteta/Kasuswi/1091.

6. Regarding the second issue, the Defendants' Counsel submitted that ownership of land parcel number Kiteta/Kasuswi/459 which was the subject of the appeal in the Minister's Land Appeal Case No.63 of 1984 is the same issue raised in the instant suit albeit the same parcel of land was further subdivided into two, Kiteta/Kasuswi/1091 being one of them.

7. It was further submitted that the parties in the instant suit were the parties in the Minister's Land Appeal case number 63 of 1984.

8. The 1st and the 2nd Defendants further contend that the Preliminary Objection is properly pleaded and that res judicata does not allow a court to try the same suit multiple times.

9. The Counsel relied on the case of **E.T vs. Attorney General & Another [2012] eKLR** where Majanja, J stated thus: -

“The courts must be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before court in another way and in a form a new cause of action which has been resolved by court of competent jurisdiction.”

10. Arising from the above, the Counsel was of the view that the Plaintiffs have not raised any new issue that was not dealt with in the previous cases.

11. Having read the Preliminary Objection and the submissions filed, I am of the view that the only issue for determination is whether the Minister sitting under the provisions of section 29 of the Land Adjudication Act chapter 284 of the Laws of Kenya is a Court of competent jurisdiction and thus this suit would be res judicata by virtue of Minister's Land Appeal Case No.63 of 1984.

12. In **section 2 of the Civil Procedure Act chapter 21 of the Laws of Kenya revised Edition 2012 [2010]** a “**Court**” is defined as;

“The High Court or Subordinate Court in the exercise of its civil jurisdiction.”

By virtue of section 7 (1) of the sixth schedule of the Constitution of Kenya, 2010 the High Court would also include courts of equal status in the definition cited.

Section 7(1) of the sixth schedule of the Constitution provides as hereunder: -

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

Further, under section 2 of the Interpretation of the General Provisions Act Revised Edition chapter 2 of the Laws of Kenya, a “**court**” is defined as “*any Court of Kenya of competent jurisdiction.*”

13. My reading of the aforementioned sections which define what a court is, a Minister sitting in appeal under section 29 of the Land Adjudication Act cannot be a court of competent jurisdiction and as such, the instant suit cannot be said to be res judicata.

14. The upshot of the foregoing is that the Preliminary Objection has no merits and I will proceed to dismiss it with no orders as to costs since the Plaintiffs did not file their responses to it. It is so ordered.

Signed, dated and delivered at Makueni via email this 28th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi