



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 11 OF 2019

CHARLES KARANJA MASHUA.....PLAINTIFF

VERSUS

MUBIRU LIMITED.....1ST DEFENDANT

DISTRICT SURVEYOR, KAJIADO.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO.....3RD DEFENDANT

DIRECTOR OF SURVEY, NAIROBI.....4TH DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI.....5TH DEFENDANT

JONAH MZEE ORUMOI.....6TH DEFENDANT

JOSEPH PARSANE ORUMOI.....7TH DEFENDANT

ROSE TITO METUO.....8TH DEFENDANT

JULIUS SARINKE ORUMOI.....9TH DEFENDANT

RULING

What is before Court for determination is the 6th to 9th Defendants Notice of Motion application dated the 6th June, 2019 brought pursuant to sections 7 and 8 of the Civil Procedure Act, Section 18(2) of the Land Registration Act and Order 2 Rule 15 (1) of the Civil Procedure Rules. The Applicants' seek for the following orders:

1. That the suit against the 6th to 9th Defendants be struck out with costs.
2. That the costs of this application be borne by the Plaintiff.

The application is premised on the summarized grounds that the suit is an abuse of the court process and res judicata as it offends the provisions of Section 7 of the Civil Procedure Act. The suit offends the provisions of section 18(2) of the Land Registration Act. Further, the claim against the 6th to 9th Defendants relates to non existent parcels of land and the orders sought are in vain.

The application is supported by the affidavit of JONAH MZEE ORUMOI where he deposes that this is not the first time the Plaintiff has filed proceedings concerning the same subject matter and the issues raised in this suit. He contends that around 1997, the Plaintiff filed a boundary dispute with the District Land Registrar, Kajiado under section 21 of the repealed Registered Land Act with regard to Land Parcel Numbers Kajiado/ Loitoktok/ Olkaria/ 65 and 66. Further, that the dispute was heard and determined on 25th September, 1997 and the Plaintiff never preferred an Appeal. He claims the Plaintiff also filed Nairobi HCCC No. 1683 of 2002 against the estate of Peter Orumoi Metuo which suit was struck out on 15th October, 2012. Further, the Plaintiff had previously sued the 1st Defendant in Machakos HCCC No. 145 of 2008 which suit was struck out on the 23rd April, 2009. He insists this suit is hence res judicata. He states that the Plaintiff's claim is statute barred since the cause of action pleaded dates back to 1980 to 1981. He reiterates that land parcel numbers Kajiado/ Loitoktok/ Olkaria/ 256 and 257 in respect of which the Plaintiff seeks orders are no longer in existence.

The Plaintiff in opposing the application filed Grounds of Opposition where he stated that:

1. The Application is frivolous, vexatious and made in bad faith.
2. That the said application is an abuse of the court process.
3. That the Honourable Court has jurisdiction to hear and determine this matter on merits.

The 1st to 5th Defendants did not file any responses to oppose the application.

The application was canvassed by way of written submissions filed by the 6th to 9th Defendants and the Plaintiff.

Analysis and Determination

Upon consideration of the 6th to 9th Defendants Notice of Motion application dated the 6th June, 2019 including the supporting affidavit, Grounds of Opposition and Submissions the following issues are for determination:

- Whether this suit is res judicata
- Whether this suit is statute barred
- Whether the suit herein should be struck out with costs to the 6th to 9th Defendants

As to whether this suit is res judicata.

The Applicants in their submissions reiterated their claim and relied on the cases of: **Joshua Ngatu V Jane Mpinda & 3 Others (2019) eKLR; Nelson Machoka Keraro V Land Registrar, Kisii & 3 Others (2019) eKLR; and Mary Wairimu Muraya V Ngari Muraya (2015) eKLR** to buttress their arguments. The Plaintiff opposed the application and relied on the decisions of **MWK Vs AMW (2016) eKLR; and D T Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & Another (1980) eKLR** to oppose the application.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata: ‘ **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.**’

The Applicants contended that the Plaintiff has not denied previously filing Nairobi HCCC No. 1683 of 2002 later renumbered Nairobi ELC No. 858 of 2007 that was later transferred to Machakos and re numbered Machakos HCCC No. 89 of 2009. They explain that the Plaintiff made averments in the said suit which are similar to the instant suit. Further, that the Plaintiff also filed a suit against the 1st Defendant to wit Machakos HCCC No. 145 of 2008. From a reading of the Rulings in relation to Machakos HCCC No. 89 of 2009 and Machakos HCCC No. 145 of 2008, I note the two suits were both struck out as the respective judges noted that the Plaintiff’s claim related to a boundary dispute which the court was not seized with jurisdiction to handle in the first instance. On perusal of the Plaintiff in the instant suit, the Plaintiff’s claim still revolves around land parcel numbers Loitoktok/ Olkaria 254 and 255 and a mutation dated 12th October, 1990 which led to the rectification of the boundaries therein. It is trite law that issues of boundary should be first dealt with by the Land Registrar before the same can be handled by the Court and will concur with my two learned Colleagues findings. However, on whether this suit is res judicata, the Court of Appeal in the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** and stated thus :-

‘ **in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.**’

Further in the case of **MWK Vs AMW (2016) eKLR**, Justice Ngugi held as follows: ‘ **I have come to the conclusion that it does not. Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*.**’

In the current scenario and based on the two Rulings which were availed to the Court from Machakos HCCC No. 89 of 2009 and Machakos HCCC No. 145 of 2008, it is clear the two suits were struck out at the preliminary stages and were not heard on merit. Based on the circumstances at hand and relying on the decisions cited above as well as Article 50 (1) of the Constitution, I find that since the two previous suits were struck out on technicalities in the preliminary stages, they were not heard on merit hence this instant suit cannot be deemed to be res judicata.

On the issue as to whether this suit is statute barred.

The Applicants claim the suit is statute barred, which fact the Plaintiff objects to. On perusal of the Plaint herein and the previous pleadings in the aforementioned two suits, I note the cause of action pleaded therein arose from the years 1980 and 1981 when the titles to Kajiado/ Loitokitok/ Olkaria/ 65 and Kajiado/ Loitokitok/ Olkaria/ 66 were both subdivided to create parcel numbers 254, 255, 256 and 257 respectively. I note the Plaintiff was well aware of the subdivisions as well as the mutations and the disputed boundaries which is the fulcrum of this suit. The Plaintiff has even referred to the Mutation Form dated the 12th October, 1990 which has led to the dispute herein. Section 7 of the Limitation of Actions Act provides that: **‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’**

While Section 26 of the Limitation of Actions Act gives an extension of time to institute a suit and states as follows:

‘Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

However, I note for a party to rely on section 38 cited above, one should not have been aware of when the cause of action arose and time only begun to run when one discovered the fraud. In the current scenario, the Plaintiff was well aware of the disputed mutation dated the 12th October, 1990 as well as the Land Registrar’s report determining the boundary dispute herein and cannot purport to rely on this provision as someone who discovered the fraud recently. I opine that from 1990 upto 2019 it is roughly 29 years which is way beyond the period of limitation. In the circumstances, I find that the Plaintiff’s claim as against the 6th to 9th Defendants’ herein is statute barred and will proceed to strike it out with costs to them.

It is against the foregoing that I find the application dated 6th June, 2019 merited and proceed to allow it.

Dated Signed and delivered via email this 14th day of May 2020

CHRISTINE OCHIENG

JUDGE