



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 188 OF 2013

JOSEPH WANJOHI MURIITHI.....1ST PLAINTIFF
HARRISON MAINA MURIITHI.....2ND PLAINTIFF
DANIEL MUNENE MURIITHI.....3RD PLAINTIFF
ESTHER NYAKANGUYU MURIITHI.....4TH PLAINTIFF

VERSUS

PETER MUTHIGANI.....1ST DEFENDANT
JANE NJERI MURIITHI SUED AS THE ADMINISTRATOR
OF THE ESTATE OF THE LATE MURIITHI NGARI MBARU Alias
TITUS MURIITHI (Deceased).....2ND DEFENDANT/INTERSTED PARTY
MUNENE NDUMBI.....3RD DEFENDANT/INTERSTED PARTY
JACK GITARI MURIMI.....4RD DEFENDANT/INDERSTED PARTY
MIRRIAM WAMBUI GITARI.....5TH DEFENDANT/INTERSTED PARTY
JAMES NGATIA KIRAGU.....6TH DEFENDANT/INTERESTED PARTY
BENSON MAINA KABAU.....7TH DEFENDANT/INTERSTED PARTY
MARGARET WANJIKU.....8TH DEFENDANT/INTERSTED PARTY
SIMON MUGO KINYUA.....9TH DEFENDANT/INTERSTED PARTY
SUSAN WANJIRU MWANGI.....10TH DEFENDANT/INTERESTED PARTY

RULING

The application before me is the Notice of Motion dated 14th June 2017 brought under **Section 1A, 1B, 3A and 7 of the CPA**. The applicants are seeking the following orders:

1. That the suit herein be struck out with costs for being res-judicata.

2. That costs be provided for.

The application is supported by the affidavit of James Munene Ndumbi, the 3rd defendant herein and grounds shown on the face of the said application. The application is opposed with a replying affidavit sworn by Joseph Wanjohi Muriithi, the 1st plaintiff/respondent sworn on 12th September 2017 and another affidavit sworn by Jane Njeri Muriithi sworn on 12th July 2017.

APPLICANTS CASE

According to the applicants who are the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th defendants, this suit was initially filed at Embu on 30th March 2011 and registered as Civil Suit No. 35 of 2011 and the defendants filed their defence on 20th May 2014. In the said suit, the defendants were only Peter Githinji Muthigani and Muriithi Ngari Mbaru who are the 1st and 2nd defendants in the present suit. However, they were later enjoined by the defendant vide an application dated 19th May 2014. The applicants contend that the issues in question in this suit were dealt with in LDT No. 3 of 2008 at Baricho. The applicants further stated that after the Baricho case was heard and determined, an appeal was preferred at Embu High Court being HCCA No. 27 of 2010 and thereafter, another case was filed being ELCA No. 27 of 2014 at Embu. The applicants argue that from the grounds of Appeal in ELCA No. 27 of 2014 (Embu), the issues are directly the same as what was determined by the Baricho and that this suit is therefore Res-judicata. The applicants are therefore seeking to have this suit struck out being an abuse of the Court process.

RESPONDENTS CASE

The plaintiffs who are also the respondents opposed this application stating that this suit was filed as a declaratory suit against the decision in L.D.T No. 3 of 2008 at Baricho which arose from Ndia Land Disputes Case No. 5 of 2003 and that this Court has the jurisdiction to hear and determine the issues arising in the matter. The respondents also contend that ELCA No. 27 of 2010 has never been heard and determined to qualify the principles of Res-judicata to apply. The 2nd defendant Jane Njeri Muriithi has also opposed this application stating that this suit is not Res-judicata. ELCA No. 27 of 2014 where she was the appellant while the 1st defendant was the respondent while the applicants herein were not parties. She stated that this suit is not Res-judicata as ELCA No. 27/2014 is not between the same parties and that the issues in controversy between the parties in the present suit are different from those in ELCA No. 27 of 2014 (Embu). She argued that in ELCA No. 27 of 2014 (Embu), her father whom she substituted was the appellant and was challenging the decision of the Baricho Land Disputes Tribunal which had distributed his land between himself and his wife jointly and the 1st defendant without jurisdiction. She stated that her late father was challenging the jurisdiction of the Magistrate in enforcing the Land Disputes Tribunal award whereas in this case the plaintiffs/respondents have come to pursue their titles to their land under different grounds. She contends that the plaintiffs herein should be given their day in Court to complete their case and that she should also be allowed to pursue the appeal to its logical conclusion.

She stated that the best cause of action is to stay this matter pending the hearing and determination of the appeal if the Court finds that it offends *Section 6 CPA*.

SUBMISSIONS BY THE APPLICANT

The applicants/defendants through the firm of Ikahu Nganga & Co. Advocates submitted that the application herein is premised on **Section 7 of the CPA** as a determination of the issues herein was made in LDT No. 3 of 2008 and the respondents preferred an appeal, being ELCA No. 27 of 2014 (Embu). The learned counsel submitted that the law is clear that where a decision has already been made and a fresh suit filed on the same issues as those in the previous suit, the subsequent suit shall be Res-judicata and should be dismissed as it is an abuse of the Court process since it may cause an embarrassment where two

(2) different decisions are likely to be made over the same issues by a Court of concurrent equal jurisdiction.

SUBMISSIONS BY THE 2ND DEFENDANT

The firm of Ann Thungu & Co. Advocate who appears for the 2nd defendant who opposed this application submitted that the plaintiffs in the present suit were not parties in LDT No. 3 of 2008 (Baricho) from which ELCA No. 27 of 2010 (Embu) arose. It is submitted that the Memorandum of Appeal dated 31/8/2010 raises 7 grounds of Appeal that arose from the orders of 18/8/2010. She submitted that the appellant in ELCA No. 27 of 2010 (Embu) was challenging a decision in LDT No. 3 of 2003 (Baricho) where the owner distributed his land between himself and his wife jointly and the 1st defendant herein. It is submitted that the plaintiffs in the instant suit are seeking several declarations and a permanent injunction based on irregularities by the trial Court in LDT No. 3 of 2008 (Baricho). She stated that the Appeal No. 27/2014 (Embu) has not been heard and determined and therefore the rules of Res-judicata cannot apply.

ANALYSIS AND DECISION

I have considered the affidavit evidence both in support and in opposition to this application. I have also looked at the annexures to the supporting affidavit, the pleadings herein and the applicable law. The one issue for determination in this application is whether the suit herein is Res-judicata or not. From the annexures in further support of the application, the 3rd – 10th defendants/applicants attached proceedings in LDT No. 5 of 2003 (Baricho) where the Tribunal after hearing a claimant by the name Peter Githinji Muthigani (1st defendant) against Titus Murithi, the 2nd defendant herein, held that the land parcel No. MWERUA/KANYOKORA/18 be divided into equal portions, one bearing the name of Peter Githinji and the other Esther Kangunyu and the objectors name to be joint to the two parcels. It was further ordered that the objector herein namely Titus Muriithi to sign all the necessary documents to warrant the division and transfer of the same to the claimant failing which the Executive officer to sign the same. In an application dated 25th March 2010, the claimant sought an order for cancellation of title deeds in respect of land parcel Nos. MWERUA/KANYOKORA/1361, 1362, 1363 and 1364 which are sub-divisions of land parcel No. MWERUA/KANYOKORA/118. According to the claimant, the objector in flagrant disregard of the judgment and decree of the Court sub-divided the suit land into four (4) portions and transferred to other parties who were not party to the suit. That application was opposed vide a replying affidavit sworn by the objector, Muriithi Ngari Mbaru Alias Titus Muriithi sworn on 20/4/2010. In a ruling delivered on 25th August 2010, the trial Court allowed the same and cancelled the four titles being MWERUA/KANYOKORA/1361, 1362, 1363 and 1364 and directed the Land Registrar Kirinyaga to dispense with the production of the title deeds marked for cancellation above stated. In another application dated 7th September 2010, the objector sought a stay of execution of the orders given on 18th August 2010 for cancellation of land parcels No. MWERUA/KANYOKORA/1361, 1362, 1363 and 1364 respectively. The said application was heard ex-parte and temporary stay orders were issued pending the hearing interpartes on 22/9/2010. On 31/8/2010, the objector filed Memorandum of Appeal containing 7 grounds of Appeal.

First the doctrine of Res-judicata is founded under **Section 7 of the Civil Procedure Act** which provides thus:

“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”.

This doctrine as I understand is an estoppel against a party who seeks to re-litigate on an issue which has been litigated upon in a previous suit by a Court of competent jurisdiction. The initial suit was a dispute before the Land Disputes Tribunal in Baricho being LDT No. 5 of 2003 between Peter Githinji Muthigani

as the claimant and Muriithi Ngari Alias Titus Muriithi as the objector on the other hand. The claim by the claimant was for the sub-division of a registered property in the name of the objector which was allowed and the award was adopted by the Magistrate's Court at Baricho vide LDT No. 5 of 2010. This suit was finally filed by the plaintiffs in 2010 seeking numerous orders including an order for a declaration that the orders of the Hon. Senior Resident Magistrate in LDT No. 3 of 2008 adopting the award of the Tribunal as judgment of the Court is irregular,

illegal, null and void. The orders being sought in the current suit are new matters which were not in issue in the former suit. What the current suit is seeking is an order that the Land Disputes Tribunal lacked jurisdiction to determine the issue that was before it. That in my view is a new matter that was not dealt with in the former suit.

For the aforementioned reasons, I find no merit in the application dated 14th June 2017 and the same is hereby dismissed with costs to the respondents.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th Day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Igati Mwai for Plaintiff – present*
2. *Ms Wangechi Munene holding brief for Ann Thungu*
3. *Mrs Makworo holding brief for Mr. Nganga*
4. *Mbogo – Court clerk*