



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

LAND AND ENVIRONMENT CASE NO. 138 OF 2015

JESCA SONGOLE.....1ST PLAINTIFF

BERNARD SONGOLE2ND PLAINTIFF

VERSUS

CHARLES AMUYUNZU LWENYA1ST DEFENDANT

GEORGE BWOYERE AKOTO2ND DEFENDANT

RULING

[1] The second defendant filed this application under Order 2 Rule 15 of the Civil Procedure Rules and under Section 1A and 1B and 3A of the Civil Procedure Act. He prays that the plaint filed herein be struck out with costs for being frivolous, vexatious and an abuse of the process of the court. The application is grounded on the fact that the present suit is barred by Section 7 of the Civil Procedure Act. That it is clear from the proceedings of Kakamega Miscellaneous civil award No. 64 of 1985 that the court order dated 31st March 1987 did not set aside the award adopted by the court on 3rd December 1985. The applicant further argues that all issues touching on the validity of the award including errors of description of the land should have been raised and conversed in the application dated 19/9/85 and not a separate suit. That finally, there was an admission by the plaintiff's predecessor that he accepted the verdict to subdivide his land and transfer to the defendant 10 acres. The application is supported by an affidavit of George Bwoyere Okoto the second defendant herein sworn on 27th July 2015. The affidavit sets out in detail all facts supporting the application herein.

[2] The respondent filed a replying affidavit dated 5th October 2015 sworn by Bernard Songole. He alleges that the suit is not *resjudicata* and that the issues herein have not been determined on merits. He relies on the order of F.Makoyo RM of 9th March 2015 in which he alleges that the Resident Magistrate stated:

“The allegations raised by the applicant are serious and upon consideration of the supporting affidavit, it is my considered opinion that such allegations touch on the issues that cannot be determined in a miscellaneous application such as this one. Such matters require evidence that ought to be interrogated and is best done through a substantive suit.”

He alleges that the applicant never appealed or sought to review the said orders. The applicant alleged that JM Khamoni P.M.(as he then was) rendered himself thus

“in view of the above, I grant the application (sic) set aside the order of 3rd December 1985”

The respondent avers that the order set aside were the orders adopting the decision of the panel of elders awarding 10 acres to the applicant.

The applicant says that the issues he raises are weighty in that they are whether the panel of elders under the defunct magistrates court jurisdiction (amended) Act No. 14 of 1981 Laws of Kenya could legalize a void transaction as provided under the Land Control (Act) Cap 302 Laws of Kenya and that the transfer of the land of 10 of prime land worth in excess of Kshs.5,000/= is weighty.

[3] The real issue for determination herein is, was the elders award in Kakamega Civil Award No. 64 of 1985 set aside? Is this suit *rejudicatta*?

On 13/12/85, N. Gakuhi SPM made the following order

“award of elders filed in this court formally on 27/8/85 is ordered adopted as a judgement of this court. 10 acres out of land parcel No.Soy/Lumino/77 is moved transferred to the respondent/plaintiff. The plaintiff to take all necessary steps to have the transfer effected. The Executive Officer of this court to sign all relevant documents to effect the said transfer. Right of Appeal 28 days to the High Court.”

On 25/2/86 Shitsama Advocate applied for a stay of execution pending the hearing of an application to set aside the judgement. Stay was given on 23/12/86. Mr. Shitsama appeared before Khamoni SRM and said that he had two applications one dated 19/9/85 and another dated 18/12/85. They chose to argue the one dated 18/12/85. He said the application was for an order to set aside the order of 3/12/85. An issue arose during the hearing thereof as to which application was to be heard, the one of 19/9/85(asking for the elders award to be set aside or the one of 18/12/85(asking for the order of 3/12/85 to be set aside) Mr. Shitsama said that the application be separated and that his instructions were limited to the present application. In his ruling JM Khamoni PM(as then was) started his ruling thus;

“This is an application by the defendant, Laban K. Songole to set aside the court’s order dated 3/12/85 dismissing his application dated 19/9/85 on the ground that he was not present”. The application that had been dismissed by Gakuhi SRM was the one dated 19/9/85 and judgement entered for the plaintiff. It was an application to set aside the elders’ award. So when J.M. Khamoni PM said,

“The defendants counsel, however, insisted that we handle this application only and if granted the application dated 19/9/85 will be handled separately. In view of the above I grant the application to set aside the order of 3/12/85. Costs in the cause.”

The learned magistrate(as he then was) was referring to the application of 19/9/85 to set aside the elders award. He set aside the order dismissing that application and consequently it came back to life. Indeed it was argued on 28/7/87 when Mr. Shitsama for the applicant said’

“Application filed on 19/9/85 we seek orders No. 1 and 3 abandoning prayer 2 that calls for the matter to be re-submitted for arbitration under a new panel of elders”

[4] In his Ruling on 18/8/87 J.M. Khamoni PM(as then was) dealt with all the issues raised including the argument advanced against, including lack of the consent of land control board, the effect of the magistrates’ jurisdiction(Amendment) Act No. 4 of 1981 and Section 6 of the Land Control Act and Section 143(1) of Land Control Act. In the final analysis, he dismissed the application to set the elders’ award aside on 18/8/97. All the parties and their advocates were recorded as present.

[5] From what I can see on the record there was no appeal against that order. The land was later subdivided and a portion of 10 acres given to the purchaser. The land has since been sold to the second defendant.

[6] After perusing the proceedings herein, I find this matter is *resjudicatta*. The land is the same, and the parties and their predecessors in title are the same. The acreage in dispute is the same. Since the application to dismiss the application to set the elders award was made, it is now 29 years. Litigation

must come to an end. The defendant operates on the mistaken view that the elders award has never been adopted. A close look at what happened before Khamoni J on 23/12/86 shows that, although the elders award had been adopted as the order of the court and 10 acres of land parcel Soy/Lumino/77 ordered transferred to the plaintiff, the respondent himself, in spite of Mr. Owinyi Advocate for the plaintiff agreeing that the award be remitted to a different panel of elders, said that he wanted the application separated and only dealt with the application of 19/9/85 to reinstate his application for setting the elders' award aside. The judgement entered by N. Gakuhi was never set aside. What was set aside was the order dismissing the application to set aside the award of the elders. The application was eventually dismissed by Khamoni P.M.(as then was)The position then became as it was on 13/12/86. There was therefore, a judgement for the plaintiff in case No. 64 of 1985.

[7] The applicants claim that there was never adoption of the award is therefore misconceived. There was no fraud in sub dividing Kakamega/Soy/77 as it was done pursuant to valid orders of the court. This land has been described as Soy/Lumino/77 and Kakamega/Soy/7. There is nothing on record to show that this is not the same land. Parties to those proceedings who were represented by counsel have not objected over the years when the land was referred to as Soy/Lumino/77. I take it to be a misdescription of the suit land while it remained the same land on the ground. There was no objection raised by anyone over the years to say that, that is not so. The land is referred by both names by both parties in their pleadings before the tribunal, the magistrates' court at Kakamega Court where all parties took part.

For those reasons, I am satisfied that this suit is resjudicata. The application herein is allowed with costs. The suit filed herein is struck out with costs to the applicants.

Dated at Kakamega this 11th day of May 2016

S.MUKUNYA - JUDGE

Ruling read in open court in presence of

C.A Nyongesa,

Tsimonjero for Kiveu for plaintiff/respondent

Masaviru Ketoo Not present

S.MUKUNYA - JUDG

11/5/2016