



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 57 OF 2019**

**CHEMWENO KIMUTWOL.....PLAINTIFF**

**VERSUS**

**ALBERT MULATI WEPUKHULU.....1<sup>ST</sup> DEFENDANT**

**PETER BIKALA BARASA.....2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR,**

**TRANS-NZIOIA COUNTY.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

1. The 2<sup>nd</sup> defendant filed a notice of motion dated 4/2/2020 and filed on 5/2/2020 seeking the following orders against the plaintiff:

**1. That this suit be struck out with costs for being *res judicata*.**

**2. That costs of this application be borne by the plaintiff/respondent**

2. The application is brought under **Section 7 of the Civil Procedure Act.**

3. The application is premised on the following grounds: that the suit and/or issue is directly and substantially in issue in **Kitale District Magistrate's Court Civil Case No. 96 of 1972** and **Kitale Senior Resident Magistrate's Court Land Case No. 7 of 1989** which were determined; that the former suits were between the same parties, who were litigating under the same title and over the same subject matter herein and they were heard and determined, and that litigation has to come to an end. The application is supported by an affidavit of the 2<sup>nd</sup> defendant sworn on 4/2/2020. It reiterates the above grounds.

**The Response**

4. The plaintiff filed a replying affidavit dated 2/3/2020. In that affidavit, he states that it is not correct to state that this matter is *res judicata vis a vis* the two cases cited above. The main reason for his belief is that both suits referred to a plot apparently measuring **23** acres while the land reference **Trans Nzoia Suwerwa/240** is only **17** acres in size.

**Submissions**

5. None of the parties filed any submissions on the application by the time of preparation of this Ruling.

**Determination**

6. The issue that arises in the instant application is whether the instant suit is *res judicata*. It is not denied by the plaintiff that the two other suits mentioned by the 1<sup>st</sup> defendant existed.

7. The applicant's version of events is that his late father purchased **Plot No 240 Suwerwa** from the 1<sup>st</sup> defendant in **1969**. He further states that in **1972** the plaintiff herein sued his father over the land in **Kitale DMC Civil Case No 96 of 1972** claiming that the 1<sup>st</sup> defendant had sold him the land and that that suit was dismissed with costs.

8. I have examined the copy of the judgment in **Kitale DMC Civil Case No 96 of 1972**. The current plaintiff was the plaintiff in that case and *Jackson Barasa*, the 2<sup>nd</sup> defendant's father was the defendant. The suit land was **Plot No 240 Suwerwa** of which the plaintiff claimed to be the rightful owner, having allegedly purchased it for **Kshs. 5000/=** from one Wepukhulu in **1971**. The court appears to have been inconclusive in its findings. In part it stated as follows in the judgment:

**“I am satisfied that the plaintiff bought plot No. 240 at Suwerwa Settlement Scheme while aware that the defendant had some interest in it. Until the position is made clear, by the Ministry Of Lands and Settlement I make no order concerning the eviction sought by the plaintiff. For this reason I dismiss this claim with costs.”**

9. This court does not find that decision to be conclusive of the rights of the parties so as to warrant the application of the doctrine of *res judicata* in the instant suit.

10. No decision in any appeal against the decision in **Kitale DMC No. 96 of 1972** is exhibited in the application. However a partly legible copy of a decree in **Civil Appeal No 106 Of 1993** is exhibited showing that an appeal against some decision (which is not identified as **Kitale DMC Civil Case No 96 of 1972**) was dismissed with the caveat that the then appellant (who is the plaintiff herein) was at liberty to apply to the lower court for some orders. The curious factor in that appeal is that it involved two defendants who included the 2<sup>nd</sup> defendant.

11. The next decision annexed to the application is a ruling dated **14/5/1998** in a **Land Case No. 7 of 1999**. The writings are so faint in some parts that this court is unable have a comprehensive appreciation of that decision. However it mentions in part a court order of **30<sup>th</sup> January 1990**. A copy of a decree dated **30<sup>th</sup> January 1990** has been exhibited. It adopts the award of a panel of elders as the judgment of the court and awards the plaintiff **8 acres** out of **Plot No 240 Suwerwa Settlement** scheme to hold in trust for the family of *Jackson Barasa* while the remaining **15 acres** are awarded to the plaintiff in the instant suit, who by that decree is also to retain the side on which he had erected his house. By that decree the defendant (who is the 1<sup>st</sup> defendant herein was to effect the transfer of the land to the entitled persons in the above ratios.

12. The plaintiff in the instant suit avers in his response that the said decree analysed above can not stand for the reason that it has referred to **23 acres** and yet the **Plot No 240** is only **17 acres**. He has exhibited a copy of the register in support of this fact. The plaintiff also exhibits copy of the proceedings in the same case showing that the 1<sup>st</sup> defendant's wife had conceded that the 2<sup>nd</sup> defendant's father was only granted a temporary occupation of a part of the land after he as refunded his money and that the land was sold to the plaintiff.

13. In this matter the plaintiff avers that he obtained a title deed to the entire land in his name in **1995**. Subsequently that title was subdivided in **2007** after the award of the elders and the decree of the court was issued and the 2<sup>nd</sup> defendant got slightly more than **8 acres**, implying that the plaintiff herein was left with **9 acres** in lieu of the **17** envisaged by the panel of elders.

14. A perusal of the plaint in the instant suit reveals that the plaintiff's claim is for an order that the land disputes tribunal did not have any jurisdiction to entertain the dispute regarding title to land among other prayers and that he was not made a party to the dispute before the tribunal. In my view, this is a claim entirely different from the claims adjudicated by the courts below. From the material placed by both parties on the record, the plea of *res judicata* does not apply to this case.

15. The 1<sup>st</sup> defendant's motion dated **4/2/2020** has no merit and the same is hereby dismissed with costs to only the plaintiff.

**Dated, signed and delivered at Kitale via electronic mail on this 21<sup>st</sup> day of July, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**