



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT AND LAND CASE NO. 149 of 2013

(IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA)

ELPHAS OTINDE ANDARU APPLICANT

VERSUS

AKWERA HEZRON NDEGU 1ST RESPONDENT

HEZRON ARUNGA 2ND RESPONDENT

RULING

1. **Akwera Hezron Ndegu** and **Hezron Arunga** (the Respondents) have raised a Preliminary Objection to the Originating Summons filed herein by **Elphas Otiende Andaru** (the applicant) and dated 21/5/2013. In the Originating Summons, the applicant seeks a declaration that he has acquired title to Parcel No. WEST BUNYORE/ITUMBU/256 by operation of the law having been on the land for more that twelve years.
2. The Respondents filed a joint replying affidavit opposing the Originating Summons and more specifically raised a Preliminary Point of law that the Originating Summons was *res-judicata*.
3. Subsequently, on 27/6/2013, the Respondents filed a formal Notice of Preliminary Objection dated 21/6/2013 and sought to have the Originating Summons dismissed on the ground that the same was now *res-judicata*. It is stated on the Notice of Preliminary Objection that the matter was conclusively determined in Kakamega CMCC No. 304 of 1980 and a ruling delivered on 12/2/1985 between the applicant's relative and father to the 1st respondent.
4. The Respondents' advocate then fixed the Preliminary Objection for hearing on 10/12/2014 and served the Applicant's counsel. When the matter came up for hearing on 10/12/2014, the Respondents' advocates were in court but the applicant's counsel was absent though served. On being satisfied that a hearing Notice had been duly served on the Applicant's counsel, I directed that the Preliminary Objection be heard.
5. Mr. Musungu, counsel for the Respondents addressed the court on the Preliminary Objection and reiterated the contents of the Notice of Preliminary Objection. He emphasized that a similar matter had been heard and determined in Kakamega CMCC No. 304 of 1980. He told the court that that suit involved Omunde Makanga, father to the applicant in the current suit, and Kwera Hezron Ndegu, the 1st Respondent in the present suit. Kwera Hezron Ndegu was the Defendant in the former suit.
6. Counsel told the court that the ruling in the former suit was made on 12/2/1985 with a finding

that the plaintiff in that suit, (the Applicant's father) was not the owner of parcel No. WEST/BUNYORE/ ITUMBU/256. This is the same parcel land that is the subject of this suit. Counsel submitted that the issues in the previous suit were in respect to ownership of this parcel of land and the plaintiff in the former suit filed an appeal which was also dismissed.

7. Counsel also submitted that the plaintiff in the former suit is related to the Applicant in the present suit as father and son. They should have raised these issues in the former suit, but having failed to do so, the issue of estoppels has caught up with them now and the present suit cannot stand. Counsel cited several authorities to buttress his argument. He urged the court to allow the Preliminary Objection and dismiss the Applicant's suit.

8. I have considered the Preliminary Objection, submissions by counsel and the authorities cited. The Respondents have contended that the suit herein is now *res-judicata* because a previous suit had been heard and determined involving the same parcel of land, a relative to the plaintiff (plaintiff's father) and the 1st respondent, being CMCC No. 304 of 1980 at Kakamega. According to counsel for the Respondents, the suit involved the ownership of parcel No. WEST BUNYORE/ ITUMBU/256, which is the same parcel in the present suit.

9. Although no pleadings have been annexed to the Responses to this suit, I have seen proceedings in which a ruling was made by the learned magistrate ordering Ominde Makanga, the judgment debtor, to vacate the suit land within six months. This was after the learned magistrate had perused the appeal file from the High Court Civil Appeal No. 40 of 1980 and found that the appeal had been dismissed on 26/3/1980.

10. According to those proceedings, the applicant's father vacated the land and on 12/9/1989, the learned magistrate was informed of this fact and ordered the caution lodged by the plaintiff (Ominde Makanga) on the suit land removed.

11. The question that I have to determine is whether or not the suit herein is now *res-judicata*. The former suit involved the applicant's father and the 1st respondent over the ownership of the suit land. Although the land involved in the former suit is same one in the present suit, the parties are different. The applicant has come to court on his own staking a claim over the land based on Section 38 of the Limitation of Actions Act saying that he has acquired title to the land by operation of the law otherwise known as "Adverse Possession".

12. Section 7 of the Civil Procedure Act (Cap. 21) Laws of Kenya provides as follows;

"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 a court."

13. Granted, the former suit involved the same parcel of land that is West Bunyore/Itumbu/256. It also involved the applicant's father and the 1st respondent herein. However, as can be seen, the applicant herein is different from the plaintiff in the former suit. It cannot be said that the applicant's father was litigating in the former suit on his behalf and that of the applicant herein.

14. Secondly, the applicant has come to this court seeking a declaration that he has acquired title to the suit land by way of adverse possession. This is a cause of action that the applicant alleges has accrued to him as a person. This claim could not have been litigated on his behalf by his father in the former suit. It is a new cause of action that the applicant says has arisen and which he wants adjudicated upon.

15. Counsel has relied on the authority of *Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End*

Distributors Ltd. [1969] EA 696 as the basis for this Preliminary Objection. As correctly stated in that decision –

“... a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit”

16. *Res-judicata* when successfully argued as a Preliminary Point of law may dispose of the entire suit. But in the present case, the circumstances are different as already stated above.

17. One of the parties is different and the issue for determination is also different. Mr. Musungu has also referred this court to a decision of concurrent jurisdiction namely ***Charles Mwangi Runguru & 3 others –vs- Nancy Wangari Mathenge and 3 others - ELC No. 136 of 2011 (Nyeri)***. In that case, ***Ombwayo, J.*** found the later suit to be *res-judicata* and in arriving at that decision, the learned Judge perused the pleadings and in particular found that the plaintiff in the former suit had sought a declaration that he was the owner of the suit land having occupied it for over 27 years. The learned Judge also found as a fact that the claim in the former suit and that in the suit before him, related to adverse possession.

18. However, in the case before me, I have not seen the pleadings in the former suit and whether or not the suit was about adverse possession is a matter for conjecture, as no pleadings in the former suit have been annexed. On that basis, I would respectfully distinguish the circumstances of this case with those my brother ***Ombwayo, J.*** was considering.

19. For me to conclude that the suit before me is *res-judicata*, I must find as a matter of fact, that the dispute that was heard and determined is the same dispute as that before me and that the parties were the same. In other words, the issues must have been the same involving same parties over the same subject matter. *Res-judicata* looks at not only the form but also the substance, that is, the real issues raised and tried in the former suit compared to those in the present suit.

20. In the case of ***Ukay Estate Ltd. & Aother –vs- Shah Hirji Manok Ltd. Civil Appeal No. 243 of 2001 [2006] eKLR, Deverell JA*** (referring to Section 7 of Civil Procedure Act) stated as follows;

“The key phrase in both the main section and the explanation is ‘the matter directly and substantially in issue’. It has to be borne in mind that neither the section nor the explanation mentions of the cause of action.

I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit. In cases where the cause of action is the same the task will be easier than in cases where the cause of action is different but the matter directly and substantially in issue is the same.”

21. From the authorities cited, I am unable to agree with counsel for the Respondent that the present suit is *res-judicata*. For me to find the suit *res-judicata*, I must have before me facts and materials that bring the suit within the bar of *res-judicata* under **Section 7** of the Act. I have neither seen the pleadings nor the determination reached in the former suit. The judgment that was pronounced by the magistrate’s court which gave rise to Civil Appeal No. 40 of 1980 has not been provided. The judgment of this court in Civil Appeal No. 40 of 1980 has also not been provided.

22. I have only seen a ruling made on 12/2/1985 which was at the execution stage, and which I have been asked to rely on to hold the present suit *res-judicata*. With respect, I am unable to do so.

23. For the foregoing reasons, the Preliminary Objection fails and is dismissed. As the applicants did not participate in the Preliminary Objection, there will be no order as to costs.

Dated and delivered at Kakamega this 3rd day of February, 2015

E. C. MWITA

J U D G E