



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO. 39 OF 2012

SAMUEL JUMA KEYA.....PLAINTIFF

VERSUS

LUKE OMULO OMOLLO..... DEFENDANT

RULING

1. The Defendant – LUKE OMULO OMOLLO – filed a Notice of Motion here on 16/7/2013 attacking the suit herein which was filed by the Plaintiff – SAMUEL JUMA KEYA – on 31/8/2012. The Motion is brought under Section 1A, 1B, and 3A, 27, 34 and Order 4 of Civil Procedure Act.
2. The Defendant is seeking to strike out the suit for reasons that it seeks to enforce the finding of the Court in KISUMU HCC No. 134/07, which is Contrary to Section 34 of Civil Procedure Act (Cap 21); that the issue of the Plaintiff's title was always active in the litigation in the aforementioned suit and it therefore ought to have been raised in that suit as doing so here would be RES JUDICATA; that the Plaintiff has omitted to plead the mandatory Provision of Order 4 choosing instead to plead the opposite in violation of the law; that in filing a suit on a matter already determined the Plaintiff is wasting Courts time and abusing Court process; that the Plaintiff failed to exhibit Notice of Intention to sue; and finally the suit is bad in law and merits being struck out.
3. The Application as filed does not have a Supporting Affidavit. The reasons for bringing it and the prayers are lumped together. The defence didn't respond to it. But both sides agreed to file written submissions to dispose of it. To that effect, the defendant submissions were filed on 27/1/2014 while the plaintiff's submissions had been filed earlier on 6/10/2013.
4. According to records availed, parties had had occasion to litigate over land parcel **No.KISUMU BORDER/3412** in **KISUMU HCC No.134/2007**. In that suit the defendant was the plaintiff and was claiming parcel **No.KISUMU BORDER/3412** (Suit Land hereafter) by adverse possession. The plaintiff herein was the defendant. Records clearly show that the plaintiff, who is now defendant, lost.
5. The defendant in this suit now submits that the issue of the Suit Land should not be entertained now, having been substantially decided in the previous suit. But the defendant position seems to be somewhat ambivalent, with another of his argument being that the issue ought to have been ventilated in previous suit. In furtherance of the second argument, the defendant says that parties should bring their whole case to court instead of bringing the issues to court in bits.
6. As regards violation of Section 34 of the Civil Procedure Act (cap 21), the defendant submitted, inter alia, that the plaintiff can not seek to have orders given by a court of competent jurisdiction

- enforced by another court. The court therefore cannot purport to enforce the orders given in the previous suit and it can not enforce a decree arising therefrom. The court was asked to note that the suit is neither an appeal nor a review. It is instead an attempt by the plaintiff to enforce the decision of the previous suit. That attempt is said to be contrary to Section 34 of the Civil Procedure Act.
7. The defendant termed the whole suit as an abuse of the court process, to the extent that the court is being asked to exercise its mind to the same issues repeatedly.
 8. In the course of defendants submissions, several decided cases were cited to drive home various points. **BENSON NGUGI VS FRANCIS KABUI KINYAJUI & Others C.A No.10 of 1986, NAKURU**, was cited as emphasis for the fact that section 7 of Civil procedure Act which is about RES JUDICTA, is couched in mandatory terms. It mandatorily bars the court from handling a decided issue. **C.R. Mandavia Vs Rattan Singh {1965} EA 118**, gave prerequisites for a proper decree. It pointed out that there must be an adjudication in a suit which must have conclusively determined the rights of the parties with regard to all or any of the matters in controversy. **GREENFIELD Investments Limited Vs Baber Alibhai Mawji: CA.NO.160 of 1997 and HENDERSON VS HENDERSON {1843}** 3 Hare 100 at 115 gave a wider interpretation to RES JUDICTA, pointing out that it is not only about decided issues but also issue that ought to have been raised.
 9. The plaintiff countered all this by observing, inter alia, that the previous suit between the parties was about adverse possession. That suit was dismissed. The issue to be ventilated here were not for determination in the Originating Summons Filed in the previous suit. It was submitted that the suit concerns trespass.
 10. The prayers sought, particularly permanent injunction and eviction, constitute a direct and separate cause of action. The plaintiff, it was submitted, is therefore entitled to sue.
 11. It was further said that Section 34 of the Civil Procedure Act only relate to execution, discharge or satisfaction of decree. The decree to have been extracted in the previous case by the plaintiff in this case would only concern costs and would not relate to the issue of vacating the land.
 12. The plaintiff also denied that the matter is RES JUDICATA. The issue of eviction, for instance, was not decided. And so also was trespass and permanent injunction. And these issues, it was further argued, could not be raised until the issue of adverse possession was determined.
 13. The defendant application was termed frivolous and vexatious and aimed at delaying the suit. The court was asked to dismiss it with costs.
 14. I have considered all the material availed. The first argument of the defendant is that the plaintiff's suit runs counter to provisions of Section 34 of Civil Procedure Act (cap 21). The provision is to the effect that where any question arises between the parties to a given suit where a decree was passed, or between their representatives relating to execution, discharge or satisfaction of the decree, no separate suit should be filed. Instead, the court that passed the decree should handle such issues.
 15. It seems to me that Section 34 (supra) is addressing matters that arise during execution stage. These are matters that relate directly to the judgment or ruling given in a suit. For instance, where property is wrongly attached in execution the objector or judgment debtor as the case may be does not have to file a separate suit. He has to apply for recovery of such property in the same suit.
 16. A question then arises in the matter whether what the plaintiff is asking for arose in the judgment or decree of the previous suit. The judgment has been availed here. It does not cover such issues.
 17. It is also significant to note that the provision talks about a decree. The defendant herein has not

availed the decree passed so that such decree can be interrogated to establish whether the issue in the suit are related to it. Such omission is serious. The defendant can not talk of a decree that exists only in his mind.

18. Further to this, it is important to address what a decree is. The defendant is alive to this, and elsewhere in this ruling, I have outlined the defendant appreciation of what a decree is and how it arises. (see C.R. Mandavas case, Supra). But the defendant didn't go far enough. A reading of Civil Procedure Act would show that a decree excludes a matter or order from which an appeal has been preferred. A look a paragraph 1 of the defendant's defence shows that the defendant filed an appeal against the decision of the court in the previous suit. It is therefore surprising that he talks of a decree in that suit. The truth of the matter is that Section 34 of Civil Procedure Act is not available to the defendant as long as his appeal subsists.

19. The upshot is that all the defendants arguments concerning this provision come to nought and I hereby reject them.

20. The other issue raised is RES JUDICATA. A repeat of what it is here is not necessary. Suffice it to observe that RES JUDICATA is a matter of procedural law. It is, in the main, meant to act as a check against abuse of court process..

It forbids re-litigation over similar issues.

21. The previous suit was started by way of Originating Summons. By its very nature, Originating summons is a limited or constricted way of litigating some issues. The plaintiff herein did not take anybody to court; he was sued. His primary duty then was to defend the suit, which he successfully did. He addressed himself to the issue raised in the Originating Summons. Given the constraining nature of a suit brought by way of Originating Summons, it is doubtful if the plaintiff could have ventilated the issues raised in this suit there. This is especially so given that he was the defendant, not the plaintiff. It is easy to understand when he asserts that he had to await the outcome of that suit first.

22. It is also necessary for the court to think about the implications and consequences of the decision it is invited to make by the defendant here. It should be remembered that this defendant wanted to become an adverse possessor of the suit Land. He failed. That left the plaintiff as the legally known owner. Indeed the plaintiff is the registered owner. This kind of ownership has statutory and constitutional rights and privileges. These rights and privileges can not be trifled with.

23. If we were to grant the defendant wish, what would happen is that the plaintiff would have no remedy against a person – the defendant that is - who is on his land after the court has declared he is not the owner. That would be a recipe of anarchy, for the law would have shut its door on the plaintiff. It would also amount to allowing procedural law to defeat substantive law which in this case is both statutory and constitutional.

24. This then becomes a proper case where Article 159(d) of the Constitution and Section 19(1) of the Environment and Land Court Act must be invoked. The sum total of what the court is saying is that substantive justice cannot be sacrificed at the alter of Procedural technicalities.

25. I therefore don't agree with the defendants arguments about RES JUDICTA. The plaintiff's suit therefore should be allowed to see the light of day. The issues raised in the suit seem not to have been raised in the previous suit and couldn't possibly be properly raised then. And allowing the argument leaves the plaintiff without a remedy.

26. A minor argument raised by the defendant concerns violation of some rule in order 4 of Civil Procedure rules. All these rules are known and are numbered. That rule is not stated in the application. It was not stated in the submissions. I must take it that the defendant was not serious. He probably didn't know well what he was saying.

27. All in all the defendant application is lacking in merit and the same is dismissed with costs.

HON A.K. KANIARU

ENVIRONMENT & LAND - JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru J.

Court clerk John Ogendo

No party present

Interpretation English/Kiswahili

Amondi for plaintiff/Respondent

Yogo for defendant/Applicant

Court: ruling on application filed here on 16/7/2013 read and delivered in open court.

Right of appeal 30 days.

HON A.K. KANIARU

ENVIRONMENT & LAND - JUDGE

7/5/2015