



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 6 OF 2020

SUDI HAMISI PLAINTIFF

VERSUS

OMARI MOHAMED KIKARATA 1ST DEFENDANT

DISTRICT LAND REGISTRAR, KWALE.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL3RD DEFENDANT

OCS, KWALE 4TH DEFENDANT

RULING

(Application for injunction; plaintiff claiming to be the owner of the suit land and contending that he has been illegally evicted; plaintiff seeking injunction pending hearing of the suit; 1st defendant filing a reply and a preliminary objection that the suit is res judicata; there having been a suit filed by the 1st defendant against the plaintiff through which the 1st defendant sought orders to evict the plaintiff from the suit land; no defence filed by the plaintiff in that suit and judgment entered for the 1st defendant herein; clear therefore that this suit is res judicata; suit dismissed for being res judicata)

1. This suit was commenced by way of a plaint which was filed on 22 January 2020. It is the pleading of the plaintiff that he is the legal owner of the land parcel Kwale/Mkongani 'B'/295 (the suit land) having purchased it in the year 1972 from one Mzee Mwanganga Chiziwi. He has averred that over the years, he has built ten houses on the land and invested about KShs. 800,000/= on it. He has pleaded that in May 2019, the 1st defendant accompanied by police officers illegally entered the suit land and started demolishing his houses. On inquiry, they produced a court order from the High Court Mombasa which case the plaintiff avers not to have been aware of. Upon the eviction, the plaintiff has pleaded that he visited the land registry and found that the 2nd defendant (the Land Registrar, Kwale) had registered the 1st defendant as owner of the land. He avers that this action has rendered him homeless thus his action of filing suit to seek redress. In this suit, the plaintiff seeks orders to permanently restrain the 1st defendant from the suit land, an order that he be reinstated as proprietor of the suit land, general and special damages, costs and interest.

2. Alongside the plaint, the plaintiff filed an application dated 22 January 2020. It is an application seeking orders of injunction to have the defendants restrained from interfering with or dealing with the suit land pending the hearing and determination of this case. To his supporting affidavit in support of the application, the plaintiff has annexed a copy of his title deed and green card of the suit land, and some photographs said to be of the suit land. He has deposed that he has been on the suit land for over 40 years and has even buried his wife and son who died in the years 2012 and 2013.

3. The 1st defendant entered appearance and filed a replying affidavit to the application, together with a preliminary objection to the effect that this suit is res judicata. He has deposed inter alia that he is the one who is the legally registered proprietor of the suit land having purchased the land from one Matano Juma Mbaruku through a sale agreement dated 20 September 2014. He has annexed a copy of the sale agreement and his title deed to the suit land. He has deposed that the demolition of the houses on the land was legal as they were pursuant to a court order issued in *Mombasa ELC Case No. 103 of 2017*. It is his assertion that this suit is res judicata and should therefore be dismissed.

4. The 2nd, 3rd and 4th defendants filed Grounds of Opposition. It is contended inter alia that the suit is res judicata as a decision was rendered in the suit Mombasa ELC Petition No. 265A of 2014; that the applicant is guilty of material non-disclosure for failing to disclose the fact of this case; that the applicant is guilty of material non-disclosure for failing to disclose the decision in the case Mombasa ELC No. 66 of 2014; and that the applicant has not come to court with clean hands.

5. I directed that the application for injunction and the preliminary objection be heard together.
6. I invited counsel to file written submissions and I have taken note of the submissions filed by counsel for the plaintiff and counsel for the 1st defendant. No submissions were filed on behalf of the 2nd to 4th defendants. In her submissions, counsel for the plaintiff inter alia submitted that the plaintiff had in the case Mombasa ELC No. 66 of 2014 filed suit against Matano Juma Mbaruku but it was dismissed due to limitation of time. Counsel submitted that this suit is not res judicata the suit Mombasa ELC No. 103 of 2017 because what was delivered in the said suit was only an interlocutory judgment and that the case was not finally determined on merits. Counsel further submitted that her client holds title and a certificate of title is conclusive proof of proprietorship.
7. On the part of counsel for the 1st defendant, it was submitted that the suit is res judicata the suit Mombasa ELC NO. 103 of 2017 and the Judgment of A. Omollo J, delivered on 7 March 2019 in the said suit. Counsel submitted that this suit should be dismissed with costs.
8. I have considered the matter. The first issue that I need to address is whether or not the suit is res judicata. If I find that it is res judicata, then the whole suit will have to be dismissed. If I do not find it to be res judicata, then I will address myself on the application for injunction.
9. Several cases have been cited being the cases *Mombasa ELC No. 66 of 2014, Sudi Hamisi vs Matano Juma Mbaruku & Another; Mombasa ELC No. 265A of 2014*; and *Mombasa ELC No. 103 of 2017 Omari Mohamed Kikarata vs Sudi Hamisi*. I have called up this latter file and perused it. It is a suit filed by the 1st defendant against the plaintiff herein, vide which the 1st defendant sought orders to have the plaintiff herein permanently restrained from the suit land and also orders for his eviction. The record shows that the plaintiff herein (as defendant) was served with summons but he did not enter appearance to the suit and did not defend it. Interlocutory judgment was entered and the matter listed for formal proof. The 1st defendant (as plaintiff) testified and the court (A. Omollo J) delivered judgment on 7 March 2019. The Honourable Judge entered judgment for the 1st defendant herein (as plaintiff) and found that the plaintiff herein (as defendant) had not demonstrated any justification to be on the suit land. The plaintiff herein was given 60 days to give vacant possession or be evicted. I am not aware of any appeal filed against this judgment or any application filed to set that judgment aside.
10. Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, espouses the principle of res judicata. It provides as follows :-

7. Res judicata

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.

11. In my view, the issues being raised in this case are the same issues that were raised or could have been raised in Mombasa ELC No. 103 of 2017. If the plaintiff believes that he has a good claim to the suit land, then he ought to have filed defence and a counterclaim within the suit Mombasa ELC No. 103 of 2017. He filed nothing and judgment was entered for the 1st defendant herein. Counsel for the plaintiff of course argued that what was entered in the suit Mombasa ELC No. 103 of 2017 was only an interlocutory judgment but clearly this is not the case. The matter was heard and final judgment was entered. If the plaintiff was aggrieved by that judgment, he ought to have filed an appeal or applied to have it set aside. The avenue was not to file a fresh case for the issue of ownership of the suit land to be re-litigated.
12. I find that this suit is res judicata and the only option that I have is to have the suit dismissed. It is hereby dismissed. Having dismissed the suit, it is not necessary for me to address myself on the application for injunction for it falls by the wayside alongside the suit. There were interim orders issued in favour of the plaintiff; the same are hereby discharged. The 1st defendant is thus at liberty to proceed and execute the judgment in Mombasa ELC No. 103 of 2017.
13. The applicant will shoulder the costs of this dismissed suit.

14. Orders accordingly.

DATED AND DELIVERED THIS 17 DAY OF SEPTEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA