



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT AND LAND CASE NO. 282 OF 2013

ONEYA OMUCHENIPLAINTIFF

VERSUS

ERICK ODHIAMBO OKETCH1ST DEFENDANT

JACINTER AKOTH OYENGO2ND DEFENDANT

MICHAEL OPONDO AMWAYI3RD DEFENDANT

PATRICK OWINO HANDA4TH DEFENDANT

MORRIS ONGAYA5TH DEFENDANT

THE REGISTRAR OF LANDS, KAKAMEGA LAND REGISTRY6TH DEFENDANT

RULING

1. Michael Opondo Wanwayi, Patrick Owino Handa and Morris Onganya, (the applicants), have moved this court by way of Notice of Motion dated 14/5/2014 asking the court to declare the suit herein as being *res-judicata*, and that the suit be dismissed as the subject matter in this suit had been heard and determined by a court of competent jurisdiction. The applicants have also asked that costs of the application be borne by the plaintiff/respondent in any event.

2. The motion is based on the affidavit sworn by M. J. Okumu, the advocate representing the applicants, and also on the grounds appearing on the face of the Motion.

3. The applicants through Mr. Okumu's affidavit, state that the issues before this court had been heard and determined in Civil Suit No. 35 of 2011 at Butere Senior Resident Magistrate's Court in a ruling delivered on 8/9/2011. The applicants hold the view that it is unjust, un-procedural, and unlawful for the present suit to remain subsisting against the respondents and pray that it be dismissed for being *Res-judicata*.

4. Oneya Omucheni, (the respondent), has opposed the Notice of Motion and filed a replying affidavit sworn on 7/7/2014. The respondent has deposed that the suit in Butere SRMCC No. 35 of 2011 was never heard and finally determined, and that it was never entertained by a court of competent jurisdiction. He says that the Butere Court ruled that it did not have jurisdiction to entertain the suit and only an application was dealt with rather than the main suit. The respondent

prays that the application be dismissed with costs.

5. In arguing this application, Mr. Okumu appeared for the 3rd to 5th defendants/applicants, Mr. Ngaywa for the plaintiff/respondent and Mr. Vadanga for the 1st and 2nd defendants. The gist of Mr. Okumu's submissions was that there had been an earlier suit filed at the Butere Senior Resident Magistrate's Court which was determined and therefore the present suit is untenable.

6. According to learned counsel, the former suit SRMCC No. 35 of 2011 was determined by a decision of the Magistrate given on 8/9/2011. It was Mr. Okumu's view that because of the decision in SRMCC No. 35 of 2011, the present suit is now **res-judicata**. He relied on Section 7 of the Civil Procedure Act. He further submitted that the plaintiff/respondent herein should have taken refuge in the option that was available to him namely review or appeal. He therefore asked that the Motion be allowed with costs.

7. Mr. Vadanga supported the Motion and agreed with the position taken by the applicant and asked that the suit be dismissed.

8. Mr. Ngaywa submitted on behalf of the plaintiff/respondent that the suit in the Butere Court was not heard on merit. According to counsel, the Butere Court observed that it did not have jurisdiction to hear and determine the matter. The learned counsel further submitted that for **Res-judicata** to apply under Section 7 of the Civil Procedure Act, the matter must have been finally determined by a court of competent jurisdiction which was not the case here. He referred to the ruling of the Senior Resident Magistrate, saying that the court doubted whether it had jurisdiction to hear and determine that matter. He asked that the application be dismissed with costs.

9. I have considered the application before me, the affidavits in support and those in opposition and rival arguments by counsel on both sides. The issue for my determination in this application, is whether or not the suit herein is **Res-judicata**. The applicants say it is while the respondent says it is not. The two opposing sides rely on a decision rendered by the Senior Resident Magistrate's Court at Butere in RMCC No. 35 of 2011, delivered on 8/9/2011.

10. I have carefully gone through that ruling and I have come to the conclusion that that ruling did not determine the suit before that court. The learned magistrate only dismissed the application dated 23/6/2011 which was seeking, among other prayers, an injunction. In that ruling, the learned magistrate also said, but in passing, that he doubted if the court could handle the matter. That ruling neither dismissed the suit nor struck it out. The suit is alive and pending in that court unless some other steps were taken against it.

11. For a matter to be said to be **Res-judicata**, a former suit between same parties, over the same subject matter and involving same issues, must have been heard and determined by a court of competent jurisdiction.

12. **Section 7** of the **Civil Procedure Act (Cap. 21)** Laws of Kenya is in the following words;

S.7. "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."

13. The import of **Section 7** is that issues directly and substantially in issue in the former suit must be directly and substantially in issue in the current suit. Parties to the former and current suit should be the same and a final determination of the issues must have been made by a court of competent jurisdiction.

14. In ***Gichuki –vs- Gichuki [1982] KLR 285*** the Court of Appeal held that for ***res-judicata*** to arise, the dispute between the same parties involving the same cause of action must have previously been adjudicated upon by a court of competent jurisdiction and no appeal was brought against that decision.

15. The same court, differently constituted, deciding in ***Kibogy –vs- Chemweno [1981] KLR 35***, held as follows –

“where a matter is directly and substantially in issue between the same parties, it is a condition precedent to the application of the doctrine of res-judicata that the issue has been finally decided by the court.”

16. The issue of whether or not a matter is ***res-judicata*** is a matter of fact to be proved by the party seeking to rely on this novel doctrine. It is not enough to allege that the matter is ***res-judicata***. The former suit and issues raised between parties must have been finally determined by a court of competent jurisdiction to bring it under the doctrine of ***res-judicata***.

17. The submissions by the applicants and the decision of the Butere Senior Resident Magistrate’s court they sought to rely on in advancing their arguments that the present suit is ***res-judicata***, have not succeeded in doing so. What was decided by the magistrate’s court was an application and not the suit. As I have stated elsewhere in this ruling, the suit in that court remains alive unless some other steps were taken on it. Determination of an application is not the same as determination of a suit. I am unable to agree with the applicants that the present suit is ***res-judicata***.

18. For the above reasons, the application dated 14/5/2014 is refused and is hereby dismissed with costs.

Dated and delivered at Kakamega this 11th day of November, 2014

E. C. MWITA

J U D G E