



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 170 of 2012

AMRAN AHMED MUSA.....PLAINTIFF

VERSUS

SILAS MWANGI KAMAU.....DEFENDANT

RULING

The plaintiff instituted this action against the defendant to evict the latter from PLOT NO.234 BLOCK 6 NAROK TOWN (the suit land) and for a permanent injunction, claiming that she (the plaintiff) is the lawful owner and that the defendant is a trespasser.

With the suit, the plaintiff also filed a motion for a temporary order of injunction. The defendant has filed a reply to this application and also raised a preliminary objection to both the application and the suit. This ruling relates to the notice of preliminary objection.

In the objection, it is averred that the suit is an abuse of the court process in view of the fact that the issue of ownership of the suit property was decided with finality in Narok SPMCC No.74 of 2010 between the plaintiff and one Sikany Ole Lengeny; and secondly that the value of the suit property being Kshs.500,000/= the suit ought to have been filed in the Senior Principal Magistrate's Court and not in the High Court.

For his part, learned counsel for the plaintiff submitted that the preliminary objection relates to disputed facts and does not raise pure matters of law. That the question of value of the suit property will entail presentation of evidence. The facts that appear uncontroverted are that:

- i) the suit property was initially allotted to one Sikany Lengeny;
- ii) the defendant subsequently purchased the suit property from the said Sikany Lengeny
- iii) that the plaintiff also had an allotment letter to the very suit property;
- iv) that the question of ownership of the suit property between the plaintiff and Sikany Lengeny was determined in the Narok SPMCC No.74/2010;
- v) the determination by that court has not been overturned on appeal.

The lower court in Narok SPMCC No.74 of 2010 was emphatic that:

“It is clear that the defendant was allotted the plot No.234 Block 6 Narok Town far much earlier than the plaintiff. Defendant therefore was the first allottee or rather the first person to be

registered as the owner of the said plot as against the plaintiff.....
the defendant is the one acknowledged by Narok Town Council as the registered owner of the plot;
and has continued to receive plot rent from her..... The Narok Town Council vide
letter dated 19th May, 2010 specifically stated therein that:

‘Our records authenticate the ownership of the above plot as belonging to one Sikany Ole Lengeny.’ If the council which is the allocating authority has said, that the defendant is the owner of the suit plot, who I’m (sic) to state otherwise.”

Even though the present defendant was not a party to Narok SPMCC No. 74/2010, her predecessor in title was. But of great importance is the finding of the lower court of a matter of fact that the suit property does not belong to the plaintiff. The question of ownership having been determined on merit is final in the absence of an appeal.

In terms of **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited**, (1969) EA 696 case, the issue of *res judicata* as provided for under **Section 7** of the **Civil Procedure Act** is pure point of law. **Section 7** aforesaid is categorical that:

“No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under which 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.”

(Emphasis added)

On that ground alone, I come to the conclusion that the suit and by implication, the application, amount to an abuse of the court process.

The suit and the application are for the above reason struck out with costs to the defendant.

Dated, Signed and Delivered at Nakuru this 2nd day of November, 2012.

W. OUKO

JUDGE