



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 52 OF 2006

MARY W. NGUNJUPLAINTIFF

VERSUS

MWALAA KAPULANGADEFENDANT

R U L I N G

A Preliminary Objection has been raised by Miss Shariff who represents the defendant on grounds that this suit is res judicata in light of Kilifi SRM Land Dispute No. 17 of 2005 AMINA HAMISI V MARY NGUNJU. She invited this court to consider the proceedings and rulings and that judgment was eventually read and adopted on 26th July 2005 and right of appeal given. No appeal was preferred. It is her contention that the subject matter in that suit is the same as the subject matter in the present suit i.e the right to develop the suit property. She points out that the plaintiff and the 2nd defendant testified and called witnesses and in the absence of any appeal challenging the judgment entered in favour of the 2nd defendant, and from where the 1st defendant derives the title, then the matter is res Judicata. It is her contention that plaintiff ought to have appealed or filed judicial review proceedings but not filing a fresh suit.

She also accuses plaintiff of perjury and non disclosure stating that plaintiff swore a verifying affidavit under Order VII Rule 2 verifying what she knew was not correct, thus perjuring herself on oath. She urges this court to dismiss the suit.

Mr. Kibara for the plaintiff opposed the Preliminary Objection saying it's a way of delaying the proceedings as the Preliminary Objection was only filed in the morning of the hearing and in any event after the court had confirmed the suit for hearing.

He points out that the matter before the Land Disputes Tribunal whose findings were adopted as judgment by the lower court involved Amina Hamisi Mohammed who sued the present plaintiff. In this instance the suit is between Mary Ngunju and Mwalaa Kupalanga who has trespassed on the plaintiff's land, and the 2nd defendant is a nominal defendant who has been fixed by the 1st defendant, to pretend that she has a cause of action yet she has none. The 2nd defendant is named as Amina Hamisi Mohammed. He then argues that the proceedings before the Land Dispute Tribunal were exparte and plaintiff was never

served. Further that in the present suit the court is being asked to make specific pronouncement regarding the portion of land in dispute, whereas in the matter before the Tribunal, there was no mention of any specific land and the proceedings were a force. He urges this court to dismiss the Preliminary Objection.

Further, that even if the proceedings were before the Tribunal, it can only adjudicate a boundary dispute alone and no more yet what is before this court is the issue of trespass by 1st defendant, so the issues before this court have not been adjudicated on.

In reply Miss Shariff pointed out that 2nd defendant is not a nominal defendant as she was even present in court in honour of the hearing.

She mentions that plaintiff should not misuse the High Court's original jurisdiction to evade addressing her grievances through the proper fora.

Is the 2nd defendant a nominal defendant fixed by the 1st defendant? I note that in the 1st defendant's statement of defence at paragraph 5 and 6, he stated that he was a lawful owner of the portion being a bona fide purchaser for value and that he derived his right of ownership from the 2nd defendant.

As a result of this, then 2nd defendant filed an application by way of Chamber Summons dated 16th February 2007, and I think the issue as to whether 2nd defendant was simply a busy body on a fixture introduced by 1st defendant must have been settled by the court which considered the application and allowed the 2nd defendant to be joined as a party.

What were the issues adjudicated upon by the Land Disputes Tribunal in the case, **Land Dispute No. 2 of 2005 AMINA HAMISI V MARY STEPHEN NGUJU** in which judgment was adopted in Kilifi SRM Land Dispute No. 17 of 2005? From the proceedings that were before the Land Disputes Tribunal and which are in this file, the issue was one of trespass, with the present 2nd defendant alleging that the plaintiff herein had trespassed on her land by extending her boundary and binding on the land. The tribunal's finding was that Amina (2nd defendant was the legal owner of the property) That was a decision passed in the year 2005. Encroachment is the same issue being raised in the present case. The Land Disputes Act No. 18 of 1996 gives the Tribunal Jurisdiction under section 3(1) a –c to deal with civil disputes involving;

(a) The division of, or determination of boundaries to land including land held in common

(b) A claim to occupy or work land

(c) Trespass to land.

The plaintiff is clear – it seeks that plaintiff be declared the legal owner of the disputed property and defendant be ordered to demolish the structures erected therein and an order of injunction to issue. Admittedly the 1st defendant was not a party to the proceedings by the Land Disputes Tribunal and the issue of ownership was determined as between the present plaintiff and 2nd defendant. This alone would not give the plaintiff reason to pursue her claim, for the simple reason that 1st defendant – has raised the defence that he derives ownership from 2nd defendant meaning he doesn't deny being on that land, but its with the authority of the 1st defendant who was declared the owner of the land. That decision as submitted by Miss Shariff, was not contended either by way of appeal or Judicial Review. Instead the plaintiff wants to now come back and reclaim the ownership she had purported to have, and which the tribunal took away from her, not by challenging the decision of the Tribunal, but by filing suit against the 1st defendant. The 1st defendant's statement of defence dated 30th January 2007 clearly at paragraph 5 stated that he is in lawful possession of the plot as a bona fide purchaser for value of the said land from

Amina Khamisi Mohamed – which takes us back to whether Amina Khamisi Mohamed is the legal owner of the disputed property and the answer isthe Land Disputes Tribunal (Kilifi) decided that she was, and that decision has never been overturned or challenged by way of appeal or Judicial Review.

Counsel cannot now begin to lament that the plaintiff herein was never given a hearing before the Land Disputes Tribunal, yet plaintiff did not challenge that decision or the proceedings despite being given a right of appeal.

The last issue is that the property which the Land Disputes Tribunal dealt with is not the same one in dispute as there was reference to the plot number in the Land Disputes Tribunal proceedings. The plot in dispute is referred to as NO. 3029 (Original Number 162). Amina in her documents including Chamber Summons she filed seeking to be joined as a 2nd defendant stated that she is the registered owner of plot No. 7172/379 Title No. 7172, and that plaintiff owns plot no. 33183 which is distinct from hers, but borders her land.

I recognize that the dispute before the Land Dispute Tribunal did not refer to a number, yet it would be myopic to order the matter to proceed when it is probable that physically on the ground the parties are referring to the same parcel which had been adjudicated upon, and that plaintiff may simply be trying to undo what the Land Dispute Tribunal had adjudicated upon. To this extent then I direct as follows:

- (1) The District Survey Malindi do visit the portion in dispute and file a report in this court to confirm;
- (a) The parcel number of the disputed portion.
- (b) Whether parcel no. 3029 (original 284/162) is the same as No. 7172/379 Title No. 7172 (original number 284/162/111/MN)
- (c) The parties and their counsel to agree on a convenient date to accompany the surveyor to the locus in quo
- (d) The report (which only needs to confirm (a) and (b) above), need not mention the names of the registered owners and the same shall be filed within 21 days from today.

The outcome of this report will help me determine whether the matter is Res Judicata or not.

- (e) Mention on 29th March 2011.

Delivered and dated this 1st day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE

Mr. Otara holding brief for Kibara for applicant