



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 34 OF 2020

(FORMERLY NAROK ELC NO. 48 OF 2019)

DANIEL KIPILAT ROTICH & 32 OTHERS.....PLAINTIFFS

VERSUS

DAVID SIRONGA TUKAI.....1ST DEFENDANT

THE LAND REGISTRAR NAROK.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 17th June 2020, the first defendant seeks striking out of this suit for being *res judicata*. The application is supported by an affidavit sworn by Mr Joseph Karanja Mbugua, advocate on record for the applicant.

2. Mr Karanja deposed that the first defendant herein filed **Nakuru HCC No. 253 of 2005 David Sironga ole Tukai vs. Francis Arap Muge, Samuel Kiprotich Arap Kirui and Johannah Kiprono Arap Mosonik (Sued as the Chairman, Secretary and Treasure respectively of Kapkween Farmers Co-Operative Society Ltd)** and that the defendants in the said case filed a counterclaim. That the matter was heard and judgment delivered on 7th June 2013 but was reversed by the Court of Appeal. He added that this matter is *res judicata* in view of the decision of the Court of Appeal.

3. The plaintiffs filed a replying affidavit sworn by Daniel Kipilat Rotich in which he stated that the plaintiffs have not been party either directly or indirectly to any suit with the applicant and that they heard about HCC No. 253 of 2005 and the appeal for the first time when they were served with an eviction notice. He added that Kapkween Farmers Co-Operative Society Ltd is a strange outfit which lacked capacity to represent them and that they are not its members.

4. The application was canvassed through written submissions. Both the applicant and the plaintiffs filed written submissions. The second defendant neither filed a response nor participated in the hearing of the application.

5. It was argued on behalf of the applicant that the present suit has been filed by the very same persons who filed **Nakuru HCC No. 253 of 2005** and that the suit therefore offends **Section 7** of the **Civil Procedure Act** as read with explanation 6 thereof. Several authorities were cited and I have taken note of them.

6. On their part, the plaintiffs argued that they have never been party to any suit involving the applicant and that the issue in this suit is adverse possession while **Nakuru HCC No. 253 of 2005** concerned a sale agreement between the applicant herein and members of Kapkween Farmers Co-Operative Society Ltd. Further, that they were neither parties to the former suit nor members of Kapkween Farmers Co-Operative Society Ltd and that they do not litigate under the same title. They relied on the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**.

7. I have carefully considered the application, the affidavits and the submissions. **Section 7** of our **Civil Procedure Act** codifies the doctrine of *res judicata*. It provides as follows:

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.

8. Key ingredients of *res judicata* are that there must have been a previous suit in which the matter was in issue; the parties in both matters

must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

9. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR the Court of Appeal stated:

... **Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -**

“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ...”

... **Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.**

10. So as to better appreciate the present application, we need to revisit the originating summons dated 23rd September 2019, through which this suit was commenced. There is no dispute that the plaintiffs seek a determination of whether they have acquired the parcel of land known as Narok/Cis Mara/Ololulunga/161 by adverse possession on the ground that they were born on the said parcel and that their parents continuously lived on it since 1970.

11. Equally, there is no dispute that **Nakuru HCC No. 253 of 2005** existed and that the parties thereto were David Sironga ole Tukai vs. Francis Arap Muge, Samuel Kiprotich Arap Kirui and Johannah Kiprono Arap Mosonik (Sued as the Chairman, Secretary and Treasure respectively of Kapkween Farmers Co-Operative Society Ltd). Thus, the first defendant herein was the plaintiff in **Nakuru HCC No. 253 of 2005**.

12. A perusal of the plaint in **Nakuru HCC No. 253 of 2005** shows that the plaintiff therein averred at paragraph 4 thereof that sometime around October 1995, the defendants therein with all their members wrongfully entered the parcel of land known as Narok/Cis-Mara/Ololulunga/161 and settled their members in it. The plaintiff therefore prayed for judgment against the defendants inter alia for eviction of the defendants their agents, their servants and all the members of Kapkween Farmers Co-operative Society Limited from the property. The suit property in **Nakuru HCC No. 253 of 2005** was the same as the one herein: Narok/Cis Mara/Ololulunga/161.

13. **Nakuru HCC No. 253 of 2005** was heard and judgment delivered on 7th June 2013 by M. J. Anyara Emukule J only to be later reversed by the Court of Appeal through judgment delivered on 18th December 2014 in **Civil Appeal No. 76 of 2014 (Nairobi) David Sironga Ole Tukai v Francis Arap Muge & 2 Others**. The Court of Appeal allowed the plaintiff's suit with costs. In other words, the plaintiff got an order for eviction of the defendants, their agents, their servants and all the members of Kapkween Farmers Co-operative Society Limited from Narok/Cis Mara/Ololulunga/161. Among others, the trial court noted that 300 members of Kapkween Farmers Co-Operative Society Ltd had settled on a portion of the property. It follows that those to be evicted included the 300.

14. The affidavit in support of the originating summons herein was sworn by Daniel Kipilat Rotich. Among others, he stated that he and the other plaintiffs have been in continuous possession of the parcel since 1970 until September 2019 when the applicant served them with an eviction notice issued in **Nakuru HCC No. 253 of 2005** “*seeking to evict myself and the 32 plaintiffs from the subject property...*” In other words, he was certain that the order targeted all the plaintiffs in this case. A perusal of the order shows that it directed the auctioneer to “*evict all the defendants from the parcel of land known as Narok/Cis-Mara/Ololulunga/161 ... together with their servants, agents and workers ...*” Since the plaintiffs herein were not direct parties to **Nakuru HCC No. 253 of 2005**, one can only conclude that they fell under the category of servants, agents or workers. They are covered by explanation 6 of **Section 7** of the **Civil Procedure Act** and are deemed to have been parties to **Nakuru HCC No. 253 of 2005**.

15. The issue of whether or not the plaintiffs herein could remain on Narok/Cis Mara/Ololulunga/161 having been conclusively determined in **Nakuru HCC No. 253 of 2005** and the ensuing appeal to the Court of Appeal, they cannot seek to re-litigate the matter by seeking an order that they have become entitled to the same property by adverse possession. The Court of Appeal ordered their eviction as they themselves concede. This entire suit is built around and was provoked by the eviction order that was served on them in September 2019 and which was issued in **Nakuru HCC No. 253 of 2005** in line with the judgment of the Court of Appeal. In the circumstances, I find that this suit is *res judicata* and that the court therefore lacks jurisdiction to try it.

16. In view of the foregoing, the suit is beyond redemption. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** [2019] eKLR. I strike it out with costs to the first defendant. The second defendant did not participate in the proceedings and for that reason, I do not award him any costs.

Dated, signed and delivered at Nakuru this 3rd day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Tuya for the plaintiffs/respondents

Mr Karanja Mbugua for the first defendant/applicant

No appearance for the second defendant

Court Assistants: B. Jelimo & J. Lotkomoi