REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT OF KENYA AT ELDORET

ELC CASE NO. 293 OF 2016

WILFRED CHERUYIOT.....1 ST PLAINTIFF

ELIJAH CHERUIYOT.....2ND PLAINTIFF

-VERSUS-

DANIEL CHEPSIETI.....1ST DEFENDANT

THE LAND REGISTRAR ELDAMA RAVINE.....2ND DEFENDANT

RULING

This ruling is in respect of a preliminary objection raised by the 1st defendant vide a notice of preliminary objection dated 31st October 2019 on the grounds that :-

a) The instant suit is subject to the doctrines of res judicata

b) The said subject matter herein was decided between the parties and judgment deliver in favor of the 1st defendant and hence the instant suit offends the mandatory provisions of the Civil Procedure Act and Rules.

c) The entire suit is therefore poorly pleaded, ambiguous, unclear and/or otherwise defective and ought to be struck out by the Honourable court

Counsel agreed to canvas the preliminary objection by way of written submissions which were duly filed.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st defendant gave a brief background to the case where he submitted that the plaintiffs filed this suit alleging that they were the legal owners of land parcel No Plot No 145/33/RAVINE 102 which initially belonged to their deceased father and are now beneficiaries after the confirmation of grant in Succession Cause NO.450 OF 2012.That the Plaintiffs have not indicated why the land has never been transmitted into their names despite having a grant of letters of administration.

Counsel submitted that this suit is res judicata as there was a similar suit filed, heard and determined at the High Court in Nakuru involving the same suit of land and between the 1st Defendant and the plaintiffs father. That the High Court at Nakuru heard and determined Civil case NO. 431 of 1998 where the parties in that case were Daniel Cheruiyot Chepsieti as the plaintiff and Cheruiyot Cheboiwo (late father to the Plaintiffs) as the Defendant. That the Plaintiff was granted the orders sought and defendant declared a trespasser.

Counsel further submitted that the Defendant was served with summons, entered appearance but did not file a defence and further that the demeanor of the Defendant (deceased's father to the Plaintiffs) was that of a guilty mind as did not defend himself. Further that neither the defendant (deceased father to the plaintiffs) nor the plaintiff filed an appeal of the Judgement issued in Nakuru Court.

Counsel further submitted that the orders sought by the plaintiffs do not specify the parcel of land that they want the defendants be injuncted from and that the plaintiffs have not acted on transmission of the suit land after succession. Counsel therefore urged the court to uphold the preliminary objection.

PLAINTIFF'S'SUBMISSIONS

Counsel for the plaintiffs relied on the provisions of section 7 of the Civil Procedure Act which provides that:

> **"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."**

It was counsel's submission that this suit is not res judicata as the suit property and the parties are not the same as the case that the 1st defendant is alluding to. That in the annexed judgement to the affidavit it is evident that the defendant had sued Cheruyiot Cheboiwo who is not a party to this suit.

Mr Mongeri further submitted that the suit land in this suit is different from the one annexed by the 1st defendant in that in this suit the plaintiffs are claiming plot No. 145/33/Ravine-102 while the suit property that had been determined is Baringo/Ravine 102/33.

Counsel relied on the case of **Michael Bett Siror Vs Jackson Koech [2019]eKLR** where the Court of Appeal held that:

> *"The appellant was contending that there were previous suits between the same parties' arising from the same cause of action. The doctrine of res judicata bars the bringing of another suit where there has been a previous suit between the same parties that has been heard and finally determined by a competent court. The rationale is that it would be pointless and a waste of judicial time, to re-litigate issues that have already been addressed and determined by the court. It was not disputed that there were previous proceedings between the parties and/or parties claiming under them. The question that the learned judge ought to have addressed is whether these previous suits involved the same issues as the respondent's current suit and if so, whether, the issues in the previous suits were finally determined.*
>
> *Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant's motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.*
>
> *We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of **section 7** of the **Civil Procedure Act,** as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.*
>
> *Thus, we reject the appellant's contention and find that the application of the doctrine of res judicata was very contentious and required full investigation at the trial, more so in a longstanding land dispute involving a big parcel of land and several other people."*

Mr. Mongeri therefore urged the court to dismiss the preliminary objection with costs to the plaintiff's as the suit is not res judicata.

ANALYSIS AND DETERMINATION

The issues for determination are whether the plaintiffs' suit is res judicata and whether the preliminary objection has merit. Section 7 of the Civil Procedure Act bars courts from hearing matters where the parties and the issues are substantially in issue and which have been heard and determined by a competent court.

In the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

> *"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;*
>
> *a) The suit or issue was directly and substantially in issue in the former suit.*
>
> *b) That former suit was between the same parties or parties under whom they or any of them claim.*
>
> *c) Those parties were litigating under the same title.*
>
> *d) The issue was heard and finally determined in the former suit.*
>
> *e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."*

The court further illuminated the purpose of the doctrine as:

> *"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It*

is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

Coming back to the current case, it is evident that the above ingredients are not in this matter as the parties in this case are not the same as the ones in Nakuru HCC No 431 of 1998. Further the suit land in the said case was Plot No. BARINGO/RAVINE 102/33 and the current claim is for Plot No 145/33/ RAVINE-102. This alone knocks out the defendant's preliminary objection.

Preliminary objections are raised on points of law which will not require any verification of facts from outside the case and it is assumed that the facts of the other side are correct and not disputed.

Counsel for the defendant also submitted on the demeanor of the defendant in the previous suit and faulted him for not filing a defence. The court cannot assume the demeanor of a party that it did not have an opportunity to observe and make an informed decision. This further deals a blow on the preliminary objection as it would require additional evidence to prove.

I have considered the submissions by counsel, the relevant judicial authorities and find that the preliminary objection lacks merit and is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 2nd DAY OF DECEMBER, 2020

M. A. ODENY

JUDGE