



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 107 OF 2018

CHEPOTULA TONGELECH.....PLAINTIFF/RESPONDENT

VERSUS

JACKSON CHAMIR.....1ST DEFENDANT/APPLICANT

LAND REGISTRAR

WEST POKOT COUNTY.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The Notice of Motion dated **15th January, 2019** which has been filed by the 1st defendant seeking the following orders:

(1) That the plaintiff/respondent's entire suit be dismissed for being *res judicata*.

(2) That the costs of this application and the entire suit be awarded to the 1st defendant/applicant.

2. The Notice of Motion is brought pursuant to provisions of Order **Section 1A, 1B, 3, 5, 6, 7 and 8 of the Civil Procedure Act Order 51 rule 1 of the Civil Procedure Rules** and it is founded on the grounds set out at the foot of the application and in the supporting affidavit of **Denis Mutaki Wanyama** Counsel for the 1st defendant, dated **15/1/2019**.

3. The grounds for the application are that the plaintiff in conjunction with one **Jacob Lemakwang** had filed another suit, to wit, **Kitale High Court Civil Suit No. 5 of 2006** against the 1st defendant; that the 1st defendant filed a defence to that suit in which he contended that in **1970** he bought and took possession of the suit land; that on **20/2/2014** an order issued from this court directing the District Surveyor Trans-Nzoia/West Pokot to visit the suit land and ascertain the owners, the acreage and occupation which survey was conducted in the presence of the plaintiff and the 1st defendant and a report prepared which report confirmed that the suit land belongs to the 1st defendant; that subsequently on **22/10/2014** this court issued an eviction order against the plaintiff in respect of the suit land; that thereafter the plaintiff filed **Civil Application No. 21 of 2015** in the Court of Appeal seeking leave to file an appeal out of time which application was dismissed. It is averred that through the instant suit the plaintiff seeks to re-litigate the issues already determined by this court.

4. The application is opposed by the plaintiff who filed replying affidavit sworn on **8/2/2019** and filed on the same date. The gist of her opposition to the application is that this suit contained a different cause of action and seeks different orders from those in **Kitale High Court Civil Suit No. 5 of 2006**; that the issue before this court now is title to the suit land while in the earlier suit it was a boundary dispute; that the decision on the application in the Court of Appeal did not address the issue of ownership; that the issue of cancellation has not been determined on merit; that the special circumstances of the instant case are that there was change of names and change of title of the register while the suit was still subsistence; that though a title was issued in **2003** in the plaintiff's name, upon the boundary dispute filed in **2006** a title was issued in the 1st defendant's name; that the defence in **Kitale High Court Civil Suit No. 5 of 2006** did not contain a counterclaim and as such the only issue for determination was a boundary dispute.

5. The plaintiff/respondent filed submissions on **25/2/2019**. The plaintiff cited the cases of **Kenya Commercial Bank (KCB) Ltd -vs- Benjoh Amalgamated Ltd [2017] eKLR, Henderson -vs- Henderson [1843-60] ALL. ER. 378, Nancy Mwangi T/A Worthlin Marketers -vs- Airtel Networks Kenya Ltd (formerly Celltel Kenya Ltd) & 2 Others [2014] eKLR and finally Enock Kirao Muhanji -vs- Hamid Abdallah Mbarak [2013] eKLR.**

6. The 2nd and 3rd defendants filed submissions on **25/2/2019**. They cited the cases of **Grace Njeri Kabiru -vs- Stephen Wagiiita Kiboi & 2 others [2018] eKLR and Kungu Ngethe -vs- George Kibatia [2018] eKLR.**

7. I have perused the court record and found no submissions filed on behalf of the 1st defendant/applicant.

8. I have gone through the applicant's application together with the supporting affidavit. I have also gone through the respondents affidavit as well as the submissions by the plaintiff and the 1st and 2nd defendant and I find that the issues which emerged for determination is whether the instant suit is *res judicata*.

9. The basis for the application of the doctrine of *res judicata* in Kenya is **Section 7 of the Civil Procedure Act (Cap 21)** and, of course, **the Judicature Act**. The material parts of **Section 7** provide 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 one 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.”

10. The doctrine and the principle behind it was succinctly explained in the case of **North West Water Ltd V Binnie & Partners [1990] 3 ALL E.R.547**, where the court held:

“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”

11. In summary, the applicant, alleging *res judicata*, must show that

(a) The matter in issue is identical in both suits,

(b) That the parties in the suit are substantially the same,

(c) There is a concurrence of jurisdiction of the court

(d) That the subject matter is the same,

and finally,

(e) That there is a final determination as far as the previous decision is concerned.

12. It is common ground that it is the same Plaintiff who filed the previous suit who has filed the instant suit and that the subject matter is the suit land known as **West Pokot/ Kapsait/694** in both suits.

13. It is however not common ground that the matter in issue is identical in both suits. The applicant has contended that the **Section 7** of the **Civil Procedure Act** ousts the jurisdiction of this court in trying this matter as the instant suit is directly and substantially in issue with the former suit, **Kitale HCCC No. 5 of 2006**, between the same parties, about the same title, already determined by a competent court and a decision has already been made on the issues involved.

14. In support of this argument, the applicants have annexed the proceedings of **Kitale HCCC No. 5 of 2006** and the ruling of the Hon. Justice S. Gatembu in **Civil Appeal No. 21 of 2016**.

15. The 2nd and 3rd defendants in their submissions called in aid two High Court decisions being the case of **Grace Njeri Kabiru vs Stephen Waigiita Kemboi & 2 others (2018) eKLR** and **Kungu Ngethe V George Kibatia (2018) eKLR** where in the latter, the Hon Justice Munyao struck out the case for being *res judicata* and affirmed that if the matter was to proceed, it would lead to an embarrassment of administration of justice as there would be conflicting judgements in the same matter.

16. I have also had a look at the authorities cited by the plaintiff.

17. In the former suit the plaintiff herein and another person sued the 1st defendant herein alone. The plaintiffs claimed in that suit that the plaintiffs own **plot numbers 51 and 54** in Kapsait West Pokot District while the defendant owns **plot number 52**.

18. The claim in that suit was that the 1st defendant herein had trespassed onto the said plots and tried to erect a structure thereon. They prayed for a rectification of the boundary.

19. I have perused the annexures and found that it is not disputed that the defendant filed a defence dated **15th February 2006** stating that: he denied that the defendants owned the plots in question; that the plaintiff did not own plot number **52** as alleged or that the defendant as alleged. The defendant averred that he owned plot number **54** (which was being claimed by the 1st plaintiff);

20. The 1st defendant also averred that in **1970** he bought and took possession of plots numbers **54, 51, and 694** from the 1st plaintiff's late father and his brother and the 2nd plaintiff's deceased's husband and in **1985**, he licenced the 2nd plaintiff's husband to utilize plot number

51. That notwithstanding, upon the demise of the 2nd plaintiff's husband tried to alienate plot number 51 to the 1st plaintiff and without the defendant's consent, also took possession of plot number 694. In that defence it was alleged that the 1st defendant had lodged appeals to the Minister under the provisions of the Land Adjudication Act and that they were still pending and that the suit was improperly before the court. The 1st defendant alleged that the two plaintiffs in that suit were guilty of trespass on his land, plots numbers 51 and 694.

21. A consent was entered into by the parties in that suit. The said consent provided in part as follows:

“THAT the District surveyor Trans Nzoia /West Pokot do visit Land Title Nos. WEST POKOT/ KAPSAIT/51, WEST POKOT/ KAPSAIT/ 783, WEST POKOT KAPSAIT/54 & WEST POKOT/ KAPSAIT/ 694 and ascertain owners, acreage & occupation which of the two parcels belong to the plaintiff and the defendant respectively and report filed within 30 days from today”.

22. The decree extracted from the suit shows that the parties adopted the surveyor's report dated 2nd April 2014 and judgment was entered in the matter as per that report which was said to effectively settle the case. The decree states as follows:

1. Land Parcel No West Pokot/Kapsait /51 belongs to Jacob Lemakwang
2. Land Parcel No West Pokot/Kapsait / 783 belongs to Cheptula Tongelach.
3. Land Parcel No West Pokot/Kapsait /54 belongs to Jackson Chamir
4. Land Parcel No West Pokot/Kapsait /694 belongs to Jackson Chamir.
5. Land Parcel No West Pokot/Kapsait / 51 is occupied by Benjamin Lemakwang who is brother to Jacob Lemakwang;
6. Land Parcel No West Pokot/Kapsait /783 is occupied by Jacob Lemakwang and his brothers Benson and Jackson.
7. Land Parcel No West Pokot/Kapsait /54 is occupied by Jackson Chamir.
8. Land Parcel No West Pokot/Kapsait /694 is occupied by Cheptula Tongelach
9. Each party is at liberty to apply to court in case of non-compliance with the order which will be extracted;
10. Each party to bear their own costs.

23. In the instant suit the plaintiff has alleged that she acquired the title deed by dint of first registration and as such her rights to the land became indefeasible.

24. Therefore the cancellation of her title deed in 2009 and its registration in the 1st defendant's name was illegal and fraudulent and null and void. She avers that the boundary dispute between the plaintiff and the 1st defendant did not resolve the dispute as to the ownership of the respective titles, and that the action of the 1st defendant has deprived her of her land.

25. Upon analyzing the pleadings on record, I am convinced that the instant suit is *res judicata* by virtue of the fact that the consent judgement entered on 20/2/2014 led to the preparation and filing of surveyor's report which the parties consented to as final, and on which the decree in that suit, upon its adoption, was based. It did indeed finalize the issues raised in the instant suit. They can not be re-litigated in this suit.

26. In my view, it is clear that no matter how one looks at the dispute, the said consent did indeed deal with the issue of ownership of **Land Parcel No West Pokot/Kapsait /694** which is raised in this very case; that though a title was issued in 2003 in the plaintiff's name, upon the boundary dispute filed in 2006 another title was issued in the 1st defendant's name is not a strange phenomenon in a land suit where, as in **Kitale HCCC No. 5 of 2006**, the 1st defendant herein had, upon being sued, revealed in his defence in that suit that he had filed an appeal to the Minister under the provisions of the **Land Adjudication Act Cap 284**. The necessary sequel to the decision in such statutory appeal is that if the decision does not favour the registered owner, the minister orders the change of the registration particulars to reflect the name of the person in whose favour the minister's decision was made.

27. In this case and in **Kitale HCCC No. 5 of 2006** the plaintiff was virtually silent on whether any appeal existed, or had been decided in relation to the suit land. This court can only presume that in line with **Explanation No. 4 in Section 7 of the Civil Procedure Act** that ownership of the land, and by extension the matters relating to the appeals before the minister, fell under the category of *“any matter which might and ought to have been made ground of defence or attack in such former suit”* and which, according to that section, *“shall be deemed to have been a matter directly and substantially in issue in such suit”*. In my view these matters should have been fully litigated in **Kitale HCCC No. 5 of 2006**. I use the words *“should have been litigated”* because the plaintiff insists that they were not; however, in my view, the issue of ownership was dealt with by way of a consent of the parties which bore the decree. It is trite that the court can not casually set aside the consent of the parties entered into voluntarily, and that such a setting aside would necessitate proof of fraud, collusion or misrepresentation, just as would an ordinary contract. In the case of **Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR [Civil Appeal No. 293 Of 2014]** the court stated as follows:

“29. The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

28. On the consent issue, I will sum up by stating that it is clear that the instant suit does not seek to set aside that consent. There is therefore nothing new in this suit, different from the matters in **Kitale HCC 5 of 2006**, that defeats the doctrine of *res judicata*.

29. Juxtaposing the principles set out earlier herein with the facts of this case, it is therefore apparent that the antagonistic parties are the same, the subject matter as well as the claim is the same and the jurisdiction of the court which handled **Kitale HCCC No. 5 of 2006** and this court matter is concurrent.

30. Accordingly, I have no hesitation in finding that the issues in this suit were directly and substantially in issue in **Kitale HCC No. 5 of 2006** previously instituted between parties.

31. Consequently, I find that the application dated **18/1/2019** has merit and I grant the same and issue the following final orders:

(a) This suit is hereby struck out in its entirety for being *res judicata*;

(b) The plaintiff shall bear the costs of the suit.

Dated, signed and delivered at Kitale on this 26th day of March, 2019.

MWANGI NJOROGE

JUDGE

26/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Maritim for Plaintiff

Mr. Wanyama for Defendant

N/A for the 2nd and 3rd Defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/03/2019