



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 15 OF 2018

TOLELINYANG LOMONGONI.....APPLICANT

VERSUS

CHEMORU TOLELINYANG.....RESPONDENT

RULING

1. The applicant filed an application dated **19/10/2018** seeking the following orders:-

- (1) That the Honourable Court be pleased to order survey of parcel of land known as West Pokot/ Siyoi B/8 at the applicant's costs.**
- (2) That the OCS Kapenguria Police station to effect compliance of the order**
- (3) That in upon granting prayer (a) above the Land Registrar West Pokot County do effect registration and issuance of the Title deeds.**
- (4) That the costs of the suit be in the cause.**

2. This Application is premised on the supporting affidavit of *Tolelinya Lomongoni* "the Applicant herein". He averred that he is the registered owner of parcel number **West Pokot/ Siyoi B/8** and that he has sought the necessary Land Control Board Consent to subdivide his land but the respondent has on several occasions denied him the chance to survey the land. The Applicant therefore contended that it is necessary for him to oversee the survey of the land now when he is still energetic as his is becoming of age. He further contended that he intends to distribute the land into **three (3)** portions to accommodate the 1st house, 2nd house and himself and that the orders sought are necessary in an order to avoid future conflicts and equitable sharing of the land.

3. In response thereto, the Respondent filed her *Replying Affidavit* on **12th February 2019**, wherein she averred that the applicant filed a suit against her in **Kitale ELC No. 76 of 2017** where he was seeking an order of removal of caution which she had lodged on the suit land. She stated that the said matter was heard and determined where the suit was dismissed and that the applicant has never appealed or sought for review of the orders issued in **ELC No. 76 of 2017**. She deposed that the present application by the Applicant herein has duplicity of issues; all issues in dispute raised in the present suit were dealt with in Environment and Land Court in **Kitale ELC No. 76 of 2017**. The respondent has annexed the said decision to the affidavit in support of her response.

4. Further thereto, she averred that the suit land is matrimonial property and that no proposals have been made by the applicant on how the acreage of land is to be awarded. She contended that the present application is purely a land dispute and more so matrimonial land and the issues raised by the applicant herein ought to be addressed in a substantive claim and not in an application.

5. The Applicant filed a *Supplementary Affidavit* on **27th February 2019**. He reiterated that the Respondent has denied him an opportunity to survey the suit land. Further thereto, it was his contention that the claim raised in **Kitale ELC No. 76 of 2017** was an order seeking removal of a caution lodged by the Respondent and that the application before the court now is seeking an order to survey the suit land which the respondent has restrained him. He reiterated that the present application is about survey of the suit land and that the issues raised in **Kitale ELC No. 76 of 2017** are different with those issues raised in the current application hence cannot be duplication of issues. He further averred that the annexed sketch map marked as "**TL3**" shows his proposal on how he intends to subdivide the land into three portions which if the court grants him an order to survey the land, the acreage of each portion will be ascertained.

6. From the pleadings of the respective parties, two issues arise for determination:-

- a) Is the matter herein res-judicata having been dealt within Kitale ELC No. 76 of 2017**

b) *Can an order issue allowing the survey on the land?*

Findings and Determination

(a) Res-judicata

7. The doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** 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 can 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. The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. **Explanations 1-3** are in the following terms:

“Explanation (1) - The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) - For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

9. The doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.

10. In **Gurbacham v Yowani Ekoru [1958] EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R.313** at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of 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 the parties to form an opinion and pronounce a judgement, 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.”

11. In **E.T. v Attorney General & another [2012] eKLR** Majanja, J correctly warned that:

“The courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”.

12. The Respondent states that the issues in this matter are *res-judicata* as they were canvassed in **Kitale ELC No. 76 of 2017**. I have perused the contents of judgement which was delivered in respect to the above-mentioned case and which I did adjudicate on. In my view this application touches on issues that have been litigated before a competent court by the same parties. This application runs afoul of **Section 7** of the **CPA**. It therefore follows that the other issue for determination can also not be determined herein for this reason. The upshot of this is that this application is *res judicata* and the same should be dismissed with costs to the Respondent.

13. Besides, the applicant has come to court by way of a miscellaneous application said to be brought under **article 159** of the **Constitution Of Kenya, Order 51 Rule 1** of the **Civil Procedure Rules and Sections 1 A 1B and 3A** of the **Civil Procedure Act** and **Section 24(A) And 28 of The Land Registration Act No 3 of 2012**.

14. I find no law in the above cited provisions to warrant the applicant to institute these proceedings by way of a miscellaneous application.

15. While referring to several decisions of the court such as **Peter Kwema Kahoro -vs- Benson Maina Githethuki [2005] eKLR** and **Geoffrey Ndungu Theuri -vs- Law Society of Kenya 1998 eKLR**, I also observe that this is not the proper procedure of presenting a dispute before court and that for an application of this nature to be deemed to have attained the threshold of procedural competence it has to be instituted within a filed suit within the manner prescribed by law and not contrary to **Order 3 Rule 1** of the **Civil Procedure Rules 2010**.

16. For the above mentioned reasons, the application dated **19/10/2018** is dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 21st day of March, 2019.

MWANGI NJOROGI

JUDGE

21/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Chebet for Respondent

Bartrol holding brief for Lowasikou for Applicant

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

21/03/2019