



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO.145 OF 2015

KITALE CHEPKOROR FARM.....PLAINTIFF

VERSUS

PETER NASASA.....1ST DEFENDANT

HASSAN NDAMWE.....2ND DEFENDANT

ANDREW GUTITIL.....3RD DEFENDANT

DEPUTY COUNTY COMMISSIONER,

TRANS NZIOA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The application before me is that dated 24/5/2018 filed by the 5th defendant. The application is brought pursuant to the provisions of **Section 7 of the Civil Procedure Act, Cap 21**, Laws of Kenya, and **Order 51 Rule 1 of the Civil Procedure Rules, 2010**, and seeks orders to have this suit struck out for being *res judicata*.

2. The application is opposed.

3. The applicant contends that this suit is *res judicata*, as the issues in the suit were determined in the suits **Kakamega High Court Misc. Application No. 42 of 1995** and **Kakamega High Court Misc. Application No. 65 of 1998**. The supporting affidavit is sworn by the State Counsel **Mr. Wabwire** who has deposed that the subject matter in this suit was heard by High Court in **Kakamega Misc Application No. 42 of 1995** and the court accordingly issued an order on 22/2/1996 in regard to the mode of distribution after the plaintiff failed to effect the orders of Saboti/Kwanza Land Control Board vide a consent dated 27/6/1994. That thereafter, after failing to effect the said orders by virtue of that non-compliance, the plaintiff through its director (Jeremiah Malakwen Lagat) moved to the High Court for an order of *mandamus* through **Kakamega High Court Misc. Application No. 65 of 1998**; that the subsequent suit was heard and determined and the court issued order dated 23/7/1998 but again due to none compliance the same was not effected. It was further contended the issue that was **Kakamega High Court Misc. Application No. 65 of 1998** before court then and which is before court now, is the mode of subdivision of **L.R. 5777/3 Chepkorok Farm** which the court conclusively made a determination and as such this court has no jurisdiction to entertain the same save for an application for review and none is before court.

4. In its reply, the respondent through one of its directors one Felix Kipkemboi Biwot has deposed *inter alia* that the issue of how the plaintiffs land should be sub-divided, has already been decided and that **Land Reference No. 5777/3** has to be sub divided into **126** portions, courtesy of the consent of the Land Control Board of 27/6/1994, and the decisions in **Kakamega High Court Misc. Application No. 42 of 1995**; that the Department of Lands forwarded Registry Index Map and the area list to the Land Registrar for issuance of Titles; that in order to actualize the issuance of titles, the applicant applied to Kiminini Land Control Board for consents to transfer **30** parcels to their owners; that there was a meeting at the Land Control Board and that when their application was called, the 1st, 2nd and 3rd defendants opposed contending that the land was supposed to be subdivided among **856** persons and not **126** persons. It is further averred that the applications for transfer was then deferred to allow parties time to agree and that the filing of the instant suit was prompted by the objections of the 1st, 2nd and 3rd defendants interfering with the transfer process of the **126** portions to the beneficiaries. The claim before this court is one of trust which has never been heard before. The respondent is of the view that the present suit is not *res judicata* as the two causes are different.

6. All the parties to this suit have filed written submissions which I have taken note of. The issue for determination is whether, through the cases that have been mentioned by the applicant, the respondent's instant case is actually *res judicata*.

7. The doctrine of *res judicata* has been sufficiently ruled upon by courts of law. The substantive law on *res judicata* is found in **Section 7 of the Civil Procedure Act Cap 21** 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”.

8. The above provision of the law embodies the common law doctrine of *res judicata* which:

- (i) prevents a multiplicity of suits which would ordinarily clog the courts; and**
- (ii) ensures litigation comes to an end;**

9. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows, that:

- (a) The matter in issue is identical in both suits;**
- (b) The parties in the suit are the same;**
- (c) Sameness of the title/claim;**
- (d) Concurrence of jurisdiction; and**
- (e) Finality of the previous decision.**

10. The Court in the English case of ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, observed thus:

“...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 litigations 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 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.”

11. All parties are in consensus that the application for consent to the Saboti/Kwanza Land Control Board, and the previous suits, namely, **Kakamega High Court Misc. Application No. 42 of 1995** and **Kakamega High Court Misc. Application No. 65 of 1998** were for the subdivision of **Chepkoror Farm L.R. No. 5777/3**.

12. The Respondent has conceded that the issue of sub division with regards to **Land Reference No. 5777/3** has already been decided and the issue before this court relates to the transfer process of the land portions to the **126** intended beneficiaries and not among **856** people as alleged in the Land Control Board meeting by the 1st, 2nd and 3rd defendants.

13. I have had a look at Plaintiff and I refer to **paragraphs 7, 8, 9 and 10** which I quote verbatim,

“7. The Plaintiff avers that it has 126 registered members who contributed to the acquisition of the suit land.

8. The Plaintiff avers that it has applied for consent to subdivide the land for the benefit of its members.

9. The Plaintiff avers that the 1st, 2nd and 3rd defendants are interfering with the process on the flimsy grounds that they have acquired part of the land from the members.

10. The plaintiff avers that the 1st, 2nd and 3rd defendants are strangers and can only deal with the members they allegedly bought from after subdivision.”

14. Applying the principles mentioned at **paragraph 9** to the suit herein, it is apparent that the issues raised in the plaintiff’s pleadings herein are different from those in the previous suits which related to sub division of **L.R. No. 5777/3** and the present suit is majorly with regards to who the real beneficiaries are.

15. Accordingly, I find that the plea of *res judicata* raised by the defendants in this case is misplaced and misguided and therefore the same is hereby rejected and dismissed with costs to the respondent.

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

MWANGI NJOROGE

JUDGE

21/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the plaintiff

Ms. Munialo holding brief for Mr. Khakula for 2nd and 3rd defendants

Mr. Kuria for 4th and 5th defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

21/03/2019