



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 313 OF 2015

KITTS MBATI MUKHONYOLE.....DECEASED

NOW SUBSTITUTED WITH MAGARET

BULIMO MBATI.....PLAINTIFF/RESPONDENT

VERSUS

LEVI NDOMBI MUKONYOLE.....DEFENDANT/APPLICANT

RULING

The application is dated 8th October 2018 and is brought under section 1A, 3, 3A and 3B of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 51 of the civil Procedure rules 2010) seeking the following orders:-

1. That this suit be dismissed.
2. That the costs of this application be provided for.

It is based on the following grounds that this suit was commenced on or about 8th December, 2015 long after the High Court of Kakamega delivered judgment in the dispute between these two parties in respect of allocation and ownership of 1 acre of land in title No. S. KABRAS/SAMITSI/99. The High Court decision was made by Hon. G.B.M. Kariuki – J (then on 18th May, 2006. High Court Civil appeal No. 31 of 1998.). That the defendant/respondent appealed to the Court of Appeal in Civil Appeal No. 16 of 2007 before Hon. Musinga, Gatembo & Murgor J.J.A. whose judgment was delivered on 20th November, 2015. Before this suit was filed. There was no further appeal and thus the court of Appeal decision on that title is binding. That the defendant/respondent subsequently filed a constitution application No. 33/15 which was allocated new No. 2 of 2017. That application was heard and dismissed on 25th July, 2018. That defendant/applicant submits that the issues of Land Parcel No. S. KABRAS/SAMITSI/199 between plaintiff and defendant is totally res judicata and prays this suit be dismissed accordingly, as per your judgment stated above and costs be awarded to defendant/applicant. This application is supported by affidavit of Levi Ndombi Mukonyole.

The applicant submitted that the matter now being canvassed by plaintiff/applicant has long been declared res-judicata. Applicant relies to the grounds dated 8th October, 2018. Applicant has also filed a detailed affidavit filed in court on 9th October, 2018. He relies on that affidavit in so far as land parcel No S. KABRAS/SAMITSI/199 in concerned, any suit purporting to show defendant/applicant does not own one (1) acre in above parcel has long been declared res-judicata. Judgment dated 25th July, 2018 in Kakamega ELC NO. 33 of 2018 (Later No. 2 of 2017 was a suit involving the two parties in respect of parcel No. KAKAMEGA/SAMITSI/99).

The respondent admits that all the above court proceedings have taken place but none of them dealt with her rights and entitlement to the suit land. She filed this suit herein to have her rights determined with finality and protected. That the Court of Appeal sitting in Kisumu only dealt with the merit and demerits of the review and not her rights to the suit land.

This court has carefully considered the application and the submissions therein. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In the instant case the High Court in Kakamega delivered judgment in the dispute between these two parties in respect of allocation and ownership of 1 acre of land in title No. S. KABRAS/SAMITSI/99. The High Court decision was made by Hon. G.B.M. Kariuki – J. That the defendant/respondent appealed to the Court of Appeal in Civil Appeal No. 16 of 2007 before Hon. Musinga, Gatembo & Murgor J.J.A. whose judgment was delivered on 20th November, 2015, before this suit was filed. There was no further appeal and thus the court of Appeal decision on that title is binding. That the plaintiff/respondent subsequently filed a constitution application No. 33/15 which was allocated new No. 2 of 2017. That application was heard and dismissed on 25th July, 2018. The said suits dealt squarely with the similar issues raised herein, regarding the same cause of action, and most importantly the claim is made between the same parties, or between parties under whom they or any of them claim this suit thus should be stayed as the section is couched in mandatory terms. Further it is clear that under section 7 of the Civil Procedure Act, the principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy raised. Referring to the case of **Pop In Kenya Ltd & 3 Others vs. Habib Bank A.G. Zurich C.A. NO. 80 of 1988** where it was held quoting with approval the case of **Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581**.

“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 litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because of 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 point upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.”

In the case of **Henderson vs. Henderson (1843) 3 Hare 100 to 115** the same holding was reached that *“Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.”*

For those reasons, I find this suit is an abuse of the court process, it is res judicata and I strike it out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE