REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 511 OF 2013

SARAH CHELANGAT SAMOEI.....PLAINTIFF

VERSUS

MUSA KIPKERING KOSGEI.....1ST DEFENDANT

ESTHER SEUREI.....2ND DEFENDANT

JUDGMENT

Sarah Chelangat Samoei ***(hereinafter referred to as the plaintiff)*** has come to court against **Musa Kipkering Kosgei** and **Esther Seurei** ***(hereinafter referred to as defendants)*** claiming that the 1st defendant is a brother in law of the plaintiff while the 2nd defendant is a sister in law of the plaintiff. That the plaintiff is the registered owner of land reference number Uasin Gishu/Tapsagoi Scheme/164 which measures approximately 11.6 hectares and has been so registered since 8.6.2010 and that by virtue of the plaintiff being the sole registered owner of land reference number Uasin Gishu/Tapsagoi Scheme/164, she is entitled to exclusive and peaceful enjoyment of the proprietary rights attendant thereto to the exclusion of all and sundry including the defendants. The defendants have trespassed into and are in illegal occupation of the suit land and have been ploughing part thereof to the detriment of the plaintiff.

The plaintiff contends that the defendants' occupation of the suit land is illegal and it ought to be brought to an end. The defendants ought to compensate the plaintiff for the loss she has suffered by tint of the illegal occupation. The plaintiff therefore prays for mesne profits at the rate of Kshs. 10,000 per acre for each year the defendants will be in occupation till they vacate the land.

The plaintiff states that several attempts have been made to have the defendants vacate the suit land to no avail hence the instant suit. The plaintiff seeks to have the defendants, their agents and servants evicted from the suit land. The plaintiff seeks to have the defendants, their agents and or servants restrained from re-entering the suit land.

The plaintiff further contends that the defendants jointly and severally have no legally enforceable claim on land reference number Uasin Gishu/Tapsagoi Settlement Scheme/164 and their acts of trespass thereon are illegal and actionable and that the cause of action arose within Uasin Gishu County and the honourable court is vested with jurisdiction.

The plaintiff avers that there is no suit pending in any court nor are their previous proceedings over the same subject matter between the plaintiff and the defendants except Eldoret Chief Magistrate's Court Civil Case No. 201 of 2011.

The plaintiff prays for an eviction order to have the defendants, their agents, servants and or their families vacate the suit land reference number Uasin Gishu/Tapsagoi Settlement Scheme/164. An order of injunction to prevent the defendants, their agents, servants and or their families from entering land reference number Uasin Gishu/Tapsagoi Settlement Scheme/164 and or doing anything thereon. Mesne profits at the rate of Kshs. 5,000 for each acre the defendants occupy and use and costs of the suit.

The defendants filed defense stating that whereas the suit land is presently registered in the name of the plaintiff, the particulars presented in Eldoret High Court Succession Cause No 302 Of 2006 was saddled with misrepresentation and non-disclosure of full material facts. The particulars of misrepresentation and material non-disclosure are; -

> ***(i) Failing to disclose that the defendants have an interest in the subject parcel of land and that they have been in occupation of some section of the suit land herein as of right donated by a court order.***
>
> ***(ii) Failing to list the defendants as interested parties in the succession petition.Failing to indicate in her petition that she had a co- wife namely NAREIYO ENE OLE SIRERE.***
>
> ***(iii) Proceeding to distribute the estate without making provisions for her co-widow and the defendants who live on the suit land.***

Further, the defendants state that they have been on the subject parcel of land since early 70s and that a dispute over ownership of the subject land herein was heard and determined in the mid-80s by a Land Disputes Tribunal and its findings were adopted as judgment of the Honourable court vide Eldoret S.R.M Award No. 81 of 1986 and the finding was to the effect that the subject parcel of land be partitioned as follows;

(i) Henry Samoei (plaintiffs deceased husband) ……8½ acres.

(ii) Musa Kiplagat (1st defendant) …….7 acres.

(iii) David Kirwa (the 2nd defendant's deceased husband) …….7 acres.

Further, the defendants aver that a surveyor was invited to subdivide the suit land as per court order and that the three portions herein have clear boundaries and that each of the 3 families herein have lived on their respective portions of the suit land.

In reply to paragraph 12 of the plaint and in view of the foregoing, it is the defendants' contention that they are on the subject parcel of land as of right, having obtained court orders which provided that the suit land herein be shared among the 3 siblings herein and a such an order for injunction cannot be issued against them and the plaintiff is invited to strict proof thereof.

The defendants aver that since the court determined that they are entitled to a share of the subject land, their occupation and user have not been unlawful and as such, the plaintiff's prayers for mesne profit and eviction cannot obtain in the circumstance.

The defendant further states that the suit has been brought in bad faith and that the same is an abuse of court process given that there is a pending case filed by the plaintiff to wit Civil Suit No. 201 Of 2011 In the Chief Magistrate's Court - Eldoret against the defendants herein seeking the very same orders as sought herein and the plaintiff shall seek orders for striking out this suit on the grounds that the same is duplicity.

Further, the defendant state that in view of the fact that the ownership dispute between the parties herein has been heard and determined, this suit is res judicata and the defendants shall raise a preliminary objection seeking to have the same struck out with cost.

Further, the defendants aver that they have since sought orders for revocation of grants issued to the plaintiff herein in Eldoret High Court Succession Cause No 302 Of 2006 and the defendants shall seek stay of this proceeding pending hearing and determination of the application in the said succession cause. The plaintiff filed reply to defence reiterating the statements in the plaint and admitting the existence of Eldoret CMCC No. 201 of 2011.

When the matter came for hearing the plaintiff testified that she is the registered owner of the land and therefore entitled to the same. She states that she has been the registered owner since8/6/ 2010 through transmission after succession proceedings and that before then the land was the property of her late husband Henry Samoei Kipruto. The defendants who are her brother in law and sister in law respectively have trespassed on the land. She acknowledges that that there were proceedings before the land disputes tribunal but the same were incompetent and a nullity as the land disputes tribunal did not have jurisdiction. On cross examination, she states that she does not know how her husband got the land. On re-examination, she states that the defendants were on the land when she filed the succession cause and that they were on the land when it was registered under Settlement Fund Trustees.

DW1: Musa Kipkering Kosgei a farmer in Tapsagoi in Uasin Gishu states that he knows Sara Samoei as his sister in law being wife to his late brother David Saurei. The land in dispute measures 22 acres. He has been living in the land for 30 years having entered in1970s. Before that, they were living in their late father Kipruto Arap Koech's land. Their father bought 164 in the scheme from Arap Matutu. They wanted to share the land but their brother refused saying that the land was his. They went to the village elders up to the District Officer. The District Officer arbitrated and ordered that the land be subdivided into three portions. Their big brother was given a bigger share but refused hence they went to court in case no. 81 of 1996. They went back to the land, called surveyor who did a survey of the parcel of land. They are still in occupation. There is a trench and posts. Sara Samoei took the title in 2010. She has a co wife known as Nareiyo. The suit should be dismissed with costs. The land should be subdivided.

On Cross examination by Momanyi he states he has no sale agreement between his father and Arap Matutu. The land belonged to Settlement Fund Trustees. He has never seen Matutu on the green card. They have never sued Settlement Fund Trustees. He does not have contrary records to the green card.

DW2 Esther Chepkesia States that her other name is Ester Seurei by virtue of being married to David Kirwa Seurei in 1972 who died in 1989. Her husband had six brothers amongst them are Musa Koskei and Henry Samoei. Henry was the husband to Sarah Chelangat Samoei. Musa Kipkering Kosgei is the 1st defendant. He has lived in the suit property L. R. No. Uasin Gishu/Tapsagoi Scheme/164 since 1964. There are 3 families in the land thus Henry Samoei (deceased) and husband to Sarah Samoei, Musa Kosgei is the 1st defendant, David Kirwa who is her deceased husband. The title was initially in the name of Henry Samoei the deceased husband of Sarah. Sarah did succession without involving them. The land belonged to them all. Henry Samoei held the land in trust for the family members. Her father in law bought the land but it was registered in the name of Henry Samoei. They all lived in the land.

In 1984, there was case between David Kirwa and Musa Kosgei whereby the latter filed a claim in the Tribunal and wanted to evict them. This was Tribunal Case No. 81 of 1984. It went up to 1986 before the District Officer. Before the District Officer was Case No. 81 of 1986.

The District Officer's decision was adopted in court. It was decided that they share the land between the three equally. Henry Samoei was to be given 8.5 acres. David Seurei (her husband) got 7 acres. Musa Kosgei was given 7 acres. This was adopted by the court in 1988.

The surveyor went to subdivide the land according to their shares and that she has cultivated her share and lives on the land. She does not have any other parcel of land. Her husband was buried on the land. She has nowhere to go. She prays that the suit be dismissed with costs.

On Cross examination by Momanyi, she states that the land was registered in the name of Settlement Fund Trustees in 1980. Settlement Fund Trustees were not involved in the case. The case was before the District Officer but not the Land Disputes Tribunal.

The father to her husband had another parcel of land No. Uasin Gishu Tapsagoi/156. The land is still registered in the name of her father in law (Kipkoech) Ruto. She is not interested in 156. Three of the deceased's sons are in 156. This was land given by Settlement Fund Trustees. It was government land.

DW3 Kiplagat Ngetich, the in charge, Civil Registry at the Chief Magistrate's Court at Eldoret Law Courts produced the It is a skeleton file in respect of land case No. 81 of 1986. The file contains certified copies of proceedings and original letters of Tribunal. It is an Award of the Tribunal.

I have considered the pleadings, submissions of both counsel and do find that this court has no jurisdiction to make a declaration that the succession proceedings in Eldoret High Court Succession Cause No 302 Of 2006 were irregular as the same is within the jurisdiction of the High Court and that this court cannot supervise the High Court.

Moreover, the award was adopted by a court that had the jurisdiction to adopt the same and that the adoption of the award as the judgment of the court finalized the dispute which was between the same parties herein and therefore the suit is res judicata.

The fundamental law of *re judicata* is found in Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya 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."**

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."**

The learned Judge went ahead and cited the case of **Omondi v National Bank of Kenya Limited & others [2001] EA 177** where it was stated that **"parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."**

In **Gurbacham v Yowani Ekori [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."**

Section 7(1) of the Land disputes tribunal act (repealed) provided that the chairman of the Tribunal was to cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which had been taken or proved before the Tribunal and the court was to enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree was to issue and was to be enforceable in the manner provided for under the Civil Procedure Act. The import of the above is that the Magistrates court had the jurisdiction to adopt the award of the tribunal.

In the High Court in HCCC No. 139 of 2009 (Kisii) as per Makhandia, J. (as he then was) observed as follows regarding the role of the Magistrates court:

> **"…In any event I do not think that the SRM's court at Keroka has jurisdiction under Land Disputes Tribunal Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is regular, bad in law and therefore void abinitio…"**

Moreover, section 8. (1) of the repealed Act provided that any party to a dispute under section 3 who was aggrieved by the decision of the Tribunal could, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which was

the subject matter of the dispute was situated.

Section 8(2) provided that the appeal was to be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof was to be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3.

Section 8 (3) provided that the appeal was to be in documentary form and was to contain a brief statement, to be divided into separate grounds of appeal, of the reasons upon which the party appealing wished to rely.

Section 8(4) provided the appeal was to be set down for hearing by the Appeals Committee at a date, time and place to be notified to the parties thereto.

Section 8 (5) provided that the appeal was to be determined by the Appeals Committee, which was to consist of three members appointed under section 9.

Section 8(6) provided that at the hearing of the appeal, the party bringing the appeal was to begin.

Section 8(7) provided that after giving each party an opportunity to state his case the Appeals Committee was to determine the appeal giving reasons for its decision: Provided that the Committee could in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal. Section (8) provided that the decision of the Appeals Committee was to be final on any issue of fact and no appeal shall lie therefrom to any court.

Either party to the appeal could appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal was to be admitted to hearing by the High Court unless a Judge of that Court had certified that an issue of law (other than customary law) was involved.

I have analyzed sections 7 and 8 of the land disputes tribunal Act (repealed) intentionally to show that there was an elaborate procedure provided by law for dispute resolution under the said Act and therefore upon adoption of the award as a decision of the court parties to the dispute cannot restart the dispute in court and were to appeal to the Appeals' Committee from the decision of the tribunal if dissatisfied and appeal to the High Court from the Appeals' Committee if dissatisfied. The other alternative procedure was to approach the court by way of judicial review.

In Florence Nyaboke Machani V Mogere Amosi Ombui & 2 Others [2014] eKLR, the High Court had found as follows: -

> ***"It will therefore be seen that the said Act provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The Act limited appeal to the High Court on questions of law only.***
>
> ***The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned Judge found in the judgment appealed from: -***
>
> ***"The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed, he was even advised by the SRM's court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again, he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate's court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent's counsel was duly served with the application and or a hearing notice and had failed to turn up.***
>
> ***It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree."***

The court of appeal held: -

> ***"We, in our own, find the above proper and legally founded. We see no reason to interfere with it. Appellants appeal has no merit and we accordingly dismiss it with costs to the respondents."***

See case of **Paul Muraya Kaguri -vs- Simon Mbaria Muchunu [2015] eKLR** where in a similar matter as the one before me L. N. Waithaka, J. stated:

> **"It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.**
>
> **…the Trial Magistrate's duty under the law was merely to adopt the award of the Land Disputes Tribunal, she had no mandate to enquire into the legality or otherwise of the judgment."**

The plaintiff did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The plaintiff instead chose to file the suit for injunctive orders and eviction which is a procedure not known in law after judgment being made by the magistrate's court. In conclusion, I do find that the plaintiffs claim is improperly before this court and the suit is dismissed with costs.

Dated and delivered at Eldoret this 8th day of March, 2019.

A. OMBWAYO

JUDGE