



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 295 OF 2015

ROBERT WANJALA WEKESA PLAINTIFF

VERSUS

ABDALA A. SULEIMANDEFENDANT

RULING

The defendant submitted that the plaintiff filed the suit herein vide a plaint dated 16th October, 2015. The defendant filed grounds of opposition dated 4th December, 2015 and a Replying Affidavit dated 1st March, 2016. Further, a preliminary objection dated 9th October, 2018 was filed. The preliminary objection is to the effect that the suit herein as filed is res judicata in view of the judgment delivered on 12th October, 2001 by Justice H.P.G. Waweru J. marked as AAS 2 in the Replying Affidavit dated 1st March, 2016.

In the said judgment, the defendant moved the court successfully and judgment was entered in favour of the defendant who was the plaintiff in that suit. The orders of eviction were issued which were executed against the defendant then one Eliud Wekesa Waswa now deceased. The current plaintiff only substituted the original defendant who passed on, and there was no appeal preferred against the said judgment. From the replying affidavit, it is clear the O.C.S. supervised the eviction of the defendant and his family including the current plaintiff who is the son of the original deceased defendant. The subject matter of the aforementioned suit was L.P. KAKAMEGA/LUMAKANDA/186 which is the same subject matter herein.

It is the defendant's submission that the current suit as constituted is res judicata since Justice H.P.G. Waweru J. delivered a judgment and pronounced himself on the same subject matter. The defendant did not move to the higher court for any appeal. The said judgment as it is has never been challenged. The court having delivered a judgment on the same subject matter, this court as it is now will not re-open the same subject matter and make any determination over that land again.

They submit that the current plaintiff obtained the registration and ownership of the title using fraudulent and corrupt scheme. Under section 26 (1) of the Land Registration Act clearly provides exceptions where the court will interfere with certificates of title to land obtained by way of fraud corrupt scheme, and illegally. Since the title to this land was already arbitrated upon and Justice Waweru made a finding on the ownership and no appeal was preferred, it follows therefore that the registration of the plaintiff as the owner of the said land without any due regard to the said judgment, it is clear that the registration was by way of a corrupt scheme where this court will not take the certificate as prima facie evidence especially noting the contents of the judgment dated 12th October, 2001.

Therefore the matter before the court is res judicata as there is a valid judgment over the suit land which is still valid and in force which has never been challenged and therefore they submit that the objection on point of law is merited, they pray that the same be upheld, and the court to strike out and/or dismiss this case with costs.

The plaintiff submitted that this matter is not res judicata and judgement mentioned aforesaid has since been overturned. The plaintiff's father herein filed a claim to the Lugari Disputes Tribunal and ownership was given to him on 21st November 2006. The verdict was adopted by the Kakamega Chief Magistrates in Kakamega Misc Application No. 166 of 2006. The defendant appealed against the verdict of the Tribunal to the Western Provincial Land Disputes Appeals Tribunal and the verdict was upheld. The defendant filed petition No. 2 of 2014 seeking to have the Tribunal's verdict and its adoption declared a nullity but the same was dismissed by the Butali court on 21st November 2018. The defendant had also filed cases in ELC court which were dismissed hence this matter is not res judicata.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. 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.”

This court has perused the court file and indeed finds that the award adopted by the court exists which seems to have overturn the judgement of Justice Waweru. There is documentary evidence that the plaintiff’s father herein filed a claim to the Lugari Disputes Tribunal and ownership was given to him on 21st November 2006. The verdict was adopted by the Kakamega Chief Magistrates in Kakamega Misc Application No. 166 of 2006. The defendant appealed against the verdict of the Tribunal to the Western Provincial Land Disputes Appeals Tribunal and the verdict was upheld. It is in the interest of justice for this court to proceed to full trial in order to get to the real issues in this matter. I find that this case is not res judicata and the objection is overruled with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH MAY 2019.

N.A. MATHEKA

JUDGE