



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 9 OF 2012

CHARLES GORDON NDIWA.....PLAINTIFF

VERSUS

HUDSON KOTET NDIWA.....DEFENDANT

J U D G M E N T

From the record, this suit was heard to completion on 11th June 2013 by **OMOLLO J** when the plaintiff and defendant testified. However, after the defendant had testified, **OMOLLO J** made the following order:-

“It seems this is a boundary dispute. To enable this Court reach a just decision, it is prudent to have the District Land Registrar and Surveyor to visit the boundary and confirm if the home of the defendant is located on parcel NO 297 OR 298. I direct that the District Land Registrar and Surveyor Bungoma do visit the site and file their report within 45 days. Both parties to share the costs of transport of the Registrar/Surveyor. Mention on 30th July 2013.”

That may have contributed towards the delay in finalizing this case because it was not until 15th February 2016 that the report by the **BUNGOMA COUNTY SURVEYOR MR KWAMBAI K. DAVID** dated 13th October 2015 was filed. It is not clear why it took 2 years 8 months for the County Surveyor to file the said report but that is the lethargy that is synonymous with that office.

The parties are acting in person and by his plaint dated 30th March 2009, the plaintiff sought the following orders against the defendant:-

- 1. Eviction from land parcel NO ELGON/CHEMOGE/297.**
- 2. A permanent injunction to restrain the defendant, his agents and/or employees from interfering in whatever manner with the plaintiff's peaceful enjoyment of the land parcel NO ELGON/CHEMOGE/297.**
- 3. Costs.**

The basis of the plaintiff's claim is that whereas he is the absolute proprietor of the land parcel **NO ELGON/CHEMOGE/297** measuring approximately 22 Ha (the suit land), the defendant has trespassed thereon and constructed 4 houses which act is unjustified and unlawful hence this suit.

The defendant filed a defence dated 14th April 2009 denying the allegations of trespass on the suit land. He added that the suit land belongs to their father **NDIWA CHEPKURKEY** and other siblings while land parcel **NO ELGON/ CHEMOGE/298** belongs to the defendant. He added that this dispute had infact been heard at **KIMILILI** and Judgment was delivered in his favour.

In a reply to the defence, the plaintiff averred that the dispute filed at **KIMILILI** was over the ownership of the suit land and was not for eviction of the defendant. The plaintiff however conceded that the defendant is the registered proprietor of the land parcel **NO ELGON/CHEMOGE/298** while the suit land was given to the plaintiff following succession proceedings.

It is important at this state to point out that this suit was originally filed in **KAKAMEGA HIGH COURT** as **CIVIL SUIT NO 42 OF 2009** before **CHITEMBWE J** transferred it to this Court on 23rd May 2012.

As indicated earlier, this suit was heard and competed by **OMOLLO J** on 11th June 2013 when the parties who were the only witnesses testified. Their evidence was very brief.

The plaintiff told the Court that the defendant is his brother and that the suit land originally belonged to their father. He added that he became the registered proprietor of the suit land in 2005 following succession proceedings. He added that he and the defendant have lived peacefully until 1998 when the defendant took possession of the suit land and both he and his sons put up houses thereon. So he filed a dispute with the then Land Disputes Tribunal which awarded him the land. That award was adopted by the Magistrate's Court and a decree was issued and although the defendant filed an appeal against that award, its status is unknown. He therefore sought the eviction of the defendant from the suit land and also prayed that the defendant be jailed for contempt and pay him compensation for using the suit land. He also prayed for a permanent injunction against the defendant and costs.

The defendant's brief testimony was that he has built his home on his own parcel of land being **L.R NO ELGON/CHEMOGE/ 298** which he also ploughs for his subsistence. He denied having used anybody else's land.

It was at that point that **OMOLLO J** called for the report from the District Land Registrar and Surveyor which, as I have already stated above, was filed on 15th February 2016. It was therefore in that spirit that when the parties appeared before me on 9th October 2018 for the plaintiff's application dated 20th July 2018 seeking summary Judgment, I impressed upon them that this suit is ripe for Judgment. The parties meanwhile agreed by consent that the report of the **BUNGOMA COUNTY SURVEYOR** dated 13th October 2015 and filed on 15th February 2016 be admitted as part of the evidence herein.

I have considered the evidence by both parties.

In his defence, the defendant pleaded at paragraph 6 as follows:-

"Paragraph 7 of the plaint is denied since the matter was heard and determined by KIMILILI (sic) whereby Judgment was delivered in favour of the defendant."

The defendant was therefore raising the plea of res – judicata which is provided for under **Section 7 of the Civil Procedure Act** 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 claim, litigating under the same title, in a Court competent to try such or subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Before res - judicata can be proved, the following conditions must exist:-

- 1: The issues in dispute in the former suit must be directly and substantially in issue in the suit where the doctrine of res judicata is being pleaded.**
- 2: The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3: The former suit must have been heard and finally decided.**
- 4: The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA .V. ATTORNEY GENERAL 2005 I E.A 83.**

It is the duty of the party raising the plea of res - judicata to place before the Court evidence to prove that the issues in dispute in the subsequent suit have been heard and determined by another Court. The defendant has not done much in that regard. The proceedings of the Land Disputes Tribunal that determined the parties previous dispute have not been availed for this Court's perusal. All that I can see is a decree in **KIMILILI SENIOR RESIDENT MAGISTRATE'S LAND CASE NO 7 OF 2006** involving the same parties dated 1st April 2007. However, that award does not indicate that the dispute involved the suit land. I shall reproduce it for the avoidance of doubt:-

"DECREE

- 1: That the Applicant/Decree holder had land dispute with the Respondent/Judgment debtor which was heard and finalized by MT ELGON Land Dispute Tribunal.***
- 2: That the MT ELGON Dispute Tribunal forwarded their findings/Ruling to this Court to be adopted as the Judgment of the Court.***
- 3: That the MT ELGON Elders Award coming up on the 27th day of February 2007 before F. K. GITONGA – SRM was adopted as the Judgment of the Court.***

IT IS HEREBY ORDERED AND DECREED THAT:

HUDSON NDIWA never purchased land but instead he grabbed a former repossessed land."

As is clear from the above decree, the land in dispute is not identified. It may very well be that the land in dispute was the suit land. However, a party pleading res-judicata must not leave room for conjecture. He must lead cogent evidence to show that the issues in dispute in the previous suit are the same ones being raised in the subsequent dispute between the same parties. The defendant has not proved that.

Secondly, assuming that the land in dispute in the Land Dispute Tribunal was the suit land, it is now well settled that a Land Dispute Tribunal established under the now repealed Land Dispute Tribunal Act [CHAPTER 303A LAWS OF KENYA] had no jurisdiction to determine a dispute involving ownership of registered land – **JOTHAM AMUNAVI .V. THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO 256 OF 2002**. And since the said Tribunal had no jurisdiction to determine the dispute before it, its decision cannot operate as res – judicata. As I held in

M. MUCHERO .V. PATRICK MURIUKI NJERU AND OTHERS 2015 eKLR citing **MULLA THE CODE OF CIVIL PROCEDURE 18TH EDITION**, res judicata presupposes that the Court that determined the former suit had the requisite jurisdiction to do so and if it didn't, then the plea of res-judicata cannot be sustained. A Judgment delivered by a Court not competent to deliver it cannot operate as res – judicata since such a Judgment is not of any effect.

The plea of res – judicata is not therefore available to the defendant in this case and although the parties did not address me on that doctrine, I have taken the liberty to address it because if it was up – held, then I would have had to down my tools.

I shall now consider the merits or otherwise of the plaintiff's claim.

It is common ground that the plaintiff is the owner of the suit land while the defendant is the owner of land parcel **NO ELGON/CHEMOGE/298**. Having pleaded that the defendant had trespassed onto the suit land and constructed 4 houses thereon, it was the duty of the plaintiff to lead evidence to prove that allegation. **Section 107(1) of the Evidence Act** states:-

“Whoever desires any Court to give Judgment as to any right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 109 similarly provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The defendant having stated in his evidence that the portion he occupies is parcel **NO ELGON/CHEMOGE/298** and not the suit land, it was imperative that the plaintiff adduces evidence such as a report by a surveyor to confirm that indeed the defendant has trespassed onto the suit land and put up his homes as alleged by the plaintiff both in his pleadings and oral evidence in Court. The plaintiff did not adduce such evidence yet the onus was on him to prove the trespass which is defined as an **“unjustifiable intrusion by one person upon the land in possession of another”** – **CLERK & LINDELL ON TORTS 7TH EDITION**. It was not enough for the plaintiff to simply allege trespass on the suit land. Trespass is an act that can be seen on the land and bearing in mind the fact that it was the plaintiff's word against the defendant, much more was required on the part of the plaintiff since he carried the burden of proof. It must have been this paucity of evidence that prompted **OMOLLO J**, magnanimously I must add, to make the orders that she did on 11th June 2013 calling for a report from the District Land Registrar and Surveyor. That report dated 13th October 2015 and filed on 15th February 2016 is signed by **KWAMBAI K. DAVID** the **COUNTY SURVEYOR BUNGOMA** and reads:-

“RE: SURVEYOR'S REPORT ON LAND CASE NO 9 OF 2012.

I visited land parcel NO ELGON/CHEMOGE/297 and ELGON/ CHEMOGE/298 on 11th day of November 2015 to implement the above order. It was found out the home of the defendant is in land parcel NO ELGON/CHEMOGE/298.”

I notice that in his application dated 20th July 2018 seeking the striking out of the defendant's defence, the plaintiff has annexed a copy of the said report as annexure **CGN 1** but it has been interfered with by cancelling the parcel **NO ELGON/CHEMOGE/298** appearing in the last sentence of the report to now read **ELGON/CHEMOGE/297** and although that alteration is counter-signed, it does not require the expertise of a document examiner to confirm that the signature of **KWAMBAI K. DAVID** who signed the report and the signature against the alteration of the number 298 to read 297 are very different. Clearly, the plaintiff was trying to doctor the report of the surveyor but ended up doing a poor job. I am satisfied that the un-altered report of the surveyor and which was, with the consent of the parties, admitted as evidence on 9th October 2018, shows that the defendant's home is on his land parcel **NO ELGON/CHEMOGE/298** and not on the plaintiff's parcel **NO ELGON/CHEMOGE/297**. It cannot therefore be correct for the plaintiff to claim that the defendant has trespassed onto the suit land. The evidence of the surveyor as contained in his report dated 13th October 2015, and who is an expert in matters to do with survey, has shown beyond doubt that the plaintiff's claim that the defendant has trespassed onto the suit land is not correct.

The up-shot of the above is that the plaintiff's suit is dismissed. As the parties are siblings and whereas I am tempted to condemn the plaintiff to meet costs as a punishment for trying to doctor documents, I will nonetheless order each party to meet their own costs.

It is so ordered.

Boaz N. Olao.

JUDGE

9th May 2019.

Judgment dated, delivered and signed in Open Court this 9th day of May 2019.

Plaintiff present

Defendant absent

Right of Appeal explained.

Boaz N. Olao.

J U D G E

9th May 2019.