



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 45 OF 2018

HALON ENYATA OKWARAPLAINTIFF

VERSUS

JOSEPH BOIYO BARASADEFENDANT

R U L I N G

When this suit came up for hearing on 24th June 2019, **MS MUTUNDA ADVOCATE** for the defendant raised a Preliminary Objection to the effect that this suit is res – judicata having been determined in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** which involved the same parties as well as **BUNGOMA SPMC CRIMINAL CASE NO 2563 OF 2004**.

With the consent of the parties, I directed that the Preliminary Objection be canvassed orally.

In her oral submissions, **MS MUTUNDA** referred the Court to documents filed by the defendants showing that the plaintiff herein had previously filed **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** claiming from two defendants namely **JONATHAN B. TENDET** (1st defendant) and **BOIYO K. TENDET** (2nd defendant) 40 acres out of land parcel **NO ELGON/ KAPSOKWONY/324** (herein the suit land). That suit was dismissed by **MUCHELULE – SPM** (as he then was). This suit should therefore be struck out for being res – judicata.

In response, the plaintiff asked the Court to determine this suit since he has no land. He wants the plaintiff to go back to his land.

When he was asked why he did not appeal the decision in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992**, the plaintiff said he was un-well and is still un-well.

I have considered the oral submissions by Counsel for the defendant as well as those of the plaintiff who is acting in person.

The basis of the defendant’s Preliminary Objection is that this suit is res – judicata having been determined in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992**. Although Counsel for the plaintiff has also referred me to **BUNGOMA SPMC CRIMINAL CASE NO 2563 OF 2004** where the defendant was charged with the offence of forcible detainer with respect to land parcel **NO ELGON/KAPSOKWONY/324** and acquitted, I do not think a Judgment in a criminal case can be invoked to raise a plea of res - judicata. I am not persuaded that a dispute over the ownership of land can conclusively be determined in a criminal case of forcible detainer. In any case, I have read the Judgment of **F. KYAMBIA (RESIDENT MAGISTRATE)** dated 9th February 2009 in **BUNGOMA SPMC CRIMINAL CASE NO 2563 OF 2004** and it is clear that he was unable to determine the ownership of the suit land. This is how the trial magistrate addressed that issue:-

“What the prosecution did is to raise a strong suspicion that the registration of the disputed land parcel was not dealt with above the board. The registration of the land in question in the name of the 2nd accused by Bungoma Land Registry was an issue which required further investigation involving availing the Land Registrar to shed some light on the history and subsequent dealings indeed registration of titles is always a process which involves various stages”.

Res – judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

“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 some 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.”

Before res-judicata can be proved, the party raising it must establish the following:-

1: That the issue in dispute in the former suit was directly and substantially in issue in the suit where the doctrine of res-

judicata is being pleaded.

2: That the former suit was between the same parties or those under whom they or any of them claim litigating under the same title.

3: That the former suit was heard and finally decided.

4: That the Court or Tribunal which determined the former suit must have been competent.

In the course of hearing the parties herein on the Preliminary Objection, it became obvious to me that while the defendant in this case is **JOSEPH BOIYO BARASA**, the 2nd defendant in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** is one **BOIYO K. TENDET**. I therefore sought to know from the parties if **JOSEPH BOIYO BARASA** the defendant herein and **BOIYO K. TENDET** the 2nd defendant In **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** are one and the same person. Both parties confirmed that the defendant herein and **BOIYO K. TENDET** the 2nd defendant in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** are one and the same person.

Although the pleadings in **BUNGOMA SPMC CIVIL CASE NO 290 OF 1992** were not availed, it is clear from the Judgment delivered by **MUCHELULE – SPM** (as he then was) on 3rd May 1995 that the dispute involved ownership of the suit land between the plaintiff herein and two defendants one of who was the defendant herein sued as the 2nd defendant. The plaintiff's suit was dismissed with costs. No appeal was filed against that Judgment and the plaintiff says he did not do so because he became un-well.

From the Plaintiff herein, the plaintiff is seeking as per paragraph 7 thereof a declaration that the defendant obtained registration of the suit land by fraudulent means and the same be cancelled and the plaintiff registered as the proprietor thereof.

It is therefore clear that the dispute between the parties herein over the ownership of the suit land was heard and finally determined by the Judgment of **MUCHELULE – SPM** (as he then was) delivered some twenty four (24) years ago. There is no doubt that the Court which determined the said dispute was a competent Court. The Preliminary Objection raising the plea of res – judicata is properly taken and I must up - hold it.

On the issue of costs, I have perused the documents filed herein and it is clear that this dispute has a long history. It started way back in 1991 when the plaintiff filed a complaint before the Assistant Chief **KIBUK SOUTH LOCATION** in **KAPSWOKONY** against the defendant. It escalated upto the Ministry of Lands. I would order that each party meets their own costs.

The up – shot of the above is that the defendant's Preliminary Objection is up – held. This suit is res – judicata and is hereby struck out. Each party to meet their own costs.

Boaz N. Olao.

J U D G E

27th June 2019.

Ruling dated, delivered and signed in Open Court this 27th day of June 2019 at Bungoma

Ms Mutunda for Mr. Khakula for defendant present

Plaintiff absent

Joy – Court Assistant

Boaz N. Olao.

J U D G E

27th June 2019.