



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 526 OF 2017

TERESIA KAGURE KAGITU.....PLAINTIFF

=VERSUS=

PETER MUTUA MUSEE.....DEFENDANT

RULING

Introduction

1. The Plaintiff filed an Originating Summons on 18th August, 2017 in which she sought to be registered as owner of LR No. Nairobi/Block 113/98 (suit property) by way of adverse possession. The Plaintiff contemporaneously filed an application seeking injunctive orders against the Defendant restraining him from in any manner interfering with the suit property. The application for injunction was placed before me on the same date when I directed that the same be served for mention on 20th September, 2017 before Justice Okong'o for directions.

2. When the application was placed before Justice Okong'o on 20th September 2017, the Judge directed that the application be heard on 22nd January, 2018. On 22nd January, 2019 when the application was supposed to be heard, no party appeared. The Judge dismissed the application for non-attendance and directed the matter to be fixed before the Deputy Registrar on 18th June, 2018 for pre-trial.

3. On 18th June 2018, the Plaintiff's Counsel appeared before the Deputy Registrar who directed that the matter be placed before Justice Okong'o on 23rd October, 2018 for directions on the trial. The Plaintiff's Counsel appeared before Justice Okong'o on 23rd October, 2018 whereby he indicated that there was a similar matter i.e. ELC 137 of 2012 which was before me. The Plaintiff's Advocate informed Justice Okong'o that he had been unable to serve the Defendant. The Judge then directed that the matter be mentioned before me on 13th December, 2018 but wondered why the Plaintiff had been unable to serve the Defendant when she had a similar matter pending before another Court involving the same parties.

4. On 13th December 2018, when the matter was mentioned before me, Mr. Ndurumo advocate for the Defendant indicated that he had instructions to receive summons to enter appearance. I then directed that summons be served upon the Defendant's Counsel and fixed the matter for mention on 18th March, 2019. On the 18th March 2019, Mr. Ndurumo for the Defendant informed the Court that he had filed a notice of Preliminary Objection and that he wished to argue the Preliminary Objection on 20th March, 2019 when ELC 137 of 2012 was set for mention. The Court directed that the Preliminary Objection be argued on 20th March, 2019.

The Preliminary Objection

5. The Defendant's Counsel argued that the present suit is res-judicata in that the issues which are being raised in this suit were dealt with in ELC 137 of 2012 which involved the same parties and that Judgment had been delivered on 27th June, 2017. The Defendant's Counsel argued that the present suit was filed two months after the Judgment in ELC 137 of 2012 had been delivered. The parties were litigating in respect of the same title as in the present case. The Defendant's Advocate argued that the Plaintiff was now seeking to be registered as owner of the suit property by way of adverse possession something which cannot happen as that issue would have been raised in the former suit.

Response to the Preliminary Objection

6. The Plaintiff's Counsel argued that the issue of res-judicata cannot be raised as the Judgment in the former suit was not obtained regularly; that no summons to enter appearance were issued or served and that there was no compliance with Order 11 of the Civil Procedure Rules. The Advocate further argued that the Court was misled into entering the Judgment.

Analysis

7. I have considered the Preliminary Objection raised by the Defendant and the opposition to the same by the Plaintiff's Advocate. The only issue for determination is whether the present suit is res-judicata. The principle of res-judicata is predicated on section 7 of the Civil Procedure Act which states as follow:-

“ 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.”

8. In the instant case, the Plaintiff had filed ELC 137 of 2012 in which she sought an injunction restraining the Defendant from interfering with LR No. Nairobi/Block 113/99. The Defendant in that suit raised a counter-claim in which he sought an injunction against the Plaintiff restraining her from interfering with the Defendant's possession of LR No. Nairobi/Block 113/98. The Defendant further prayed for an order directing the Plaintiff to remove all structures which had encroached on to LR No Nairobi/Block 113/98.

9. The suit i.e ELC 137 of 2012 was fully heard and a Judgment delivered on 27th June, 2017 dismissing the Plaintiff's claim against the Defendant and allowing the Defendant's counter-claim as against the Plaintiff. Barely two months later, the Plaintiff filed the current suit in which she seeks to have herself registered as owner of the same by way of adverse possession.

10. The present suit was filed after the Judgment in ELC 137 of 2012. The parties in this suit were the same as in the counter-claim in ELC 137 of 2012. If the Plaintiff had any claim on grounds of adverse possession, she should have raised that as a defence to the counter-claim against her. She cannot bring another suit based on what she should have raised in ELC 137 of 2012.

Conclusion

11. The Plaintiff's suit is not only res-judicata but is also an abuse of the Court process. I proceed to uphold the Preliminary Objection and strike out the present suit with costs to the Defendant.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 27th day of June, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Kangata for Mr. Ndurumo for Defendant.

Court Assistant Hilda