



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO.326 OF 2014

MARTHA SIGEI KILELE.....PLAINTIFF

VERSUS

PETER MBUGUA GITAU.....1ST DEFENDANT

AGRICULTURAL DEVELOPMENT CORPORATION.....2ND DEFENDANT

RULING

(Application seeking to strike out suit as being res judicata; applicant having had litigation with the son and licensee of the plaintiff where the son was held to be a trespasser to the suit land; plaintiff now filing suit claiming ownership of the land; plea that the suit is res judicata; suit not res judicata; the issue of ownership as between the plaintiff and applicant has never been determined; suit against licensee not capable of binding the person claiming primary ownership of the land; application dismissed)

1. The application before me is that dated 19 February 2019, filed by the 1st defendant, under the provisions of Sections 7 and 8 of the Civil Procedure Act, and Order 2 Rule 15(1)(a) and (d) of the Civil Procedure Rules. The application seeks orders that this suit be struck out for the reason that it is *res judicata*.

2. To put matters into context, this suit was commenced through a plaint which was filed on 26 November 2014. The plaintiff sued the applicant as 1st defendant and Agricultural Development Corporation (ADC) as the 2nd defendant. In the plaint, she averred that she is the beneficiary/allottee of a land identified as Nakuru/Nyota Pendle Tregana said to measure approximately 4.0 hectares. She pleaded that on 31 July 1995, ADC issued her with a letter confirming the allocation of the said land. She stated that she has now been threatened with eviction by the 1st defendant/applicant despite having lived in the said land since the year 1993 and has planted trees plus five dwelling houses. She contended that the applicant has illegally and irregularly processed a title deed in his name for the said land yet he has no right over it. She mentioned that there has been no previous suit and no suit pending between the parties over the same subject matter and sought orders that she be declared the rightful owner of the disputed land and a permanent injunction to restrain the applicant from the said land. She also asked that the title of the applicant be cancelled and the same to issue to her, or alternatively, an allocation of alternative land by the 2nd defendant.

3. The 2nd defendant filed a defence on 29 April 2015, through which it averred that it is a stranger to the allegations of the plaintiff.

4. The applicant filed defence on 4 September 2015. He denied that the 2nd defendant ever issued the plaintiff with any allotment letter. He further pleaded that the plaintiff and her agents and servants were evicted from the applicant's land parcel Nakuru Nyota Pendle Tregana/218 around March 2014 following a decree, judgment and eviction order issued in Nakuru CMCC No. 688 of 2012 where the plaintiff was enjoined as interested party and actively participated in the proceedings. He pleaded that he was rightfully issued with title deed to the land and that the plaintiff has no rights over it. He further pleaded that the plaintiff had the opportunity to ventilate her grievances, which she did, in Nakuru CMCC No. 688 of 2012 which was dismissed and she did not file an appeal against that decision. He also faulted the plaintiff for not disclosing other suits including :-

(a) Molo SRM Criminal Case No. 126 of 2010, *Republic vs Enock Kibet Kilele*, where the accused was the plaintiff's son who was arrested and charged with the offence of forcible detainer contrary to Section 91 of the Penal Code and was tried, convicted and sentenced to 6 months imprisonment or a fine of Kshs. 20,000/=. It is pleaded that he did not appeal or challenge the conviction and sentence.

(b) Nakuru CMCC No. 1019 of 2012 – *Martha Sigei Kilele vs Peter Mbugua Gitau & Wilson Kiprono Soi* – where the plaintiff sought a declaration that she is owner of the land known as 17691/218 Nyota Complex Farm Molo and sought cancellation of the defendant's registration as proprietor, and a permanent injunction. It is pleaded that the plaintiff withdrew the suit with costs after it was pointed out that there existed the suit Nakuru CMCC No 688 of 2012.

(c) Nakuru CMCC No. 688 of 2012 , *Peter Mbugua Gitau vs Enock K. Kilele* , where the applicant sought eviction against the

defendant and the plaintiff herein sought to be enjoined and was enjoined as interested party. It is pleaded that she actively participated in the proceedings and was represented by an advocate.

5. The applicant thus pleaded in his defence that the present suit is *res judicata* and warned that he would raise a preliminary objection to the suit.

6. I directed that a formal application be filed to address the claim whether the suit is *res judicata* and this application was subsequently filed.

7. In the supporting affidavit to the application, the applicant has reiterated that the issues raised in this case have been raised in the previous suits referred to in his defence. He annexed copies of the pleadings and the proceedings in Nakuru CMCC No. 688 of 2012 where the plaintiff was enjoined as interested party. He has mentioned that in the said suit, he obtained a decree in his favour and an eviction order which was executed. It is his view that it is an abuse of the court process for the plaintiff to now file a new suit against him.

8. In response, the plaintiff swore a replying affidavit vide which she deposed inter alia that the cases mentioned, were never against her and the applicant, and that the eviction order was not against her. She has stated that there is no case between herself and the applicant that has ever been substantially heard and a verdict rendered by a court of competent jurisdiction. She has deposed that even after the filing of this case, the 2nd defendant continued receiving money from her and thus the case should proceed to its logical conclusion. She has deposed that the application she made to be enjoined as interested party was made on September 2015 and had already been overtaken by events as a decree had been issued on 24 January 2014, and the said decree was not against her and that she never participated in the said case. She has pointed out that the case, Nakuru CMCC NO. 1019 of 2012, which she filed, was withdrawn.

9. No reply was filed by the 2nd defendant but counsel for the 2nd defendant stated that they associate themselves with the position of the applicant.

10. I invited counsel to file submissions and counsel for the applicant and for the plaintiff did file their written submissions. I have gone through them and considered the same before arriving at my decision.

11. The issue raised in this application is that this suit is *res judicata*. The application, as I had earlier pointed out, is premised upon the provisions of Section 7 and 8 of the Civil Procedure Act, which are drawn as follows :-

Section 7 : *Res judicata*

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Section 8 : Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

12. It will indeed be seen from the above provisions that the law frowns upon a party who moves the court to litigate over a matter that he/she has already litigated on.

13. The applicant in this case has pointed to three previous cases and I have gone through them. The first, Molo SRM Criminal Case No. 126 of 2010, is a criminal case against one Enock Kibet Kilele. I have discerned that he is the son of the plaintiff herein. In the criminal case, he was charged with forcible detainer, found guilty and was sentenced. The second case is Nakuru CMCC No. 688 of 2012 and the third case mentioned is Nakuru CMCC No. 1019 of 2012. Nothing much arises out of the latter of the two civil cases, for that case was withdrawn

before it was ever heard. It can therefore not be captured in the definition of a 'former suit' because upon the withdrawal, the court did not have opportunity to pronounce itself on the issues. On the former civil suit, I have noted that the defendant was Enock Kibet and not the plaintiff in this matter. The eviction order was also issued against the said Enock Kibet and not the plaintiff herein. I have taken note of the averment that the plaintiff was enjoined in the said suit as interested party and was heard and she cannot therefore now file a new suit. I regret that all that I have seen is an application that was filed by the plaintiff dated 5 November 2012, filed in that case, where the plaintiff sought to be enjoined as interested party. I have the whole of the proceedings of that case before me and I have no evidence that the said application was ever heard and no evidence that the plaintiff was ever enjoined as interested party in the said case. The plaintiff also never participated as a witness in the said case. There being no evidence that her application to be enjoined as interested party was ever allowed, it cannot be said that she was ever a party in the said case. I also note that she never participated in any way in the said matter.

14. My own assessment of the three suits mentioned is that none can qualify to be termed as a 'former suit' between the plaintiff and the applicant herein. In the two suits that may qualify to be former suits, it is the plaintiff's son and not the plaintiff who was party.

15. In his submissions, Mr. Karanja Mbugua, learned counsel for the applicant, referred me to the Tanzanian case of **Lotta vs Tanaki & Others, Court of Appeal of Tanzania at Arusha, (2003) 2 EA 556**. In that case, the 2nd respondent (as plaintiff) filed suit against the mother and sister of the appellant for possession of land. The court found in favour of the 2nd respondent and ordered the appellant's mother and sister to vacate the suit land. The appellant subsequently commenced proceedings against the 2nd respondent and two others claiming ownership of the land. He averred in his plaint that the land had been donated to him by his mother, and that the respondents had since 1986 trespassed on the land. The respondents raised the preliminary objection of inter alia, *res judicata*. The objection was upheld by the trial court and the High Court on appeal. On further appeal to the Court of Appeal, it was contended that the appellant was not claiming through his mother and therefore the suit was not *res judicata*. It was held that since the appellant's mother and sister had sued on the same subject matter, the appellant could not be disassociated from that litigation but was deemed to claim under his mother. Accordingly, the appellant's suit was *res judicata*.

16. I have no problem with the reasoning in the above case but the roles in this case are reversed. In the instance of that case, the appellant's mother was the one who claimed primary ownership of the land and the appellant was claiming what I would consider to be secondary ownership, as he claimed that the land was donated to him by his mother. If the mother, as primary owner, lost the case on its ownership, there is no way that a secondary owner can now claim title to it, since the issue of ownership between the primary persons claiming the land, had already been determined.

17. In the cases cited by the applicant herein as constituting previous cases for which the doctrine of *res judicata* would apply, the person who was sued, Enock Kibet Kilele, was a mere occupier of the land. In his defence, both in the criminal matter and in the civil suit, he claimed that the land was owned by his mother (the plaintiff herein) and that it is by virtue of that ownership that he was in possession of the land. He never claimed that he himself was entitled to ownership of that land but merely a right to occupy as licensee. The dispute as to the ownership of the land, as between the applicant and the plaintiff, has never really been determined in any proceedings. The case of **Lotta vs Tanaki & Others** is therefore distinguishable from the facts in this case. If it was the case that the plaintiff is the one who had been defendant in the previous suits, and Enock her son, filed this suit, then this suit would be *res judicata*, because Enock would be claiming under the title of her mother, and if it was held that her mother had no good title, there is no way Enock would now litigate for the issue of ownership would already have been determined. But Enock's failure in the previous suits cannot bind the plaintiff, for Enock was a mere licensee, and the fact that the licensee lost a case, cannot bind the owner. A licensee would however be bound by litigation between the person who gave him the licence and another person also claiming ownership of the same land.

18. From the above discourse, it will be seen that I am not persuaded that this suit is *res judicata*. As I have mentioned before, the issue of ownership of the land, between the plaintiff and the applicant, both of whom claim to be the rightful owners has never been determined and neither has it been ventilated. It will therefore be an injustice to close the door in the face of the plaintiff, merely because her licensee has been held to be a trespasser, but her claim to the land has never been determined. The upshot is that this application is found to be unmerited and is hereby dismissed with costs.

19. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Karanja Mbugua for the 1st defendant/applicant.

Ms. Nancy Njoroge holding brief for Mr. E.M Juma for the 2nd defendant.

No appearance on the part of M/s Ogeto & Ogeto Advocates for the plaintiff/respondent.

Court Assistants: Janepher Nelima/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU