



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 462 OF 2017**

**(Formerly Kisii ELCC NO. 6 OF 2014)**

**MESHACK ABOK WAGA alias KURA WAGA.....PLAINTIFF**

**VERSUS**

**ERNEST ONDORO JUMA.....DEFENDANT**

**RULING**

1. This ruling is in respect of preliminary objection on point of law as raised by M/s. Oguttu Mboya and Company Advocates now M/s. Oguttu , Ochwangi, Ochwal and Company Advocates at paragraph 11 of the defendant's statement of defence dated 13<sup>th</sup> February 2014. The defendant craves that the plaintiff's suit be struck out and or dismissed with costs on the grounds that ;-

- a) The plaint herein does not disclose nor capture any reasonable cause of action.*
- b) The instant suit is barred and/or prohibited by dint of the Provisions of sections 4,7 and 8 of the Limitation of Actions Act, Chapter 22 laws of Kenya.*
- c) The instant suit is barred and/or prohibited by dint of Sections 6 and 7 of the Civil Procedure Act, Chapter 21, laws of Kenya.*
- d) The plaintiff is non –suited.*
- e) The instant suit amounts to and/or constitutes an abuse of the due process of court.*
- f) The suit is legally untenable.*

2. The plaintiff through the firm of Moerwa Omwoyo and Company, Advocates commenced the instant suit by way of a plaint dated 13<sup>th</sup> January 2013 and filed on 14<sup>th</sup> January 2014 wherein he is seeking the following substantive reliefs:-

- i. A declaration that the plaintiff is the registered owner of land parcel No. East Karachuonyo/Kobuya/880.*
- ii. An order for cancellation of the name of the defendant currently registered and restoration of the name of the plaintiff who was the registered owner of land parcel No. East Karachuonyo/Kobuya/880 (the suit land ) and any other titles on the same parcel of land.*

3. It is alleged in the plaint that the plaintiff is the son and legal representative of the estate of Waga Oyieng (deceased) and he was registered by the said deceased at the age of 8 years as the owner of the suit land. That the plaintiff discovered from the land Registrar's office, Homa-Bay, that the defendant had fraudulently and illegally executed transfer documents and obtained a title deed to the suit land without the consent of the plaintiff hence provoking the instant suit.

4. In his statement of defence, the plaintiff's claim is denied by the defendant who raised the instant preliminary objection. He stated that whereas the suit land was registered in the name of the plaintiff up to including the year 2004, the same was sold and transferred to and in favour of the plaintiff on 22<sup>nd</sup> April, 1992. That the defendant has been in occupation and possession of the suit land. He termed the allegation of fraud a witch-hunt by one Samwel Lusi Waga, who is the plaintiff's brother having previously filed a suit vide Oyugis Principal Magistrate's court Civil case number 147 of 2011 which was dismissed.

5. The suit was partly heard on 8<sup>th</sup> February 2018 when the plaintiff (PW1) testified, inter alia, that he has cultivated the suit land for 35 years and that he did not sell the land to the defendant. He relied on the adjudication record dated 13<sup>th</sup> July, 1974 (PEXhibit 1), the green

card/register dated 13<sup>th</sup> July, 2004 in respect of the suit land (PExhibit 2) and certificate of official search dated 14<sup>th</sup> December 2011 (PExhibit 3). PW1 then closed his case.

6. On 6<sup>th</sup> October 2018, Ms. Ochwal learned counsel for the defendant expressed the defendant's intention to proceed with the preliminary objection which the court directed to be argued by written submissions.

7. Learned counsel for the defendant filed submissions dated 16<sup>th</sup> November 2018 in which reference was made to the background of the case, identification and analysis of two (2) issues for determination namely;-

***a) Whether the instant suit is statute barred by dint of the provisions of Sections 4,7 and 8 of the Limitations of Actions Act chapter 22 laws of Kenya.***

***b) Whether the instant suit is res judicata.***

8. Counsel cited **sections 4, 7 and 8** of the **Limitation of Actions Act (Cap 22)**. He relied on authorities including **Rawal –v- Rawal (1990) KLR and John Florence Maritime Limited and another –v- Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR**, in support of the defendant's contention that the suit is statute barred and that in view of the orders issued in Oyugis PMCC number 147 of 2011, the suit is res judicata. That the suit is mischievous and has not been brought to court in good faith hence it should be dismissed and or struck out with costs to the defendant.

9. Learned counsel for the plaintiff filed submissions dated 11<sup>th</sup> February 2019. He submitted that the suit is based purely on fraud and cited sections 4,7 and 8 of the **Limitation of Actions Act (Cap 22)**.

10. Counsel submitted on the gist of res judicata and that the preliminary objection be dismissed for the matter to proceed to defence hearing. He relied on **Zipporah Keru** (suing for and on half of the estate of **Eliud Kibia Muthigani** (deceased) –v- **Salesio Gana Njeru and 2 others (2016) eKLR** and **Henry Wanyama Khaemba –v- Standard Chartered Bank (K) Ltd and another (2014) eKLR** on res judicata and preliminary objection.

11. I have carefully considered the preliminary objection, the pleadings and submissions in this matter. The issues for determination at this stage are whether the instant suit is statute barred and whether the same is res judicata.

12. In respect of the first issue, the defendant contended that the plaintiff sold the suit land to the defendant by land sale agreement dated 22<sup>nd</sup> April 1992 while the instant suit was lodged on 14<sup>th</sup> January 2014. That the suit is statute barred by virtue of **Sections 4, 7 and 8 of the Limitation of Actions Act (Cap 22)**.

13. On the other hand, the plaintiff asserted that the suit does not fall under the sections cited by the defendant's counsel. That therefore the preliminary objection is bound to fail.

14. The plaintiff pleaded particulars of fraud on the part of the defendant at paragraph 5 of the plaint. That there was a mutual lease agreement between the parties in the year 1995. The mutual lease agreement features in the statement of the plaintiff and those of his two witnesses, Petro Akuno and Samwel Lusi Waga. The said statements accompany the plaint dated 13<sup>th</sup> January 2013.

15. Paragraphs 4,7 and 9 of the defendant's statement of defence disclose the land sale agreement dated 22<sup>nd</sup> April, 1992. The sale agreement is not disputed. It relates to the suit land. The instant suit was clearly filed after 12 years from the date on which the right to recover land accrued. Thus, in view of **Rawal case (supra)**, among others, the suit is stale under **Sections 4 and 7 of the Limitation of Actions Act (Cap 22)**.

16. On the second issue, I find abundant help in **Black's Law Dictionary 10<sup>th</sup> Edition** and **Section 7 of the Civil Procedure Act (Cap 21)** on the definition of the term "**res judicata**". The elements of "**res judicata**" doctrine are :-

***a) An earlier decision of the issue.***

***b) A final judgment on the merits***

***c) The involvement of the same parties or parties in privity with the original parties.***

17. The defendant in the instant suit was the same defendant in Oyugis PMCC number 147 of 2011 which was filed on 2<sup>nd</sup> September 2013. The plaintiff herein is a brother of the plaintiff in Oyugis PMCC number 147 of 2011 as discerned at paragraph 3 of the plaint and paragraph 7 of the statement of defence.

18. The suit land in the present suit was the same subject matter in Oyugis PMCC number 147 of 2011. It is LR NO. EAST KARACHUONYO/KOBUYA/880. The parties are litigating under the same title. The plaintiff herein is in privity with the plaintiff, Samwel Lusi Waga ( his brother) in the earlier suit filed on 2<sup>nd</sup> September 2013.

19. Notably, the earlier case namely Oyugis PMCC number 147 of 2011 was heard and finally determined on merits. It is so revealed by the decree dated 2<sup>nd</sup> September 2013 accompanying the statement of defence herein. As such, res judicata doctrine applies very handy in the present suit.

20. Moreover, it is a cardinal principle that litigation has to come to an end; see **Halsbury's Laws of England (4<sup>th</sup> Edition) volume 22 page 273.**

21. In the premises, I find that the instant suit barred by sections **4 and 7 of the Limitation of Actions Act (Cap 22)**. The same is also res judicata under **section 7 of the Civil Procedure Act (Cap 21)**. The defendant's preliminary objection raised at paragraph 11 of his statement of defence is hereby upheld accordingly.

22. A fortiori, the plaintiff's suit filed by way of plaint dated 13<sup>th</sup> January 2013 be and is hereby struck out with costs to the defendant.

23. It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 16<sup>th</sup> day of July 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Sigei holding brief for Omwoyo learned counsel for the plaintiff.

Ms. Opiyo holding brief for W. Ochwal learned counsel for the defend

Tom Maurice – Court Assistant.