



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 5 OF 2019

WILLIAM KIPKOSKEI SEREM.....PLAINTIFF

VERSUS

TABARNO BUSIENEI *alias*

MARTHA JEPKIMO BUSIENEI.....1ST DEFENDANT

JOSEPH IKIGU THUKU.....2ND DEFENDANT

RULING

1. The application before me is that dated **15/2/2019** filed by the defendants. The application is brought pursuant to the provisions of **Section 7** of the **Civil Procedure Act** and **Order 51 Rule 1** and **3** of the **Civil Procedure Rules, 2010**, and seeks orders to have this suit struck out with costs for being *res judicata*. They also seek an order that the plaintiff/respondent be condemned to pay the costs of this application.

2. The application is not opposed.

3. The application is founded on the grounds set out at the foot of the application and in the supporting affidavit of the 1st defendant dated **15/2/2019**.

4. The grounds for the application are that the question of ownership and possession of the land comprised in Title No. **Trans-Nzoia/Sinyerere/36** and which is substantially in issue in the present suit was substantially in issue in two former suits i.e. **Kitale HCCC No. 119 of 2012 (Tabarno Busienei and Moses Thuku Mwangi -vs- Susan Kiprono)** and **Environment and Land Court at Kitale, Land Case No. 14 of 2017 (Moses Thuku Mwangi and Tabarno Busienei *alias* Martha Jepkimo Busienei -vs- William Kipkosgei Serem)**; that whereas the appeal against the decision in **Kitale HCCC No. 1192 of 2012** abated and an application for revival of the appeal and substitution of the appellant got dismissed, no appeal was preferred against the decision in **Environment and Land Court at Kitale, Land Case No. 14 of 2017**; that the filing of the present suit amounts to a serious abuse of the due process and that the averment in the plaint that there is no other suit pending or determined between the parties and over the same cause of action is outrightly false and meant to conceal the true factual position.

5. On 25/3/2019 this court ordered that submissions of the parties be filed within 14 days from that date. I have perused through the record and noted that no submissions filed on behalf of any of the parties.

6. **Section 7 of the Civil Procedure Act (Cap 21)** on which the doctrine of *res judicata* is based provides 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 one 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.”

7. In determining whether the doctrine of *res judicata* is applicable to a suit the court examines whether there has been previous litigation determined by a court of competent jurisdiction between the same parties or parties under whom they claim and on the same issues or issues which if they were not raised in the previous litigation ought to have been so raised.

8. The objector who claims that the doctrine of *res judicata* applies must show that:-

(a) The matter in issue is identical in both suits,

- (b) That the parties in the suit are substantially the same,
- (c) There is a concurrence of jurisdiction of the court
- (d) That the subject matter is the same and finally,
- (e) That there is a final determination as far as the previous decision is concerned.

9. The following facts are not in dispute:-

- (a) That **Kitale HCCC No. 119 of 2012 (Tabarno Busienei and Moses Thuku Mwangi -vs- Susan Kiprono)** and **Kitale ELC No. 14 of 2017 (Moses Thuku Mwangi and Tabarno Busienei *alias* Martha Jepkimo Busienei -vs- William Kipkosgei Serem)** pre-existed this suit.
- (b) That the two suits involves the same parcel of land.
- (c) That in **Kitale HCCC No. 119 of 2012** the claimant therein sued Susan Kiprono (now deceased) who is the predecessor in title to William Kipkosgei Serem who became the administrator to her estate after her death.
- (d) After her death William Kipkosgei Serem obtained registration of the suit land by way of misrepresentation to the succession court in **Kitale HCCC No. 237 of 2009** wherein he was named as administrator and the same suit land herein was transmitted to him upon distribution of the estate without his disclosing that the title to the deceased had already been cancelled in favour of the defendants in **Kitale HCCC No. 119 of 2012**.
- (e) That following that transmission the the defendants in **Kitale HCCC No. 119 of 2012** sued William Kipkogei Serem over the same parcel of land in **Kitale ELC No. 14 of 2017** wherein the court ordered that the title registered in his name by way of transmission arising from a grant of letters of administrations issued in **Kitale Succession Cause No. 237 of 2009** be cancelled and that a permanent injunction be issued to restrain the defendant from interfering with the suit land.

10. It is clear that the first decision in **Kitale HCCC No. 119 of 2012** resolved the ownership dispute relating to parcel No. **Trans-Nzoia/Sinyerere/36** while Susan Kiprono was still alive. It is also clear that **Kitale ELC No. 14 of 2017** resolved the issue of propriety of the registration of the plaintiff herein as proprietor by virtue of transmission to him vide a succession cause filed in respect of Susan Kiprono's estate.

The plaintiff herein has only substituted Moses Mwangi Thuku with Joseph Ikigu Thuku who though the fact has not been pleaded with precision by the plaintiff, can only be deemed to be claiming to the land under the former. It is clear therefore that the parties in the two previous suits hereinabove mention and this suit are the same and that the same issue of ownership of **Kitale HCCC No. 119 of 2012** has been substantially in issue in all the three suits.

11. Consequently, I find that the application dated **15/2/2019** has merit and I grant the same and issue the following final orders:

- (a) **This suit is hereby struck out in its entirety for being *res judicata* Kitale HCCC No. 119 of 2012 Tabarno Busienei and Moses Thuku Mwangi -vs- Susan Kiprono.**
- (b) **The plaintiff shall bear the costs of the suit.**

Dated, signed and delivered at Kitale on this 15th day of July, 2019.

MWANGI NJOROGE

JUDGE

15/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for Defendant/Applicant

N/A for the Plaintiff

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

15/7/2019