



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 291 OF 2014

ALI WAZIRI ABUBAKARI.....PLAINTIFF

VERSUS

THE DISTRICT LAND REGISTRAR, KAKAMEGA

THE HON. ATTORNEY GENERAL.....DEFENDANT

RULING

The 3rd defendant herein raised a preliminary objection on law against the whole suit on the following grounds:-

- (a) That the plaintiff lacks locus standi to file a fresh suit against the defendant as the claim and parties therein are over an issue which have been dealt with in other court cases i.e. vide Kakamega CMCC 331 of 1990 and Bungoma HCCC 21 of 2007 which had been heard and determined.
- (b) That the suit is frivolous, vexatious and scandalous and meant to embarrass the 3rd defendant herein.
- (c) That the plaintiff in this suit filed this case only to delay justice in Bungoma High Court Civil suit No. 21 of 2007 which was determined and is pending for the Kakamega County Land Registrar the 1st defendant herein to execute the orders of the court thus the plaintiff's suit is a res judicata.

It is the 1st and 2nd defendants submissions that this suit is res judicata the decision and judgment in Bungoma High Court Civil Case No. 21 of 2007 which had been heard and determined since the same related to the same parties that is the plaintiff and the 3rd and 4th defendants and related to the same parcels of land being land parcels No. Marama/Shimwenyuli/895 and land parcel No. Marama/Shimwenyuli/896 the subject of this instant suit. That the plaintiff suit is res judicata and offends the provisions of Section 7 of the Civil Procedure Act. That the court Njue Ngai vs. Ephantus Njiru Ngai & Another (2016) eKLR defined the term res judicata while quoting the Black's Law dictionary, Ninth Edition as follows;

“What is res judicata and when does it apply “the Latin of it is simply “a thing adjudicated.” But it has overtime received extensive judicial interpretation in various jurisdictions of the globe which we shall not be tempted to explore here. Suffice it to adopt the definition in Black's Law Dictionary, Ninth Edition as:-

“(i) An issue that has been definitely settled by judicial decision;

(ii) An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been-but was not raised in the first suit.”

The plaintiff through his replying affidavit opposed the preliminary objection on grounds that the 3rd defendant failed to provide proof of the allegations contained in the notice of preliminary objection by annexing copies of pleading and proceedings in Kakamega CMCC No. 331 of 1990 and Bungoma HCCC No. 21 of 2007 as proof. As it is the 3rd defendant has failed to discharge his burden of proof as no copies of pleading and proceedings in Kakamega CMCC No. 331 of 1990 and Bungoma HCCC No. 21 of 2007 have been provided before court to aid the honourable court arrive to a conclusion that the suit herein is res judicata. There being no proof whatsoever that the instant suit is res judicata the honourable court can only arrive at one conclusion. That the preliminary objection raised is baseless, unsupported hence only calculated to waste this honourable court's judicial time hence the same must be dismissed with costs.

This court has carefully considered the preliminary objection and submissions therein. The issue as to whether or not this suit is res judicata

is properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

I have perused the pleadings/ ruling in Bungoma HCCC 21 of 2007 where the parties filed the case through representatives and the subject matter was the same. The Judge held that;

“The applicant has satisfied the court that the suit before this court is resjudicata since the issues herein where directly and substantially in issue in Kakamega CMCC 331 of 1990 and concern the same parties or their legal representatives. The earlier suit was heard and determined and no appeal or review has been preferred. This court has no business hearing the same issues based on the same subject matter again. I therefore find the application merited and I allow the same as prayed. The plaintiff’s suit is dismissed with costs to the defendant.”

I find that this matter is res judicata Kakamega CMCC 331 of 1990 and Bungoma HCCC 21 of 2007 which have been heard and determined. I find that the preliminary objection has merit and I strike out this suit with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE