



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.22 OF 2016

TITUS KIPKORIR TOROITICH.....PLAINTIFF

VERSUS

PAUL BULLUT.....1ST DEFENDANT

ISAIAH K. MUTAI.....2ND DEFENDANT

RULING

This ruling is in respect of a Notice of Preliminary Objection by the defendant/Applicants dated 17th April 2019, on the following grounds:-

- a) That this suit offends the Provision of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya.
- b) That the suit is an abuse of court process as it does not raise any triable issues.
- c) That the Plaintiff's plaint herein is therefore frivolous, vexatious, scandalous, misconceived, bad in law and an abuse of the court process hence should be dismissed with costs.

APPLICANTS' SUBMISSIONS

Counsel for the applicants submitted that the current suit offends Section 7 of the Civil Procedure Act as it is *res judicata*. Counsel relied on the authorities filed to demonstrate the principles of *res judicata*. Counsel stated that the 2 attached cases ELC No.84 of 1994, the defendant herein was the Plaintiff in that case and the Defendant in that suit was the Plaintiff in this current suit.

Counsel further submitted that the court made an order that the Defendant and family members were to vacate the suit land within 3 months which included the Plaintiff and the cause of action relates to the same parcel of land. Further that the Defendant in that suit had appealed to the Court of Appeal vide Court of Appeal case No.72 of 2007 which was dismissed.

Mr. Lemayan therefore prayed that this suit be dismissed as the current Plaintiff is estopped from bringing the similar suits by Section 5 and 8 of the Civil Procedure Act. Counsel further submitted that the court is being invited to review the decisions of the High court and Court of Appeal, and that litigation must come to an end as the subject matter has been litigated since 1994. He therefore urged the court to uphold the Preliminary Objection and dismiss the case with costs.

RESPONDENT'S SUBMISSIONS

The respondent opposed the Preliminary Objection by filling a response dated 10th June 2019 whereby he gave the reasons why the court should not uphold the Preliminary Objection.

The respondent stated that the current application had been dismissed vide a court order dated 3rd October 2018 which has neither been set aside, reviewed nor appealed against.

The respondent further stated that he does not have any dispute with the Judgments rendered as they were valid judgments save for the execution of the decree and the Judgment ELC No.84 of 1994 which was delivered on 7th April 2000 and was executed on 27th March 2015, 15 years down the line. He also stated that the same is barred by Limitation of Actions Act as the defendants were ordered by the court to issue a Notice to show Cause why the respondents should not be evicted. The respondent went ahead to argue his case which was not in response of the preliminary objection. He urged the court to dismiss the Preliminary Objection with costs to the respondent.

Analysis and determination

This is a Preliminary Objection on the ground that this suit is *res judicata*. The principles of *res judicata* are as provided for under Section 7 of the Civil Procedure Act which states as follows:

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.

In essence a court is precluded from trying such cases mentioned under Section 7 as it amounts to abuse of court process. In the case of **Kanorero River Farm & Others ---Vs---National Bank of Kenya Ltd [1986] KLR**, it was held that the doctrine of *res judicata* applies equally to decisions on applications as it does to final decisions on a matter.

This brings me to the current Preliminary objection which had been raised vide a notice of motion dated 31st January 2017 seeking for striking out the plaintiff's suit on the ground that it is *res judicata*. The same was dismissed vide and order dated 3rd October 2018. The defendants neither sought for setting aside nor review of the orders dismissing the application. They also never appealed the order. This is a backdoor way of bringing an application that has been dealt with by the court hence an abuse of the court process.

I find that the Preliminary Objection had been dismissed and therefore the court cannot entertain it again. If the respondent had argued it then before the dismissal for non-attendance, the court could have come to a different conclusion.

Consequently I find that the Preliminary Objection as currently filed is an abuse of the court process and is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 26TH DAY OF SEPTEMBER, 2019.

M. A. ODENY

JUDGE

RULING READ in open court in the presence of Miss. Karuga holding brief for Mr.Kamau for Defendant/Applicant and in the absence of the Respondent.

Mr. Mwelem – Court Assistant