



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 245 OF 2016

DAVID KIPROTICH ARAP TOO.....PLAINTIFF

VERSUS

STEPHEN MBURU NJOROGE.....DEFENDANT

RULING

The defendant raised a preliminary objection for the suit to be struck out with costs on the grounds that, the application intends to cleanse orders obtained through perjury which is an abuse of the court process. The application is misconceived as it revolves around a property owned by the defendant's employer who is suitable to be sued over ownership. The matter is res judicata having been adjudicated by numerous competent courts. The plaintiff does not disclose the numerous adjudicated court cases over the same subject matter and parties. The defendant submitted that Likuyani Division Land Disputes Tribunal purported to award the suit land to the plaintiff vide Case number 9 of 2005. The award was adopted in Kakamega Chief Magistrates Court Misc Application No. 20 of 2006. This was invalidated by Eldoret High Court Misc. Application No. 88 of 2006. The plaintiff lost the appeal in Civil Application No. 254 of 2007. Again in Eldoret ELC No 964 of 2012 invalidated the award and the court order.

The plaintiff filed the plaint dated 29th November, 2016 claiming that he is the registered owner of Parcel Number Kakamega/Sergoit Scheme/44 and that the defendant has trespassed into the suit parcel and prays that this honourable court do issue eviction order against the defendant from the suit property Kakamega/Sergoit Scheme/44 and costs of the suit. That the suit before this honourable court is not res-judicata. The plaintiff has never sued the defendant or any other person in any court of law claiming for eviction orders with regard to parcel number Kakamega/Sergoit Scheme/44 as claimed by the defendant. In the case of Bernard Mugo Ndegwa vs. James Nderitu Githae and 2 others (2010) eKLR Justice W. Karanja while overruling preliminary objection raised by the defendant claiming that the suit is res-judicata stated that:-

“The suit is res-judicata when; the matter in issue is identical in both suits, the parties in the suit are the same, sameness of the title/claim, concurrence of jurisdiction and finality of the previous decision. Whereas in this suit, the matter in issue, parties, claim and final decision is different from the previous suits. Thus this matter is not res-judicata”.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

The issue as to whether or not this suit is res judicata or sub judice is therefore 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.”

The defendant submitted, the matter herein is res judicata. The defendant submitted that Likuyani Division Land Disputes Tribunal purported to award the suit land to the plaintiff vide Case number 9 of 2005. The award was adopted in Kakamega Chief Magistrates Court Misc Application No. 20 of 2006. This was invalidated by Eldoret High Court Misc. Application No. 88 of 2006. The plaintiff lost the appeal in Civil Application No. 254 of 2007. Again in Eldoret ELC No 964 of 2012 invalidated the award and the court order. I have perused the rulings and the judgements of the various courts. Indeed the parties are similar and so is the subject matter. This matter has gone upto the court of appeal. I find that the plaintiff is a vexatious litigant. I find that this matter is res judicata Eldoret High Court Misc. Application No. 88 of 2006. Civil Appeal Application No. 254 of 2007 and Eldoret ELC No 964 of 2012 . I find the preliminary objection has merit and I uphold the same. This suit is struck off with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE