



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 49 OF 2017

SARAH CHESIELE BARTA.....PLAINTIFF

VERSUS

KIPLANGAT BARTA.....1ST DEFENDANT

LAND REGISTRAR BOMET.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the preliminary objection filed by the 1st defendant on 5th June, 2017. The said preliminary objection is raised on the following grounds:

1. *That this honourable* court lacks jurisdiction to hear and determine this suit as per the provisions of section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya
2. That the Plaintiff's entire suit is an abuse of the process of the court.

2. The Plaintiff filed suit against the defendant seeking the following reliefs:

- a. An order of rectification of the register through cancellation of title deed numbers KERICHO/KIMULOT/1551 and KERICHO/KIMULOT/1552 and reinstatement of title deed number KERICHO/KIMULOT/514.

3. In the plaint, the Plaintiff alleges that the land parcels number KERICHO/KIMULAOT/1551 and KERICHO/KIMULOT/1552 which were previously comprised in his larger parcel of land number KERICHO/KIMULOT/514 were procured through fraud, undue influence and outright misrepresentation as the 1st and 2nd defendants acted in cahoots to cancel the original land parcel number thus extinguishing it from the register. At paragraph 11 of his Plaint, the Plaintiff states that there is no other suit pending in court between the Plaintiff and the Defendants over the same subject matter other than Kericho HCCC No. 6, 21 and 32.

4. In his defence the 1st defendant denies that he procured the titles mentioned in the Plaint through fraud and states that by virtue of the cases mentioned in paragraph 11 of the Plaint the Plaintiff admits that the matter is res judicata. Pursuant to the said defence the defendant filed his notice of preliminary objection which is the subject of this ruling.

5. Section 7 of the Civil Procedure Act which captures the doctrine of res judicata states 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 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”

6. Res judicata is defined in Black’s law Dictionary 9th edition as follows:

“An issue that has been definitely settled by judicial decision and barring the same parties from litigating a second lawsuit on the same claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

7. As rightly submitted by learned counsel for the Plaintiff, there are three key ingredients of res judicata:

i. The issue in dispute must be the same or substantially the same as the one in a previous suit

ii. A final judgment must have been rendered on the merits by a court of competent jurisdiction

iii. Involvement of the same parties or parties in privity with the original parties.

Analysis and Determination

8. Based on the above definition, what the court is called upon to determine in this matter is

i. Whether land parcels number KERICHO/KIMULOT/1551 and KERICHO/KIMULOT/1552 which are the subject matter of this suit were litigated upon by the same parties and finally determined by the court in Kericho HCCC number 21 of 1995, Kericho HCCC No32 of 1996 and Kericho HCCC No. 6 of 2003 (O.S)

ii. Whether this suit is an abuse of the process of the court.

9. In order to determine the first issue, it is necessary to examine each of the suits mentioned in paragraph 11 of the Complaint to find out if they fall within the above-mentioned criteria.

10. In Kericho HCCC no 21 of 1995 the parties were **Kiplangat Arap Barta V Kipkoske arap Barta**. The subject matter of the suit is land parcel number KERICHO/KIMULOT/514. While the defendant in the in this suit was the plaintiff is HCCC No. 21 of 1995, the relationship between Sarah Barta (the plaintiff in this case) and the defendant in HCCC No.21 of 1995 is not clear. Whereas it has been submitted by learned counsel for the plaintiff that HCCC was filed against a deceased person, it is not clear what became of the suit. Although counsel for the plaintiff has attached a copy of the complaint and death certificate to his submissions, it is surprising that learned counsel for the defendant who has raised the issue of res judicata did not deem it necessary to prove his claim that this suit is indeed res judicata by placing the necessary material before the court. Even from the plaintiff’s submissions, I am unable to tell what became of this suit as the decree arising from it has not been attached by either of the parties.

11. Moving on to Kericho HCCC No. 32 of 1996, the parties are **Kiplangat Barta V Sarah Chesiele Barta** who are the same parties in the instant suit. In the said suit the plaintiff sought a declaration that he was the owner of half of land parcel number KERICHO/KIMULOT/514 and an order requiring the defendant to sub-divide and transfer half of the said parcel of land to him.

12. According to the decree attached to the plaintiff’s submissions, judgment was entered in favour of the plaintiff (Kiplangat Barta) and the court issued an order for the transfer of half of parcel number KERICHO/KIMULOT/514 Mr. Kiplangat. This is confirmed by the defendant’s submissions.

13. In Kericho HCCC No. 6 of 2003(O.S) **Cheruiyot Chepkwony alias Mapengo V Sara Chesiele Barta and Kiplangat Barta**, the plaintiff therein sued both the plaintiff and the defendant in the instant suit for a declaration that they were holding a portion of land parcel number KERICHO/KIMULOT/514 measuring 2 acres in trust for him. According to the defendant's submissions the said suit was dismissed on the grounds that the suit emanated from HCCC No. 32 of 1996 which had been decided among the parties and the decision had not been overturned. He has also submitted that the parcel numbers KERICHO/KIMULOT/1551 and KERICHO/KIMULOT/1552 were derived from land parcel number KEWRICHO/KIMULOT/514 pursuant to the judgment in HCCC no. 32 of 1996. This may well be true. However, what I find a little unsettling is that in his defence, the defendant does not raise all these issues raised in his submissions. Instead, he has filed a defence that amounts to a mere denial.

14. On the other hand, learned counsel for the defendant has submitted that the issue in dispute in the instant case, that is, whether the title deeds in respect of KERICHO/KIMULOT/1551 and KERICHO/KIMULOT/1552 were obtained through fraud has not been adjudicated and finally determined by a court of competent jurisdiction. I am inclined to agree with him though I must add that it is not rocket science where this will lead us to.

15. I have considered the preliminary objection in light of the pleadings, submissions and all the material placed before the court so far and I am of the view that the preliminary objection is not merited. In the in the interest of justice the parties ought to be given an opportunity to present their evidence in totality in order for the court to reach an informed decision on whether or not the case is res judicata. This issue will be revisited after a full hearing. At this juncture therefore, I dismiss the preliminary objection and direct that the parties comply with order 11 within 30 days to pave way for an expeditious disposal of this case.

16. Costs shall abide the main suit.

Dated, signed and delivered at Kericho this 26th day of January, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Terer for the Plaintiff
2. Mr. Kemboi for Mutai for the Defendant
3. Court assistant – Rotich