



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 790 OF 2013

DAVID MUGO MURIMI.....PLAINTIFF

VERSUS

SOSPETER MURIMI KARITU.....DEFENDANT

RULING

SOSPETER MURIMI KARITU (the defendant herein) was the plaintiff in **NYERI HIGH COURT CIVIL APPEAL No. 472 of 1986** (the **NYERI CASE**) in which he had sued **MURIMI KARIO** and **DAVID MUGO MURIMI** as 1st and 2nd defendants respectively. In the course of the trial however, the case proceeded only as against **DAVID MUGO MURIMI** (the plaintiff herein) as the defendant. The suit involved a contract of sale of land parcel No. **MWERUA/KANYOKORA/131** which had turned sour and **SOSPETER MURIMI KARITU** (**SOSPETER**) was seeking, inter alia, an order that **DAVID MUGO MURIMI** (**DAVID**) transfers the suit land to him and in the alternative, refunds the purchase price and compensate him for the developments on the land.

The suit was heard by **MAKHANDIA J.** (as he then was) who, in a judgment delivered on 18th June 2009 entered judgment for **SOSPETER** in the following terms:

- (a) “Ksh. 3,500 being the refund of the purchase price.*
- (b) Ksh 3,680.000 being the total value of tea and arrow roots on the suit premises.*
- (c) Ksh. 1,111,864.80 being the total value of the trees on the suit premises.*
- (d) Costs and interests”.*

It is not clear if **DAVID** ever satisfied that judgment or filed an appeal therefrom.

On 7th November 2013, **DAVID** moved to this Court alleging that **SOSPETER** was illegally occupying his land parcel No. **MWERUA/KANYOKORA/13** and had refused to vacate even after the judgment in the **NYERI CASE**. **DAVID** pleaded therefore that as a result of **SOSPETER**’s refusal to vacate the land in dispute, he (**DAVID**) was losing Ksh. 400,000 per month which he would have earned by growing a crop on the land. **DAVID** therefore sought judgment against **SOSPETER** in the following terms:

- (a) “Ksh. 400,000 being loss of earnings per month to be calculated for four years.*
- (b) Compensation for illegal occupation and denial of income since 1986.*

(c) Costs and interests.

(d) Any other relief that the Court may deem fit to grant in the interest of justice”.

SOSPETER filed a defence denying all the averments by **DAVID** and also pleaded in paragraph seven (7) of the defence that he would be raising a Preliminary Objection that this suit is res-judicata because of the **NYERI CASE**.

DAVID's suit was however dismissed on 11th November 2015 for want of prosecution. I now have before me **DAVID**'s Notice of Motion dated 23rd May 2017 seeking the main order that the order dismissing his suit on 7th November 2013 be set aside and the suit be reinstated for hearing. The application is opposed by **SOSPETER** and their respective counsels have filed submissions for and against that application. In his submissions, Mr. **MWAI** counsel for **SOSPETER** referred the Court to the judgment in the **NYERI CASE** although he did not specifically ask me to make a finding that the suit is res-judicata. On the hand, counsel for **DAVID**, Mr. **C.M. ONGUTO**, steered clear of the **NYERI CASE** and only confined his submissions to the law and principles that guide the Court in an application for dismissal of a suit for want of prosecution.

In my view, this Court should first consider whether or not this suit is res-judicata because if it is, then there will be no need to proceed any further and consider the Notice of Motion dated 23rd May 2017.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** 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 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”.

Before I proceed further, I need to put one issue out of the way. In the **NYERI CASE**, the suit land is referred to as **MWERUA/KANYOKORA/131** while in this suit, the land is referred to as **MWERUA/KANYOKORA/13**. I have considered whether the two are separate and distinct parcels of land. The document of title would have been the best evidence to help this Court determine the proper designation of the land. In the absence of that evidence, I only have the statements of the parties to rely on. In **DAVID**'s statement filed together with this suit, he states that **SOSPETER** has refused to vacate his land following a judgment ***“delivered on 18th June 2009”***. On his part, **SOSPETER** has stated as follows in his statement filed together with his defence and dated 2nd June 2014:

“After the father of the plaintiff took so long to transfer the land to me, I filed a suit against him and the plaintiff in the year 1986 for a declaration that the father of the plaintiff had breached our contract and that the plaintiff do transfer the land to me. The suit was NYERI HCCC No. 472 of 1986”.

From the above, it must be clear that the land parcel No. **MWERUA/KANYOKORA/131** referred to in the **NYERI CASE** and parcel No. **MWERUA/KANYOKORA/13** referred to in this case are one and the same parcel of land.

For Res-judicata to apply, the following must be proved:

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in issue between the parties in the suit where the doctrine of res-judicata is pleaded.***
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.***

3. The former suit must have been heard and finally decided.

4. The Court or Tribunal which determined the former suit must have been competent.

See **KARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83** and also **JOHN FLORENCE MARTIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE E.A CIVIL APPEAL No. 42 of 2014 (MALINDI)**. The rationale behind res-judicata is based on the public interest that there should be an end to litigation so that parties are not made to face repetitive litigation over the same matter. It also ensures that the Courts' limited resources are expended in determining real disputes and that litigants do not clog the judicial processes regurgitating the same issues in different Courts. The establishment of the Environment and Land Court was not meant to be a forum in which to resuscitate land disputes that had long died and were buried.

It is clear that the parties in this case were the parties in the **NYERI CASE** but further that they were litigating over the same land. It is also clear that the **NYERI CASE** was heard and finally determined by a competent Court. What **DAVID** (the plaintiff herein) seeks this Court to grant him is a sum of Ksh. 400,000 being loss of earnings per month as well as compensation for the illegal occupation of the suit land by **SOSPETER** (the defendant herein). Those are remedies that could have been pleaded in the **NYERI CASE** because they are founded on the same subject matter. In **HENDERSON VS HENDERSON 1843 67 E.R 313**, it was held that:

“Where a given matter becomes the subject of litigation in and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time” emphasis added

Similarly, explanation No. 4 of **Section 7 of the Civil Procedure Act** provides that:

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.

When **SOSPETER** filed the **NYERI CASE** in 1986, **DAVID**'s claim against him of Ksh. 400,000 being loss of earnings per month and also compensation for the illegal occupation and denial of income since 1986 could have been canvassed in the same suit and I do not see that this is a special case to allow this suit to otherwise proceed to trial as it is clearly res-judicata. There will be no need therefore to consider the Notice of Motion dated 23rd May 2017 seeking the reinstatement of this suit.

The up-shot of the above is that this suit is struck out with costs to the defendant.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February 2018 at Kerugoya

Mr. C.K. Ongoto for Plaintiff absent

Mr. Ngigi holding brief for Mr. Mwai for Defendant present.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018