



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 518 OF 2017

(Formerly KISII ELC CASE NO. 747 OF 2016)

SHEM KIHAYA ASUNGA.....PLAINTIFF

VERSUS

REGISTERED TRUSTEES OF LEGIO MARIA CHURCH.....DEFENDANT

RULING

1. By a plaint dated 22nd December 2011, the plaintiff namely SHEM KIHAYA ASUNGA sued the defendant, Registered Trustee of Legio Maria Church for the following orders:-

(a) THAT a declaration that the mutation form and plans dated 17/8/1985 amending the registry index for land parcel No. SUNA EAST/WASWETA 1/1777 and 1776 was wrongful irregular and unlawful.

(b) THAT an eviction order against the defendant, its agents and/or servants from a portion of the plaintiff's land parcel No. SUNA EAST / WASWETA 1/1777 that the defendants claim from the plaintiff following the said amendments of registry Index Map dated 17.8.1985 in respect of land parcel No. SUNA EAST / WASWETA 1 / 1777 and 1776.

(c) Costs of this suit.

2. The plaintiff further filed a Notice of Motion dated 19th July, 2017 under Order 40 Rule 2 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya (the application). He has sought a mandatory temporary injunction and costs of the application against the defendant.

3. In his statement of defence dated 20th April, 2012 and a Notice of Preliminary Objection dated 7th August 2017, the defendant raise a Preliminary Objection to the suit and the application respectively. The Preliminary Objection is on points of law as follows:-

(a) The Honourable Court is devoid of Jurisdiction to entertain and/or adjudicate upon the subject suit.

(b)The subject dispute herein has hitherto been heard and finally disposed of vide MIGORI SRMCC No. 25 of 2000. Consequently, the instant suit is Res-Judicata.

(c) The instant suit is barred and/or prohibited by dint of section 6 & 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

(d) The cause of action complained of, (sic) arose and or accrued in the year 1985, consequently, the Plaintiff's claim is time barred.

(f)The instant suit does not disclose and/or raise any reasonable cause of action.

(g)The Plaintiff is non-suited.

(h)The instant suit amounts to and/ process of Cour or constitutes an abuse of the due

4. The defendant filed a Replying Affidavit sworn on 7th August 2017 by Nahashon Ondieki Nyakondo, a Registered Trustee of the Defendant, in response to the application. Both the suit and the application are pending hearing and determination.

5. On 28th August, 2017, this court directed that the Preliminary Objection be canvassed by way of written submissions, see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and practice direction No. 33 (a) of the Environment and Land Court Practice Direction, 2014.**

6. M/s Oguttu, Ochwangi & Ochwal Co. Advocate, learned Counsel for the Defendant filed submissions dated 11/ 1/ 2018 giving background of the Preliminary Objection and sought for dismissal of the suit with costs to the defendant. Counsel submitted in respect of the Preliminary Objections on points of law (a) to (h) hereinabove. He relied on Sections 6 and 7 of the Civil Procedure Act Cap 21 Laws of Kenya and case law, KISII HCCC NO. 151 OF 2003 **Geoffrey Makana Asanyo =vs= Kenya Agricultural Research Institute and Civil Appeal No. 261 of 2000 in the Court of Appeal at Nakuru; Daniel Kirui & Another =vs= Monicah W. Macharia & Another.**

7. The Plaintiff through J. O. Soire & Co Advocates filed submissions dated 3/1/2018. He cited Section 101 of the Land Registration Act, 2012, Section 7 of the Civil Procedure Act and paragraph 6 of the Plaintiff. He submitted that there are no pleadings, decree or order supplied to this Honourable Court. In support of the application. He further submitted that this is a land matter not suitable for summary decision. He urged the Court to exercise extra caution, accord the parties chance to be heard in court and that the Preliminary Objection be dismissed with costs to the Plaintiff.

8. I have studied the pleadings, the application, the Preliminary Objection and Replying Affidavit herein. The issues for determination at this stage are whether:-

(i) The Court has jurisdiction to entertain the suit

(ii) The instant suit is subjudice or resjudicata

(iii) The suit is statute barred

(iv) There is any reasonable cause of action in the suit

(v) The suit is an abuse of the court process.

(vi) Who is to bear costs of the Preliminary Objection?

9. On the issue of jurisdiction, the defendant's counsel stated that this Court has no jurisdiction to entertain and/or adjudicate the suit. The defendant claimed that the suit is founded on ground that the defendant wrongfully and irregularly amended the mutation forms hence interfering with the boundary therein in 1985. The plaintiff's counsel submitted that this court has jurisdiction to entertain the matter pursuant to **Section 101 of the Land Registration Act, 2012.**

10. In **Abdalla =vs= Building Centre (K) Ltd & 4 others (2014) KLR – SCK**, it was observed that a litigant who approached the Court had to be clear which jurisdiction he / she intended to invoke. The court stated, inter alia:-

“A litigant who approached the court must be clear which jurisdiction he/she intends to invoke. In Samwel Kamau Macharia and another –vs- Kenya Commercial Bank and 2 others, application No. 2 of 2011 (2012) e KLR, this court pronounced itself on jurisdiction.....”

11. Article 162 (2) of the Constitution of Kenya 2010 provides for jurisdiction of this court over the dispute by virtue of the reliefs sought in the plaint dated 22/12/2011 . **Section 13 of the Environment and Land court Act, 2015(2011) and Section 101 of the Land Registration Act, 2012** reinforce that Constitutional Provision.

12. Counsel for the defendant submitted that the claim ought to have been filed in court within a period of three (3) years and that the problem arose in 1985 yet the plaintiff came to court in 2012. Counsel cited **Section 7 of the law of Limitations Act (Cap 22)** which reads:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.”(Emphasis Provided)

13. Counsel further relied on the case of **Geoffrey Makana Asanyo** (Supra) and cited **Section 4 (1) of the Limitation of Actions Act Cap 22 laws of Kenya** which provides;

(1) The following actions may not be brought after the end of six (6) years from the date on which the cause of action accrued-

(a) Actions founded on contract;

(b) Actions to enforce a recognizance;

(c) Actions to enforce an award;

(d) Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any the written law.”

14. On 2nd March 2017, I called for the original record file in respect of Migori CMCC NO. 25 OF 2000 (the magistrate’s court) and perused it. I noted from the record that the plaintiff filed the suit way of a plaint dated **30th October 1996** against the defendant whereby he sought orders namely cancellation of new boundaries fixed by Land Registration on 31st May 1985 fixing boundary between LR **NOs. Suna East/Wasweta 1/3547 and 1776** according to survey mutation plan dated 24th September 1980 and costs of the suit.

15. It emerges from that Magistrate’s court case that the court discontinued the suit on 13th January 2005. Learned trial magistrate Hon. Ezra Awino, Principal Magistrate (as he then was) rendered an order thus:-

“This case is referred for determination before the appropriate land disputes tribunal. It is therefore discontinued.”

16. It is abundantly unclear from that case and this suit whether the appropriate Land Disputes Tribunal referred to in Migori CMCC No. 25 of 2000, ever heard and determined the same matter. Whereas in the magistrate’s court case, the suit parcels of land were Nos. Suna /Wasweta 1/3547 and 1776, in the instant matter, the suit parcels of land are Nos. Suna East/Wasweta 1/1776 and 1777 hence the claim is not substantially the same. Moreover, it has not been established at this stage whether the appeals committee for the province in which the land was situated, heard and determined the same subject matter involving the same parties as indicated in the plaintiff’s submissions.

17. On subjudice doctrine, **Section 6 of the Civil Procedure Act (Cap 21)** reads as follows:-

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

18. The doctrine of re judicata is anchored on Section 7 of the Civil Procedure Act (Cap 21) which provides:-

“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 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”.

19. In the case of **Enock Kirao Muhanji –vs- Hamid Abdalla Mbarak (2013)e KLR A.O. Angote J**, held inter alia;-

“ The issue before the court in RMCC No. 711 of 2001, were never heard and determined.”

20. In a nutshell, I find that :-

(a) The magistrate’s court discontinued Migori CMCC No. 25 of 2000. There is not proof that the suit `before court that was heard and finally determined.

(b) The subject matter, in particular, the suit parcel of land in Migori CMCC No. 25 of 2000 is not substantially the same as the subject matter in this suit.

(c) In view of (a) & (b) hereinabove, the instant suit is neither sub-judice nor res-judicate as envisage under Section 6 and 7 of the Civil Procedure Act (Cap 21) respectively.

21. A fortiori, I am of the considered view that the preliminary objection is want of merit and I disallow the same accordingly.

22. Costs shall be in the cause.

DELIVERED, SIGNED and DATED in open court at MIGORI this 20th day of MARCH 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Ochwal learned counsel for the defendant

Tom Maurice – Court Assistant