



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 5 OF 2015

VERONICA J. MAGUT.....PLAINTIFF

VERSUS

MARY KERUBO AMINGA.....1<sup>ST</sup> DEFENDANT

PAUL KAVISI.....2<sup>ND</sup> DEFENDANT

EMILY MISOL.....3<sup>RD</sup> DEFENDANT

KAPYEMIT BLOCK 20/46 SELF HELP GROUP.....4<sup>TH</sup> DEFENDANT

RULING

This ruling is in respect of an application dated 5<sup>th</sup> May 2017 brought by way of Notice of Motion by the defendant/applicants seeking for the plaintiff's suit to be struck out on the grounds that it is *res judicata*.

Counsel agreed to canvass the application by way of written submission which they filed.

**Defendants' Counsels' Submission**

Counsel for the defendants submitted that the application is based on the grounds that the plaint is an abuse of the court process as the suit is *res judicata*. Counsel submitted that the suit replicates Eldoret CMCC No. 238 of 2011 which was heard and determined in favour of the defendants. He further submitted that the plaintiff has not established any equitable interest in the suit property hence lacks locus standi.

It was Counsel's submission that the plaintiff should have sought for eviction orders instead of injunction reliefs against the defendants. Counsel listed issues for determination amongst them being whether the suit is *res judicata*.

Counsel cited section 7 of the Civil Procedure Act which provides for the ingredients of *res judicata* which states that :

*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."*

Counsel submitted that the parties in the previous suit Eldoret CMCC No. 238 of 2011 are similar and the subject property is also similar being Eldoret Municipality/ Block 20 (Kapyemit)/46. He further stated that the plaintiffs claim or suit against the Defendants in Eldoret CMCC No. 238 of 2011 was fully determined by way of Preliminary Objection based on the issue of locus standi and jurisdiction of which the plaintiff/respondent never appealed against the ruling which dismissed the suit /stuck it out.

It was Counsel's submission that the issue of 'locus standi and jurisdiction' is core in the civil suits. He further cited the provisions of Section 8 of the Civil Procedure Act which stops/bars any litigant from instituting a suit in respect of a similar cause of action.

Counsel urged the court to allow the application and strike out the suit on the grounds

that it is *res judicata*.

### **Plaintiff's Counsel's Submission.**

Counsel for the plaintiff/respondent opposed the application and submitted that the same does not meet the threshold of *res judicata* as the matter has never been heard and determined. Counsel also took issue with the fact that the applicant annexed a copy of a plaint and defence but did not annex a copy of the judgment or decree.

It was Counsel's further submission that this suit was filed in 2015 after the Environment and Land Court was established which took away the jurisdiction of the Chief Magistrates' Courts to hear land matters. Counsel also submitted that the matter has not been heard and determined as alleged by the applicant. He also referred the court to the annexed defence whereby the defendant admitted that the court had no jurisdiction to hear and determine the matter. He therefore urged the court to dismiss the application with costs to the respondent.

### **Analysis and determination**

The issue for determination is as to whether this suit is *res judicata* and whether the application meets the threshold as provided for under section 7 of the Civil Procedure Act.

It is not in dispute that a case had been filed at the Chief Magistrate's Court. What is in dispute is as to whether the same was heard and determined by a competent court. The ingredients of *res judicata* bars a court from trying 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 applicant admitted in the defence that the Chief Magistrate's Court did not have jurisdiction to hear the case making it incompetent to decide with finality on the issue. The applicant also chose to annex the plaint and defence but did not annex the decree or the judgment to demonstrate that the suit was heard and determined by a competent court. From the foregoing it is now the defendant's word against the plaintiff's which the court cannot verify.

The principle of *res judicata* is to stop litigants from abusing the court process with matters which have been heard and determined by competent courts or tribunals in respect of the same parties and the same subject matters.

In this current case, I am not persuaded that the matter is *res judicata* and Counsel for the defendant has also made allegations that the pleadings are poorly drafted. That is for another day when the matter comes for full hearing as that is not one of the ingredients to be satisfied in an application to strike out a case on grounds of *res judicata*.

The upshot is that the application by the defendant applicant fails and is therefore dismissed with costs. The parties should comply with order 11 within 30 days and fix the matter for hearing.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of June, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Miss Kibichy for the Defendant/Applicant and in the absence of Mr. Melly for Plaintiff/Respondent.