



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 6 OF 2018

MUGO NJAGI.....PLAINTIFF

VERSUS

MBUGI MATHENGE.....DEFENDANT

RULING

1. By a plaint dated 7th February 2018 and filed on 8th February 2018 the Plaintiff sought the following reliefs;

a. The decision of the Embu Land Disputes Tribunal be set aside and declared null and void.

b. The Land Registrar and District Surveyor Embu be ordered to visit the ground and carve (sic) out the boundaries between land parcel Nos. Ngandori/Kirigi/2077 and Ngandori/Kirigi 2078.

c. That the Defendant be ordered to vacate the portion of the Plaintiff's land that he currently occupies and demolish the perimeter wall he has constructed.

d. Costs and interest.

2. It was pleaded in the plaint that the Plaintiff was the registered proprietor of *Title No. Ngandori/Kirigi/2077* (hereinafter described as parcel No. 2077) whereas the Defendant was the registered proprietor of *Title No. Ngandori/Kirigi/2078* (hereinafter described as parcel No. 2078). It was further pleaded that the said two parcels of land were adjacent to each other.

3. The Plaintiff further pleaded that although land demarcation was done in 1963 each of the parties had settled on the parcel of land belonging to the other with the consequence that the Plaintiff had settled on parcel No. 2078 whereas the Defendant had settled on parcel No. 2077.

4. It was the Plaintiff's case that when he sought to have the District Land Registrar to have the situation resolved, he was advised by the latter to seek legal redress in consequence of which he filed a claim before the defunct Land Disputes Tribunal at Embu.

5. The said Tribunal made an Award sometime in 2007 in which it was directed that each of the parties should retain the parcels they were respectively occupying. The said Award was thereafter adopted as a judgement of the court in Embu CMCC Award No. 42 of 2010.

6. The Plaintiff thereafter filed an application for review and setting aside of the Magistrate's order adopting the said Award as a judgement of the court but the said application was dismissed on 29th June 2011. The Plaintiff then filed Embu ELC Civil Appeal No. No 20 of 2014 against the said ruling. The said appeal was dismissed by this court vide a judgement dated 28th September 2017.

7. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion under **Order 40 of the Civil Procedure Rules** seeking an interlocutory injunction to restrain the Defendant from erecting a perimeter wall, remaining on, undertaking permanent developments or in any way interfering with the Plaintiff's parcel of land i.e. No 2077 pending the hearing and determination of the suit. The said application was based upon the grounds shown on the face of the motion and supported by the affidavit sworn by the Plaintiff.

8. The Defendant filed a replying affidavit sworn on 22nd February 2018 in opposition to the Plaintiff's said application. It was contended that the issues raised by the Plaintiff in the instant suit were directly and substantially in issue in Embu Land Disputes Tribunal Award No. 4 of 2007 whereby the Tribunal made an award which the Plaintiff unsuccessfully challenged both before the Magistrate's Court and the Environment and Land Court at Embu. It was, therefore, contended that the suit was *res judicata*.

9. The Plaintiff filed a further affidavit sworn on 9th March 2018 in which he stated that the Embu Land Disputes Tribunal had no

jurisdiction to handle the land dispute in the first instance. He further contended that Embu Environment and Land Court Appeal No. 2014 was not an appeal against the Award of the Tribunal but an appeal against a ruling on an application to set aside the Award. He maintained that the instant suit was not *res judicata*.

10. When the said application came up for hearing on 15th February 2018 the parties agreed to dispose of it through written submissions. The parties were each granted 30 days to file and exchange written submissions. However, at the time of preparation of this ruling, none of the parties had filed any submissions. The Plaintiff, however, appears to have filed his written submissions on 6th June 2018 after preparation of the ruling.

11. In my opinion, the main issues which arise from the application are two folds. First, whether the Plaintiff's suit is *res judicata* in view of the previous proceedings between the parties herein. Second, whether the Plaintiff has satisfied the principles for the grant of an order of interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**.

12. The doctrine of *res judicata* is a common law doctrine whose purpose is to prevent a matter which has already been adjudicated upon from being re-litigated by the same parties. It is ideally meant to bring litigation to an end. The material provisions of **section 7 of the Civil Procedure Act (Cap 21)** provide, *inter alia*, 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”.

13. In the case of **Njue Ngai Vs Ephantus Njiru Ngai & Another (2016) eKLR** the court summarized the rationale for the doctrine of *res judicata* as follows;

“In the case of Likay Estate Ltd & Another Vs Shah Hiri Monak & 2 Others (2006) eKLR (supra) cited by the Appellant, Waki J.A stated as follows;

The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality in litigation and to prevent harassment of individuals twice over the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause”.

14. Whereas the Defendant contended that the matters raised herein were directly and substantially in issue in previous proceedings between the same parties, the Plaintiff contended that the earlier proceedings and civil appeal were on a different issue altogether and that the tribunal had no jurisdiction to deal with the land dispute in the first place.

15. In the case of **Kamunye & Others Vs The Pioneer Assurance Society Ltd [1971] EA 263** the test for *res judicata* was described by Harris J. as follows;

“The test whether or not a suit is barred by *res judicata* seems to me to be-is the Plaintiff in the second suit trying to bring before the court, in another way and in form a new cause of action, a transaction which he has already put before court of competent jurisdiction and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at time.”

16. Similarly, in the case of **E.T. Vs Attorney General & Another (2012) eKLR** the Hon. Justice D. Majanja made the following observations on the doctrine of *res judicata*;

“57. The court must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action a matter which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177, the court held that ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case, the court quoted Kuloba J, in the case of Njangu Vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, ‘if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he come to court, then I do not see the use of the doctrine of *res judicata*.”

58. In my view the addition of the Attorney General and the exclusion of the Petitioner's mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as a party to evade the general principle.”

17. The court has carefully considered the pleadings and the affidavits on record. There is no doubt that the Plaintiff has engaged in a very lengthy journey of over eleven (11) years in trying to correct the anomaly alluded to earlier in the ruling. He has all along fought to settle on his parcel of land which he believes Defendant has settled on since the 1960s. That is the claim which was rejected by the Tribunal in its

award. Upon the adoption of the said Award as a judgement of the court on 8th March 2007, the Plaintiff sought to overturn it by filing an application to it set aside vide the application dated 6th January 2011. The said application was dismissed by the Magistrate's Court.

18. The Plaintiff did not stop at that. He filed *Embu ELC Appeal No. 20 of 2014* against the order dismissing his application dated 6th January 2011. That appeal was heard and ultimately dismissed by this court vide a judgement dated 28th September 2017. There is no indication on record if the Plaintiff ever appealed against the said judgement.

19. What is clear to me is that by filing the instant suit, the Plaintiff is essentially seeking to achieve the same object i.e. to have the parties to interchange the parcels of land they have occupied and developed over the years. In my opinion, when the Plaintiff's avenues for challenging the Award of the Tribunal failed through his application for setting aside and the civil appeal, he decided to change fact by filing a fresh suit in order to achieve the same purpose.

20. It is thus clear to me that the instant suit is barred by the doctrine of *res judicata*. In my view, the Award of the Tribunal ceased to exist on its own upon adoption by the Magistrate's Court as a judgement. It henceforth became a decree of the Magistrate's Court in *Embu CMCC Award No. 4 of 2007*. There is no doubt that the Chief Magistrate's Court at Embu was a court of competent jurisdiction within the meaning of **section 7 of the Civil Procedure Act (Cap 21)**. The Plaintiff's remedies were thus restricted to an appeal or application for judicial review. See **Florence Nyaboke Machani Vs Mogere Amosi Ombui & Others [2014] eKLR**.

21. In view of the Court's finding that the instant suit is *res judicata*, it is not necessary to consider the Plaintiff's application for interlocutory injunction dated 7th February 2018.

22. The upshot of the foregoing is that the Plaintiff's suit is hereby struck out for being *res judicata*. For the avoidance of doubt, the Plaintiff's notice of motion dated 7th February 2018 stands struck out as well. The Plaintiff shall bear the costs of the entire suit.

23. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14TH** day of **JUNE, 2018**.

In the presence of Mr Lee Maina holding brief for Ms Anne Thungu for the Plaintiff and Mr Okwaro holding brief for Ms Beth Ndongoro for the Defendant.

Court clerk Mr Muinde.

Y. M. ANGIMA

JUDGE

14.06.18