



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL CASE NO.99 OF 2001

BENJAMIN KISAKA MUYALA.....PLAINTIFF

VERSUS

JOHN WAFULA MAKOKHA.....DEFENDANT

RULING

It is unfortunate that the Parties herein are canvassing a Preliminary Objection on res judicata in 2018 in a suit originally filed in 2001 before being amended in 2015. I hope that henceforth, the Parties will ensure that this suit is expedited in keeping with the overriding objections of the Civil Procedure Act and the rules made thereunder.

The Plaintiff originally filed this Originating Summons on 12th June 2001 seeking the main order that he has acquired by adverse possession land parcels No. **EAST BUKUSU/SOUTH KANDUYI/5361, 5362, 5363 and 5364** having been in open, peaceful and un-interrupted occupation thereof since 1938 and continued to do so even after the land adjudication process in 1969. On 13th January 2015, the Originating Summons was amended to show that the land parcel in dispute is **EAST BUKUSU/SOUTH KANDUYI/659**.

In opposition to that Originating Summons, the defendant filed a replying affidavit in which he pleaded, inter alia, that the suit is barred by the statute of Limitation, that the Plaintiff only moved to the suit land in 1987 using his influence as a Police Officer after getting the defendants and his brothers arrested, that the Plaintiff has his own land being **EAST BUKUSU/SOUTH KANDUYI 660** on which he lives, that there was a previous suit in 1990 and so any adverse possession has been interrupted etc.

After various interlocutory applications, this matter came up for hearing on 27th June 2018 and it was then that the defendant informed the Court that he had a Preliminary Objection dated 6th May 2015. I therefore directed that it be canvassed by way of oral submissions which was done.

In his oral submissions, the defendant told the Court that this suit is res-judicata in view of the fact that the same issues have been determined in **KAKAMEGA HIGH COURT CIVIL CASE NO.10 OF 1991**.

He also submitted that there also have been two other Cases all involving the same parties and the same subject matter.

These are:

1. KAKAMEGA HIGH COURT CIVIL APPEAL NO.86 OF 2000

2. KAKAMEGA HIGH COURT CIVIL CASE NO.100 OF 1982.

In response, Counsel for the Plaintiff Mr. KWEYU submitted that **KAKAMEGA HIGH COURT CIVIL CASE NO.10 OF 1991** was withdrawn with costs to the Plaintiff before Justice TANUI on 14th October 1997. And with regard to **KAKAMEGA HIGH COURT CIVIL APPEAL NO.86 OF 2000, JUSTICE ETYANG** (now deceased) only vacated eviction orders that had been issued by **Justice ANGAWA**.

Res judicata is provided for under Section 7 of the Civil Procedure Act in the following terms:

“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”.

In KARIA V A.G. 2005 I.E.A. 83, the Court stated that before its judicata can be invoked, the following conditions must be proved:

1. **The issue in dispute in the former suit between the same parties must be directly and substantially in dispute between the Parties in the suit where res judicata is pleaded.**
2. **The former suit must be between the same parties or those under whom they or any of their 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 to try such suit.**

The doctrine of res judicata is essentially a bar to any subsequent proceedings involving issues which have been finally and conclusively decided by a competent Court in a prior suit between the same Parties or their representatives. It therefore protects parties and their privies from being vexed over the same issues over and over again and thereby helps in bringing litigation to an end. In invoking that doctrine in this case, the defendant has submitted that the issues raised in this suit have been the subject of litigation in other suits. I will therefore examine those other suits from the pleadings that have been placed before me to see whether indeed they can support the defendant's claim that res judicata is applicable in this case. It must be remembered that the onus is always on the Party raising the plea of res judicata to prove that it applies in any particular case.

1. KAKAMEGA HIGH COURT CIVIL CASE NO.10 OF 1991

That suit involved the same Parties herein only that the defendant herein was the Plaintiff and the Plaintiff herein was the defendant. That Case was also an Originating Summons which was however withdrawn on 14th October 1997. Res judicata cannot therefore be properly involved because that suit was not “**heard and finally decided**” as required by Section 7 of the Civil Procedure Act.

2. KAKAMEGA HIGH COURT CIVIL APPEAL NO.86 OF 2000

That appeal appears to have arisen out of an award by the **KANDUYI LAND DISPUTES TRIBUNAL CASE NO.10 OF 1990** which awarded the land Parcel No. **EAST BUKUSU/SOUTH KANDUYI/659** to the defendant herein while the Plaintiff was ordered to move to land parcel No. **EAST BUKUSU/SOUTH KANDUYI/660** belonging to his late father. The matter then went to the Provincial Lands Appeals Committee which ordered that both parties be given an equal share in the land parcel No. **EAST BUKUSU/SOUTH KANDUYI/659**.

Those awards became the subject of various application which were heard and determined by **Judges MBITO, ANGAWA** and the late **ETYANG**. The bottom line however is that the **KANDUYI LAND DISPUTES TRIBUNAL** did not and could not have determined a dispute based on adverse possession which could only have been determined by the High Court or, after 30th August 2011, this Court. That case cannot therefore be involved to defeat this suit on the basis of res judicata.

3. KAKAMEGA HIGH COURT CIVIL CASE NO.100 OF 1982

From the documents availed, that suit involved **MELABU WASIKE** and **HERBERT WANYONYI** as Plaintiffs against the defendant herein. It is not clear what the suit related to but what is clear is that the suit was withdrawn before **AGANYANYA J** on a date that is not clear in 1985.

The up-shot of all the above is that whereas there have been previous suits involving the Parties herein, there is no evidence placed before me to show that the issue of adverse possession with regard to land Parcel No. **EAST BUKUSU/SOUTH KANDUYI/659** and which is the issue for determination in this suit has been heard and determined by other competent Courts. Res judicata cannot therefore be properly invoked to defeat this suit.

Ultimately therefore the defendant's Preliminary Objection dated 6th May 2015 is devoid of any merit. It is hereby dismissed with costs to the Plaintiff. I further direct the Parties to take the earliest available date in the new term so that this suit which was filed in 2001 is heard and determined on priority basis.

BOAZ N. OLAO

JUDGE

26TH JULY 2018

Ruling dated, delivered and signed in open Court this 26th day of July 2018 at Bungoma

Mr. Kweyu for Plaintiff

Defendant in person present

Plaintiff present

BOAZ N. OLAO

JUDGE

26TH JULY 2018