



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 143 OF 2015

ANDREW MAYAKA ONYONI PLAINTIFF

VERSUS

MESHACK MOTURI SIRO (DONOR)

Sued through JANET SIRO (DONEE) DEFENDANT

R U L I N G

1. The plaintiff commenced the instant suit vide a plaint dated 14th April 2015 filed in court on the same date. The plaintiff by the plaint averred that he is the registered owner of land parcel number **Nyaribari Chache/B/B/Boburia/1752** measuring 0.7Ha and the defendant is the registered owner of land parcel **Nyaribari Chache/B/ B/Boburia/2632** measuring 0.6Ha. The plaintiff claims the defendant's land parcel was unlawfully transferred to the defendant contending that the same was part of the plaintiff's land and therefore should be given back to the plaintiff.

2. The plaintiff inter alia seeks the following orders as against the defendant:-

(a) An order declaring the defendant' occupation of the suit land unlawful.

(b) An order cancelling the defendant's name as the proprietor of the suit land and the same to be registered in the name of the plaintiff.

(c) An order of eviction of the defendant from the suit land.

3. The defendant filed a statement of defence on 12th May 2015 and inter alia pleaded that the ownership of the subject property was the subject of previous proceedings in Kiogoro Land Disputes Tribunal Case No. 7 of 2011 and Kisii CMCC Misc. Application No. 72 of 2011 where the dispute was determined and decisions of the tribunal and the Kisii Chief Magistrates Court were never challenged, impugned, appealed against and/or reviewed. The defendant thus contends the plaintiff is barred and/or estopped from instituting the present suit when previous legal proceedings have been instituted and a valid decision on the matter made and which decision has not been set aside.

4. Further the defendant averred that the plaintiff's suit is misconceived and legally untenable and under paragraph 10 of the defence gave notice that he would raise a preliminary objection to the suit on the following grounds:-

(i) The instant suit is barred and/or prohibited by the provisions of Sections 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

(ii) The plaint does not disclose any reasonable cause of action against the defendant.

(iii) The plaintiff has concealed material facts in respect of the subject matter pertaining to and involving previous proceedings over and in respect of the subject matter. Consequently, the plaint contravenes the provisions of Order 4 Rule 2 of the Civil Procedure Rules, 2010.

(iv) The instant suit is res judicata and hence barred by the provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya.

(v) The instant suit is legally untenable and therefore amounts to and/or constitutes an abuse of the du process of court.

(vi) The plaintiff is non-suited.

5. The defendant filed a formal notice of preliminary objection dated 3rd August 2017 on 14th August 2017 more or less adopting the grounds set out under paragraph 10 of the defence as above. The court directed that the preliminary objection be canvassed by way of written submissions. The defendant filed his submissions on 26th March 2018 and the plaintiff filed his on 20th April 2018.

6. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A 696** laid down the principle on what constitutes a preliminary objection thus:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and occasionally confuse the issues. This improper practice should stop.

7. The preliminary objection by the defendant raises issues of law and I am satisfied that the same qualifies to be taken as a preliminary objection. The defendant’s preliminary objection is principally anchored on the grounds that the plaintiff’s suit is statute barred under the provisions of Section 4 and 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya; that the plaintiff’s suit is *res judicata* there having been previous proceedings where the issues were determined; and that the plaintiff has concealed material facts relating to the subject matter and is thus abusing the process of the court.

8. Issue of suit being statute barred:

The defendant has submitted that the plaintiff’s suit is barred by statute under Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya and places reliance on the plaintiff’s witness statement filed in court on 14th April 2015. In the witness statement, the plaintiff states that the defendant’s land and his (plaintiff’s) land belonged to his father one, Simon Onyoni Mayaka (deceased) and he was the only son. The plaintiff states further that he left home in 1963 and returned in or about 1973 and it was later that the defendant’s father started laying claim to the land and asserting he and/or the defendant had right to use the same exclusively. The plaintiff admits in his witness statement that he is the one who filed the dispute before the Kiogoro Land Disputes Tribunal but the decision of the Tribunal went against him.

9. Both the plaintiff and the defendant participated in the tribunal proceedings and called witnesses in support of their respective cases. The case before the Tribunal as is evident from the proceedings which both parties have annexed in their bundles of documents dealt with issues of occupation and trespass in regard to which the tribunal had jurisdiction to deal. The observations and ruling made by the tribunal demonstrate the tribunal was conscious of their mandate. Observations 4 to 7 were in the following terms:-

4. By the time the claimant (plaintiff) offered the suit land for sale to Siro (defendant’s father), adjudication had not been done. It was done after Siro bought and subdivided it into two portions giving a share to his son Meshack (defendant) and another to Osongo Siro. In regard to this, Meshack’s land parcel was registered or known as Nyaribari Chache/B/B/Boburia/2632, Osongo Siro - B/B/Boburia/ 1751 and the claimant Mr. Mayaka Andrew given land registration Nyaribari Cahche/B/B/Boburia/ 1752.

5. For all this period, Siro’s sons have been cultivating the suit land though the claimant has been persistently trespassing thereon and arraigned in court on three occasions and charged.

6. During site visit, the tribunal observed that the original common boundaries are intact though some areas were seen interfered with by either parties mostly the claimant.

7. It was also observed that the claimant’s son planted gravellier trees along the common boundary which was a clear indication that they know the border of their land and those of the objectors.

10. In its decision the tribunal inter alia held thus:

(i) It is evident and has been proved that the claimant sold the suit land to the objector’s father on mutual understanding and that he has no neither right nor legal authority to claim the same from the objectors.

(ii) Because the original boundary has been tampered with, it is hereby ordered that both parties apply to the lands registry and the surveyor to go to the ground to confirm its size and boundaries so that the anomalies can be rectified so as to conform with what is in the registry index map.

(iii) The existing boundary between the suit land and the forested portion be maintained and respected by both parties.

11. I have made the above reference to the tribunal proceedings to illustrate the issues that the tribunal dealt with and to contextualize the basis of the preliminary objection taken by the defendant. It is the defendant’s contention that his late father purchased the suit property from the plaintiff and that the land was following adjudication and demarcation registered as **Nyaribari Chache/B/B/Boburia/2632**. It is the defendant’s position that his late father took possession of the land and commenced utilizing the same and that the defendant continued with cultivation of the land even after the death of his father. The plaintiff and the defendant have annexed copies of their bundle of documents and perusal of the copies of the titles **“Part B - Proprietorship Section”** shows that both parcels **1752** and **2632** were first registered on 7th January 1971. The first registration was done following the completion of the adjudication process. This is consistent with the evidence that was tendered before the tribunal that the sale of the suit property to the defendant’s father was before the adjudication process was carried out such that the defendant’s father was adjudicated as the owner of land parcel **2632** and **1751** while the plaintiff was adjudicated as owner of land parcel **1752**. The plaintiff in his witness statement acknowledges the defendant has been staking claim to land parcel **2632** since 1970’s.

12. The plaintiff's suit as per the plaint is basically for the recovery of the suit land from the defendant which the defendant is in occupation of and has been utilizing. The suit property LR No. **Nyaribari Chache/B/B/Boburia/2632** was adjudicated during the land adjudication in favour of the defendant's father and was subsequently registered in the defendant's name. The evidence establishes the defendant has occupied and utilized the suit land since the 1970's.

Issue of suit being res judicata:

13. Under Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya any action to recover land after the expiry of 12 years is barred by limitation. Section 7 of the Act provides:-

“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 some person through whom he claims, to that person.”

The suit property in the instant matter was registered in the defendant's father's name in 1971 immediately following the land adjudication and the defendant has occupied and cultivated the land since the 1970's. The plaintiff returned to the land parcel **1752** in 1973 and by then the defendant's family was cultivating the land they had purchased and had been adjudicated to their late father. It is this land the plaintiff wants to recover through this suit. Unfortunately the law bars the bringing of such an action after the expiry of twelve years. Even assuming the plaintiff discovered the defendants were unlawfully using the suit land on 26th July 1979 when he is shown to have been registered as the proprietor of land parcel **Nyaribari Chache/B/B/Boburia/1752**, he ought to have instituted recovery action against the defendant on or before 26th July 1991 when the twelve years elapsed. At the time of registration as proprietor on 26th July 1979, the plaintiff must have noted his land measured 0.7hectares and did not comprise the portion he claims the defendant was occupying and hence he ought to have initiated recovery proceedings of the land before the expiry of twelve years from then.

14. I am in the premises persuaded that the plaintiff's present action is statute barred by reason of the Limitation of Actions Act. I therefore would uphold the defendant's preliminary objection on this ground. Although this ground would have been sufficient to dispose of this matter, I will nonetheless consider the other ground argued by the parties on whether or not the instant suit is *res judicata* having regard to the Kiogoro Land Disputes Tribunal decision and the subsequent adoption of the tribunal decision by the Chief Magistrate's Court vide Kisii CMCC Misc. App. No. 72 of 2011.

15. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which embodies the doctrine of *res judicata* 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 parties under whom they or any of them claim, litigation 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.”

16. Earlier in this ruling, I made reference to the proceedings before the Kiogoro Land Disputes Tribunal where the plaintiff was the claimant and the defendant was the respondent on behalf of his family members. I made a finding that the tribunal had jurisdiction to deal with issues relating to occupation, boundary and trespass. The tribunal made observations, findings and decisions relating to the issues before it and its decision was adopted by the Magistrates Court and there was no appeal and/or review by any party and the determination by the tribunal thus stands unchallenged. In the instant suit, the plaintiff seeks an order declaring that the defendant's occupation of the suit land as unlawful and eviction of the defendant from the suit land. Although the plaintiff also seeks an order for the cancellation of the title held by the defendant on allegations that the same was unlawfully transferred to the defendant, no particulars of any fraud or misrepresentation have been pleaded and the claim lacks any basis and is unsustainable.

17. The issues of unlawful occupation and trespass were fully dealt with by the Land Disputes Tribunal and it possessed the jurisdiction and mandate to deal with the issues. The submission by the plaintiff that the tribunal lacked jurisdiction to deal with the matters before it pursuant to Section 3 of the Land Disputes Tribunal Act No. 18 of 1990 (repealed) is without any basis. I would therefore equally uphold the defendant's preliminary objection on the ground that the instant suit is *res judicata* Kiogoro Land Disputes Tribunal Claim No. 4 of 2011 subsequently adopted as judgment in Kisii CMCC Misc. App. No. 72 of 2011. The tribunal in my view did not deal with issues of ownership and/or title to land as they merely investigated how the defendant got to occupy the land and to be registered as the owner thereof. The tribunal properly found that the defendant's father had purchased the suit land before land adjudication took place and that upon adjudication, the defendant's father's portion which he had purchased was split into parcels **1751** and **2632** which were registered in the names of his family members. The tribunal did not confer any ownership interest and neither did they make any decision that affected any title to the land. They merely confirmed the ownership as per the titles held by the respective parties.

18. On the basis of the foregoing, I uphold the preliminary objection and it is my finding that the plaintiff's suit lacks any merit and that the same constitutes an abuse of the process of the court. I order that the same be struck out with costs to the defendant.

19. It is so ordered.

RULING DATED, SIGNED and DELIVERED at KISII this 28TH DAY of SEPTEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Okenye for Ayienda for the plaintiff

Mr. Ollando for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE