

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 158 OF 2013

MESSEN SHISIA JUMA.....PLAINTIFF

VERSUS

BILHA OLINGO MULUKA

SOPHIE AKOLA MULUKA.....DEFENDANTS

JUDGEMENT

This case is that, at all material times, the plaintiff was the registered proprietor of L.R.L. NO. Butso/so/Shikoti/4329. That in the year 2009, the plaintiff, acting upon rumours that the suit land was no longer in his name, obtained a certificate of the register and confirmed that indeed, the suit land had been transferred from his name into that of the 1st defendant in the year 1996. The certificate of register proceeded to show that subsequently, the 1st defendant in turn transferred the suit land to the 2nd defendant who is presently the registered proprietor thereof. That the transfer of the suit land from the plaintiff into the names of the defendants was done fraudulently. The plaintiff seeks judgment against the defendants jointly and/or severally for:

1. Restoration of the plaintiff's name in the certificate of register as the proprietor of the suit land and mesne profits.
2. Costs of suit.

PW1 testified that, the defendants took his land by using fraud and he never sold it to them. He however, admits that they have been two previous matters touching on the same subject matter.

The 1st defendant avers that the plaintiff is the former registered owner of the suit land which he sold and transferred to her on 6th August, 1996 at an agreed consideration of Ksh. 70,000/= which was fully paid to him. The first defendant avers that all legal procedures in tandem with sale and transfer of land were duly met and that the plaintiff fully participated in the entire process which culminated in her registration as owner of the suit land on 6/8/1996. The first defendant further states that the plaintiff had sold the suit land to her together with all developments thereon and hence paragraph 6 of the plaint is false, misconceived and baseless as there was no iota of fraud involved. That she lawfully transferred the suit land to the second defendant on 10th May, 2007. The defendants jointly aver that the plaintiff has no legal right over the suit land which he sold, gave vacant possession in 1996 and that he does not qualify for any of the reliefs sought against the defendants. The defendants shall raise a preliminary objection on a point of law that the plaintiff's suit be ordered struck out for being statute barred. The second defendant avers that she is the registered owner of the suit land which was lawfully transferred to her by the first defendant as a gift. The second defendant is a stranger to the plaintiff's allegations of fraud and further contends that the particulars thereof are false, misconceived and untenable in law. The defendants aver that the plaintiff had previously filed Kakamega CMCC NO. 444 OF 2009 and Kakamega High Court Civil suit No. 124 of 2011 in which the former suit was withdrawn while the latter was heard and determined by the court in which the suit was dismissed with costs. The defendants shall raise a further preliminary objection that the plaintiff's suit be ordered struck out with costs for being res judicata in view of Kakamega High Court Civil Suit No. 124 of 2011 in which the court determined the same issues in this case which have again been brought forth before this court.

The defendants took issue with the plaintiff's suit stating that the plaintiff had previously filed 2 suits against them namely Kakamega CMCC No. 444 of 2009 which was later withdrawn and Kakamega HCCC No. 124 of 2011 which was struck out with costs. The court found that the plaintiff's claim was time-barred in view of section 7 of the Limitation of Actions Act. There is no evidence if the ruling of the court was ever challenged on appeal.

This court has carefully considered this case and the submissions herein. The preliminary issue to determine in the present case is whether this case is properly before the court or if it is res judicata. The defendants aver and the plaintiff admits that the plaintiff had previously filed Kakamega CMCC NO. 444 OF 2009 and Kakamega High Court Civil suit No. 124 of 2011 in which the former suit was withdrawn while the latter was heard and determined by the court in which the suit was dismissed with costs. The defendants shall raise a further preliminary objection that the plaintiff's suit be ordered struck out with costs for being res judicata in view of Kakamega High Court Civil Suit No. 124 of 2011 in which the court determined the same issues in this case which have again been brought forth before this court.

Section 7 of the Civil Procedure Act provides as follows:-

“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.”

I find that, Kakamega High Court, a Court of equal and competent jurisdiction determined the dispute between the plaintiff and the

defendants in Kakamega HCCC No. 124 of 2011. Therefore the claim before me is clearly res judicata and there was even no need for the parties to subject this matter to a trial in the face of the ruling of the Honourable Lady Justice Beatrice Thurania Jaden, which is on record.

The plaintiff discloses at paragraph 8 of the said plaint that there have been previous proceedings between her and the defendant over the same subject matter namely Kakamega CMCC NO. 444 OF 2009 and Kakamega High Court Civil suit No. 124 of 2011. I find that this suit is res judicata in view of the said Kakamega ELC No.124 of 2011 which has been decided. The doctrine of res-judicata requires that there should be an end to litigation where a court of competent jurisdiction has rendered a conclusive decision. I find this suit is res judicata and I strike out this suit with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE