



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO.106 OF 2012

MUSA KIPRONO NGETICH.....1ST PLAINTIFF

KIPLANGAT NGETICH.....2ND PLAINTIFF

VERSUS

CHEPYATOR CHERONODEFENDANT

RULING

(Application seeking to dismiss suit for being res judicata; applicant arguing that the plaintiff had earlier filed suit before the Land Disputes Tribunal which went on appeal to the High Court; High Court holding that the Tribunal did not have jurisdiction to hear the case and setting aside its decision; it cannot therefore be argued that the issues were ever determined; suit not res judicata; application dismissed)

1. The application before me is that dated 18 January 2016 filed by the defendant. It seeks orders that this suit be dismissed for being res judicata. The suit which the applicant claims to have been earlier filed and determined over the same issues, is the case Nakuru High Court, Civil Appeal No. 69 of 2002. This was an appeal whose genesis was an award of the Koibatek Land Disputes Tribunal and the decision of the Rift Valley Provincial Appeals Committee.

2. To put things into context, Musa Ngetich, the 1st plaintiff in this suit, lodged a complaint before the Koibatek Land Disputes Tribunal registered as Land Case No. 15. The complaint was over the ownership of the land parcel Perkerra 101/9, and it seems as if Musa Ngetich was agitating that the land or part of it, belongs to the family of one Kiptalam Ngetich (probably his father). After hearing the parties, the tribunal made an award that the family of Kiptalam Ngetich is entitled to 58.25 Ha of the land and, Chepyator Cheron, the applicant herein, is entitled to 8 acres. The applicant was naturally aggrieved by this decision and he lodged an appeal at the Rift Valley Provincial Land Disputes Appeal Tribunal. The Appeals Tribunal held that the applicant is entitled to 14.3 acres whereas the family of Kiptalam Ngetich is entitled to the remainder of the land. Still aggrieved, the applicant then lodged an appeal before the High Court, being Nakuru High Court Civil Appeal No 69 of 2002. His main complaint at this level was that the Land Disputes Tribunal and the Appeals Committee did not have jurisdiction in the matter. Emukule J, who heard the matter agreed that the Tribunal and the Appeals Committee did not have jurisdiction and quashed their decisions.

3. The issues of the Tribunal having become water under the bridge, the two plaintiffs/respondents filed this suit on 21 July 2010, by way of a plaint. They averred that they have filed suit on behalf of the estate of Kiptalam Ngetich and they pleaded that the applicant in the year 1998, fraudulently acquired title to the land Baringo/Perkerra-101/232. They claimed that the estate of their late father is entitled to 15 acres of this land. The applicant filed defence and refuted the claims of the respondents. He also raised issue that the case of the respondents was determined in HCCA No. 69 of 2002 which is exactly what he now raises in this application.

4. I have taken note of the submissions of both Mr. Onkoba for the applicant and Mr. Rodi for the respondents.

5. The res judicata principle is one which bars a party from presenting before court, a matter that has already been litigated before. The aim is to bring litigation to an end and avoid an ad infinitum filing of cases. Once an issue is heard and resolved by a competent court, one is not permitted to try and re-litigate the matter through the filing of another case. This principle is well embodied in our Civil Procedure Act, Cap 21, at Section 7 which is drawn as follows :-

7. Res judicata

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others

6. The above provision of the law should speak for itself. One is barred from filing a new suit if a matter has been heard and determined before a competent court. Now, that is what the applicant is claiming in this matter, but I do not agree. In the first place there has been no determination of the dispute that is now before this court, for whatever the Tribunal and the Appeals Committee decided, were all quashed for having been heard before bodies that were incompetent. One cannot therefore point at any existing judgment or determination over the issues raised in this suit. Secondly, even if there was any determination, such determination was not made by a competent court as to invite the res judicata rule. If the applicant herein asserts that the dispute was decided, what can he point to as being the decision? He can point to none, as such decision was quashed. None exists at the moment, and that being the case, there is no decision that one can refer to, to support the argument that this suit is res judicata.

7. Need I say more? I really do not think that it is necessary to do so. There being no existing decision over the subject matter herein, this suit does not qualify to be said to be res judicata. This application is therefore dismissed with costs to the respondents.

8. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 25th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ombati holding brief for Mr. Onkoba for the defendant /applicant.

Ms. Nancy Njoroge holding brief for Mr. Rodi for the plaintiff/respondent.

Court Assistants: Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU