



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 215 OF 2017

KUNGU NGETHE.....PLAINTIFF

VERSUS

GEORGE KIBATIA.....DEFENDANT

RULING

(Preliminary objection that plaintiff's suit is res judicata; plaintiff having sued defendant's late father over the suit land; plaintiff's suit having been dismissed; plaintiff now suing son of defendant in the earlier suit claiming similar reliefs; rights of plaintiff over the suit land having already been determined in the earlier case; suit dismissed as being res judicata).

1. This ruling is in respect of a preliminary objection raised by the defendant who has argued that this suit is res judicata the case Nairobi HCCC No. 5716 of 1989 and ought therefore to be struck off. The preliminary objection is opposed and before I go to the gist of it, I feel it prudent to give a brief background to this suit.

2. This suit was commenced by way of a plaint which was filed on 12 July 2011. In the plaint, the plaintiff has pleaded that he is the owner of the land parcel Maela/Ndabibi Block 1/175. He has averred that the defendant fraudulently caused this land to be subdivided. In the suit, the plaintiff has asked for a declaration that the subsequent subdivision of the land is illegal; nullification of the title issued to the defendant; eviction of the defendant; costs and interest.

3. In his defence, the defendant did not deny that the plaintiff is the owner of the land parcel No.175. He however denied having caused its subdivision and denied having made any attempt to take away this land from the plaintiff. He did not deny that the plaintiff is entitled to a declaration that he is the owner of the land parcel No. 175 but averred that this has to be subject to the conditions set out in the judgment in the case Nairobi HCCC No. 5716 of 1989 which case was filed by the plaintiff against the defendant's father. He has stated that he has not been occupying the plaintiff's land but has been occupying the land parcel No.439 which borders the plaintiff's land and which is in the name of his late father. He has pleaded that the judgment in the case Nairobi HCCC No. 5715 of 1989 ordered the plaintiff to surrender his title to the land parcel No. 175 so that the acreage can be corrected and that the court held that the boundaries on the ground should not be disturbed.

4. In this preliminary objection, the defendant has contended that the plaintiff's case is res judicata the case Nairobi HCCC No. 5716 of 1989. In his submissions in support of the preliminary objection, Mr. Mwicigi, learned counsel for the defendant, referred me to Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. Ms. Nancy Njoroge, learned counsel for the plaintiff submitted that res judicata cannot apply as the parties in the two cases are not the same and that there is a difference with the prayers sought in the two cases.

5. I have looked at the plaint and the judgment in the case Nairobi HCCC No. 5716 of 1989. The plaintiff herein was the plaintiff in the previous suit and it is common ground that the defendant was father of the defendant in this case. In that case, the plaintiff claimed that in the month of June 1987, the defendant's father unlawfully entered the land parcel No. 175 and started cultivating it. He asked for the following prayers:-

(a) *A declaration that the defendant is an unlawful occupier of the land parcel No. 175.*

(b) *An eviction order against the defendant.*

(c) *Costs of the suit.*

6. The judgment in Nairobi HCCC No. 5716/89 reveals that both plaintiff and defendant's father were members Ndidithi Farmers Company Limited, a land buying company. When the land was distributed to members, the defendant was entitled to 9 acres and one acre for building

purposes. He was however given 6 acres. He complained and he was added the extra 3 acres which formed the land in dispute in the said case. These three acres which were initially identified as Plot No. 231A became registered as parcel No. 439. The evidence also showed that the plaintiff was entitled to 4 ½ acres of land and one acre for building purposes but he ended up with 2 ½ acres. He also lodged a complaint about his reduced acreage and he was given a plot No.207 to compensate him. He however ended up with both Plot No. 207 and Plot No.231A and got a total acreage of 8 acres comprised in the land parcel No.175. In his judgment, Rimita J, held that the plaintiff's title to the parcel No.175 should be surrendered and corrected so that it gives the correct acreage. From what I can discern, he found that the parties were occupying what they were entitled to and therefore only the paperwork needed to be rectified. The judge found that the plaintiff's suit is unmerited and he proceeded to dismiss it.

7. It is apparent to me that the plaintiff in this case is more or less presenting the same claim that he presented in the suit Nairobi HCCC No.5716 of 1989. He wants a declaration that his land was improperly subdivided to the benefit of the defendant and has still argued that the defendant is occupying his parcel No.175 and needs to be evicted. In my view, his rights over the land parcel No. 175 were resolved by the judgment of Rimita J. The judge already held that he is not entitled to the acreage shown in his title but to less acreage. The judge also held that his title needs to be rectified to reflect the correct acreage, which the judge noted, is what he occupies on the ground.

8. Section 7 of the Civil Procedure Act which embodies the res judicata rule 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.

9. It will be seen from the above provision of the law, that a court is not to try a matter which was directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them litigate. I have no doubt that the issues the plaintiff has presented in this case are the same issues that he presented in the case Nairobi HCCC No. 5716 of 1989.

10. It was argued by counsel for the defendant that the parties are different. That may be the case, but it cannot be disputed that the defendant's position is similar to that of a person litigating under the same title. In this instance, the position of the defendant is precisely similar to the position that his father was in. The complaint is the same and if it were to be heard and determined in favour of the plaintiff, then the plaintiff will end up succeeding over the same matter that he has previously failed, which will occasion an embarrassment to the administration of justice.

11. I am convinced that this case is res judicata the case Nairobi HCCC No. 5716 of 1989 and I hereby dismiss it with costs.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 11th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Ikuu holding brief for Ms. Nancy Njoroge for the plaintiff.

No appearance on the part of M/s Mwicigi Kinuthia & Company advocates for the defendant .

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU