



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 586 OF 2016

AMOS K. CHOMBOI.....PLAINTIFF

VERSUS

BARINGO COUNTY GOVERNMENT.....1ST DEFENDANT

BARINGO COUNTY GOVERNMENT,

DEPARTMENT OF ENGINEERING,

TRANSPORT & INFRASTRUCTURE.....2ND DEFENDANT

OFFICE OF THE CHIEF (EMINING LOCATION)...3RD DEFENDANT

THE WARD ADMINISTRATOR

EMINING LOCATION.....4TH DEFENDANT

THE OFFICE OF THE COMMISSIONER,

BARINGO COUNTY GOVERNMENT, .

THE PUBLIC SERVICE BOARD.....5TH DEFENDANT

SAMMY CHERONO.....6TH DEFENDANT

CHEMJOR CHEPKUTO.....7TH DEFENDANT

COSMAS CHEMJOR.....8TH DEFENDANT

RULING

1. By Notice of Motion dated 14th February 2018, the 7th and 8th defendants sought the following orders:

1. That before any preliminary or substantive matters are placed before court for hearing and determination, the honourable court be pleased to strike out the suit herein in so far as it relates to all that parcel of land known as Pokor/Kures/83 with costs to the 7th and 8th respondents.

2. That costs of this application be provided for.

2. The application was brought under Order 2 rule 15 of the Civil Procedure Rules among other provisions and was supported by an affidavit sworn by Cosmas Chemjor, the 8th defendant. He deposed that the 7th defendant was a party to Nakuru HCCC No.644 of 1991(O.S), a suit whose subject matter was Pokor/Kures/83. That the said case was heard and determined in a judgment delivered on 16th June 2006 wherein the High Court found in favour of Amos K. Chomboi (the plaintiff) herein and two others and found that they had become entitled to Pokor/Kures/83 by adverse possession. An appeal was preferred to the Court of Appeal and on 20th March 2014, the Court of Appeal set aside the judgment of the High Court and instead dismissed the Objecting Summons with costs. The deponent added that therefore, this suit

has already been determined in so far as it relates to Pokor/Kures/83 and that it merely seeks to vex the 7th and 8th defendants. The deponent annexed copies of the originating summons, a replying affidavit by the 7th defendant herein, the judgment of the High Court and the judgment of the Court of Appeal.

3. In an affidavit filed on 5th March 2018 by the 1st defendant, Jonah Korir, the Sub-county Surveyor, Eldama Ravine Ward supported the application and added that orders of eviction were issued against the plaintiff on 23rd June 2015 in Nakuru ELC No. 644 of 1991. He therefore urged the court to allow the application.

4. The plaintiff opposed the application through his Replying Affidavit filed on 30th April 2018. He deposed that this case is not res judicata since the reliefs sought and the parties are distinguishable from those that were in HCCC No. 644 of 1991 (OS).

5. The application was heard by way of written submissions. The applicants filed their submissions on 14th May 2018, the 1st, 2nd, 4th and 5th defendants filed theirs on 24th May 2018 while the plaintiffs filed theirs on 14th August 2018. Essentially the defendants generally supported the application while the plaintiff opposed it. I have considered the application, the affidavits filed and the submissions.

6. Res judicata is provided for under **Section 7** of the **Civil Procedure Act**. The said section 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 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.

7. For res judicata to apply, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

8. The Court of Appeal had the following to say as regards the provisions of **Section 7** of the **Civil Procedure Act** in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

9. A perusal of the plaint herein shows that the plaintiff was one of the plaintiffs in Nakuru HCCC No. 644 of 1991 (OS) while the 7th defendant herein was the sole defendant in the OS. The 8th defendant herein is a son of the 7th defendant. The plaintiffs in the OS claimed that they had become entitled to the parcel of land known as Pokor/Kures/83 by adverse possession. Although the High Court found in favour of the plaintiffs in the OS on 16th June 2006, the Court of Appeal set aside the decision of the High Court and dismissed the OS with costs on 20th March 2014.

10. In this case, the plaintiff has brought the proceedings as a holder of letters of administration ad litem in respect of the estate of Chepkonga Mogobe (deceased). The plaintiff alleges inter alia that the deceased was the owner of Pokor/Kures/83 and that the defendants herein invaded the property in November 2016 and destroyed developments thereon. The plaintiff therefore seeks a permanent injunction to restrain the defendants from further trespassing onto or damaging the parcel Pokor/Kures/83 alongside another parcel known as Pokor/Kures/65.

11. The plaintiff's claim as far as Pokor/Kures/83 is concerned is based on the allegation that the deceased, who was also a plaintiff in Nakuru HCCC No. 644 of 1991 (OS), was the owner of Pokor/Kures/83. That is why he seeks an injunction against the defendants. Without staking a claim on the land, there would be no foundation upon which to mount the current claim for injunction. The Court of Appeal determined with finality in Nakuru Civil Appeal No. 44 of 2007 that the deceased was not entitled to Pokor/Kures/83. The plaintiff cannot invite the court to determine the issue afresh. I am therefore satisfied that the plaintiff's suit against the defendants in so far as it concerns Pokor/Kures/83 is res judicata and is hereby struck out with costs to the defendants.

12. As drafted, the plaint herein does not suggest that any particular defendant is sued in regard to any particular plot only and since the plaintiff's suit as regards Pokor/Kures/65 survives, I order that costs be determined at the conclusion of the entire case.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Tombe for the 7th and 8th defendants/applicants

Mr Karanja Mbugua for the plaintiff/respondent

Mr Nyamwange holding brief for Mr Kibii for the 1st, 2nd, 4th and 5th defendants/respondents

No appearance for the 3rd defendant/respondent

Court Assistants: Gichaba & Lotkomoi