



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO.1206 OF 2016

(FORMERLY HCC NO. 222 OF 2009)

OCHIENG SESE..... PLAINTIFF

VERSUS

LAWRENCE MOTURI OCHARO

(Administrator of the estate of

JOHNSON OCHARO – deceased)..... DEFENDANT

R U L I N G

1. The plaintiff, Ochieng Sese, suing as the administrator of the estate of Sese Saisi instituted the instant suit by way of plaint dated 3rd November 2009 claiming that Plot No. 93 (new No. 7) Kitaru Settlement Scheme had been allocated to his late father by Settlement Fund Trustees. He averred that the defendant was allowed and/or permitted to cultivate on the suit property but after the death of the plaintiff's father in 1998 the defendant refused to yield possession culminating in the filing of Kisii HCCC No. 65 of 2003 and HCC No. 89 of 2005 (OS) which were struck out and withdrawn respectively.

2. The plaintiff prayed for judgment against the defendant for:

- (a) A declaration that Plot No. 93 (new No. 7) Kitaru Settlement Scheme is part of the estate of the deceased Sese Saisi.**
- (b) An order of eviction of the defendant his agents and/or servants from the said Plot No. 93 (new no. 7) Kitaru Settlement Scheme.**
- (c) Costs of the suit.**
- (d) Any other relief this court deems fit to grant.**

3. The defendant vide his defence asserted that the court in Kisii HCCC No. 65 of 2003 made a final determination of the issues in the dispute and therefore the present suit is *res judicata*. The defendant further asserted that he was the bonafide and legal owner of the suit property. The defendant on 16th October 2017 filed a Notice of preliminary objection principally on the ground that the instant suit is *res judicata*. The defendant stated that the court determined that the plaintiff's earlier suit was statute barred; and the same could therefore not be resurrected through the present suit. The defendant further on 17th October 2017 filed a Notice of Motion seeking for the dismissal of the suit on the same ground that it was *res judicata* on account of the determination in respect of Kisii HCCC No. 65 of 2003.

4. The plaintiff filed a response by way of a replying affidavit sworn on 19th December 2017. The plaintiff denied that the present suit is *res judicata* arguing that the issues in HCCC No. 65 of 2003 that was struck out were not directly and substantially the same as the issues in the present case.

5. The doctrine of *res judicata* is anchored under Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides as follows:-

7. 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 heard and finally decided by such court.

6. In Kisii HCCC No. 65 of 2003 the present plaintiff was the plaintiff and the defendant was still the defendant therein. The plaintiff in the earlier suit claimed that his father was the allottee and owner of land known as Kitaru Settlement Scheme Plot No. 93 (new No. 7) which was allocated to him by the Settlement Fund Trustees in 1967. He claimed that owing to the death of the wife (father's), his father in 1967 left the land under the care of the defendant and went and settled elsewhere. The plaintiff stated it was during the absence of his father that the defendant fraudulently changed the letter of allotment to his name. The plaintiff sought orders for cancellation of the registration of the suit property in favour of the defendant and for the eviction of the defendant from the suit property.

7. The plaintiff vide the plaint acknowledged there was indeed a previous suit namely Kisii HCCC No. 65 of 2003 which he stated was struck out. It is this suit the defendant contends finally dealt with the issues arising in the present suit and consequently asserts that the present suit is *res judicata*.

8. In the earlier suit, the defendant who still is the defendant in the present suit, took a preliminary objection at the hearing which was determined in his favour leading to the suit by the plaintiff being struck out. In the ruling by Kaburu Bauni, J. dated 26th April 2005, the Judge summarized the preliminary objection taken thus:-

(i) That the plaint was not supported by a competent verifying affidavit;

(ii) That the plaintiff lacked locus standi to institute the suit on behalf of the estate of his late father as he had no letters of administration;

(iii) That the suit was time barred, the same having been brought after 12 years from the time the defendant took possession of the suit land.

9. The learned Judge upheld the preliminary objection on all the three grounds and specifically made a finding on the issue of limitation of the action. In striking out the suit the Judge stated as follows:-

“Defendant has been in the land since 1966 a fact not disputed. No suit was filed within 12 years. Clearly this suit was brought out of time. True the plaintiff in paragraph 7 of the plaint talked of fraud on part of the defendant. However no particulars of fraud specifically pleaded. Order 6 rule 4 provides clearly that particulars are given and as such the plaintiff cannot rely on the issue of fraud. Cause of action arose in 1966 when the plaintiff's father was still alive and not in 1998 when he died. The suit was filed in April 2003, 37 years later. It is time barred.

From the above, therefore, I strike out the plaint with costs to the defendant.”

10. It is clear from the ruling by Kaburu Bauni, J. that apart from upholding the defendant's preliminary objection that the plaint was not accompanied by a competent verifying affidavit as the law requires and further that the plaintiff had failed to demonstrate he had the *locus standi* to represent the estate of his father, the Judge further made a determination that the suit was statute barred. While the objection on the basis of lack of a competent verifying affidavit and lack of *locus standi* can be said to be technicalities that could be cured, the objection on the basis of the limitation of action went to question the jurisdiction of the court to entertain the suit. The court made a specific finding that the plaintiff's suit against the defendant was statute barred. There was no appeal against the ruling by Kaburu Bauni, J. The matter before the court involves the same parties and the same parcel of land. The court in the previous suit made what constitutes a final determination as relates to whether or not the suit by the plaintiff was statute barred. This court cannot try the issue again and therefore in regard to the issue of limitation, I hold that this suit is *res judicata*.

11. The Judge in the earlier suit held that the cause of action arose in 1966 and that the suit was brought in 2003 which was 37 years later. The plaintiff's father died in 1998 and for about 32 years during his lifetime he did not bring any action against the defendant who throughout the period was in possession of the suit property and from the evidence the defendant was carrying out developments that were consistent with him being the owner. After the initial suit was struck out in April 2005, the plaintiff filed the instant suit in November 2009 and the latter suit related to the same land which was the subject matter in the suit the plaintiff had filed against the defendant in 2003. It cannot be said that facts relied on had altered and/or had changed. The issues remained the same. The plaintiff wanted to recover land parcel **Kitaru Settlement Scheme Plot No. 93** (now land parcel **Kitaru Settlement Scheme/7**) from the defendant which the plaintiff claimed had been allocated to his late father in 1966 but the defendant had fraudulently caused to be changed to his name. The defendant's position is that he had validly been allocated the property by the Settlement Fund Trustees in 1968 and subsequently was issued with a title deed. The defendant contended the suit by the plaintiff, at any rate was statute barred and was therefore unmaintenable. Kaburu Bauni, J. upheld the objection by the defendant.

12. As I have observed earlier in this ruling the issue of whether a suit is time barred goes to the jurisdiction of the court to entertain the suit. Once a court determines a suit is time barred, the court is divested of jurisdiction and cannot entertain the suit.

13. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya makes it clear that the owner of land cannot bring an action to recover land after the expiry of 12 years from the date the cause of action accrued. Section 7 provides thus:

7. 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 him or, if it first accrued to some person through whom he claims to that person.

14. Justice Bauni held that the defendant had been on the suit land since 1966 and no action was commenced within 12 years by the plaintiff's late father to recover the land. By 1998 when the plaintiff's father died his right to recover the land, if at all he had any interest in it, had become time barred and the plaintiff could not properly resuscitate the action. On the basis of the holding by Kaburu Bauni, J. the instant suit is statute barred. I dare say that even if Kaburu Bauni, J. had not held the suit was statute barred I would on the facts have held the suit to be statute barred. There is absolutely no explanation why the plaintiff's father from 1966 never made any effort to recover the

land from the defendant. There is nothing to suggest there was any attempt made by the plaintiff's father to recover the land from the plaintiff. There is also absolutely no evidence to support the assertion by the plaintiff that his father had permitted the defendant to occupy the land. The claims of fraud are hollow and unsupported not to mention that no particulars have been pleaded. I see the instant suit as a fishing expedition by the plaintiff seeking to wrestle the suit land, which he probably genuinely believes was allocated to his father, from the defendant. The plaintiff however has come too late in the day and his claim is unsustainable on account of delay in bringing the same.

15. On the whole, it is my holding and finding that the present suit is **res judicata** as the issues in Kisii HCCC No. 65 of 2003 were directly and substantially the same as in the present suit. I accordingly, order the suit dismissed and award the costs of the suit to the defendant.

16. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 23RD DAY of NOVEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for the plaintiff

Mr. Morara for Achoki for the defendant

Saitoti Court assistant

J. M. MUTUNGI

JUDGE