



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC CASE NO. 188 OF 2017**

**JULIUS NJUGUNA NDUATI.....PLAINTIFF**

**VERSUS**

**JAMES MACHARIA NJUGUNA.....1<sup>ST</sup> DEFENDANT//RESPONDENT**

**PAUL NGATIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOHN KAMBO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE COUNTY SURVEYOR**

**UASIN GISHU COUNTY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE COUNTY LANDS REGISTRAR**

**UASIN COUNTY.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This Ruling is in respect of an application dated 22<sup>nd</sup> April, 2017 seeking for striking out of the plaint dated 28<sup>th</sup> April 2017 on the ground that it is res judicata. Counsel agreed to canvass the application by way of written submissions which they filed.

**APPLICANT'S SUBMISSIONS**

Counsel submitted that the suit is res judicata as it meets the ingredients as provided for under Section 7 of the Civil Procedure Act which prohibits a court from trying any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they claim.

Counsel submitted that in **Eldoret HCCC NO.93 of 1977** the Plaintiff JOSEPHAT GITAU & 29 OTHERS which included the plaintiff herein and the defendants of which the issue before the court was the subdivision of the former suit parcel No.LR.838/3 prior to the subdivision. That the issue before the court was the manner of distribution of the shares to the members including the plaintiff herein.

The court record indicates that there was a consent of all the parties that the documents including the title deeds be released to the then DC Eldoret for subdivision and registration of the plots as per the proposed plans whereby the plaintiff was awarded a total of 0.42 hectares. The order is dated 23/11/84.

Counsel further submitted that another consent was recorded vide *HCC MISC.APPL NO.3 OF 1984. GITHIA FARM VS JULIUS NDUATI (PLAINTIFF) BEFORE VV PATEL J.* where the parties were represented including the AG. The consent was to the effect the 1<sup>st</sup> Respondent Julius Nduati the plaintiff herein be declared a shareholder of Githia Farm owning the share and plot that he was occupying.

The 1<sup>st</sup> Respondent was at liberty to carry out the process of survey to carve out his portion. The plaintiff made an application for review of the order and the same was dismissed by the judge on 14/10/95 on the grounds that the application was an afterthought and lacked merit.

It was Counsel's submission that the plaintiff herein further filed appeal vide Nakuru Civil Appeal No.134 of 1985 which was heard by a 3

Judge bench and the same was dismissed.

Further that the plaintiff filed a case against the administrator of *ZAKARIA MWANGI KAMBO (LUCY NYOKABI MWANGI)*. *VIDE SPMCC NO.490 OF 2004*. The same was heard and dismissed on 21/9/10. Being dissatisfied with the judgment the plaintiff filed an Appeal vide *Kitale HC E&L Appeal No.24 of 2010*. which was also dismissed. Counsel therefore urged the court to strike out the plaintiff's plaint.

### **RESPONDENTS SUBMISSIONS**

The Respondent opposed the application on the ground that the issue raised are totally different from those in previous suits and that failure of the applicant to annex the whole pleadings is fatal. Counsel prayed that the application be dismissed with costs.

### **ANALYSIS AND DETERMINATION**

The application is for striking out of the plaintiff's suit on the ground that it is res judicata. The ingredients of res judicata are as provided for under Section 7 of the Civil Procedure Act.

The issue for determination is as to whether the current suit is res judicata. The defendants have been helpful in giving a chronology of the suits and events in respect of the suit land and the parties involved.

The plaintiff herein has filed many cases in respect of this suit land in various courts in Eldoret, Kitale and Nakuru unfortunately he has been losing his bid to enforce his purported rights.

A party should not be allowed to litigate by installments or piecemeal. A party should put his act together and claim in whole not taking parties in circles.

I have looked at the pleadings and the cases mentioned and find that the plaintiff has been litigating in respect of the same subject matter and the same parties. In other instances, they have recorded consents which have not been set aside.

The question whether the subject matter in this proceedings being plot number 3A within Gitiha Farm and the entire Farm (I-R NO 838/3) was once subject to litigation between the plaintiff and the defendants can be answered in the affirmative from the chronology given above. The plaintiff has litigated in different court namely Eldoret, Kitale and Nakuru in respect of the same subject matter.

The plaintiff was given an opportunity to curve out his portion of the land where he occupies but did not take the option. He should not be allowed to use the courts on matters that have been tried by competent courts and finalized. This is what we call an abuse of the court process.

If the plaintiff is not stopped on his tracks, then he will fit the description of a vexations litigant. This part I leave to the AG who has the mandate of filing an application to declare one as such. The AG also supported the striking out of the plaintiff's suit on the ground that it is Res judicata.

The court should sparingly strike out cases but when the abuse is glaring then it should act decisively to save the integrity of the court.

Having considered the submission of Counsel and the relevant judicial authorities I find that the plaintiff's case is res judicata and is therefore dismissed with costs.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of November, 2018**

**M.A ODENY**

**JUDGE**

**RULING READ** in open court in the presence of Plaintiff and Defendants, and Mr.Wambiri for 4<sup>th</sup> and 6<sup>th</sup> defendants and in the absence of Mr. Mwaka counsel for Plaintiff/Respondents and Wanyonyi for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

M/s Koech – Court Assistant

**M. A. ODENY**

**JUDGE**