



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT AND LAND CASE NO.56 OF 2015

TOM CHEBUNGWEN NDIWA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....1ST DEFENDANT

MANAGEMENT COMMITTEE KIBOGO PR. SCHOOL.....2ND DEFENDANT

MANAGEMENT COMMITTEE KIBOGO SEC. SCHOOL..3RD DEFENDANT

CABINET SECRETARY NATIONAL TREASURY.....4TH DEFENDANT

JUDGEMENT

By an amended plaint dated 16th June 2017 and filed herein on the same day, TOM CHEBUNGWEN NDIWA (the plaintiff herein and suing as the Administrator of the Estate of his late father NDIWA CHEBUNGWEN) sought judgement against the defendants in the following terms:

(a) Cancellation of the registration of the 4th defendant as owner the land parcel **No. ELGON/KAPSOKWONY/409** and the same to revert to the name of the late **NDIWA CHEBUNGWEN**.

(b) Compensation for the irregular registration of the land parcel **No. ELGON/KAPSOKWONY/409** in the names of the 4th defendant.

The Plaintiff's claim is premised on the pleading that his late father **NDIWA CHEBUNGWEN** (the deceased herein) was at all material time the original owner of the land parcel **No. ELGON/KAPSOKWONY/409** (the suit land) before it was registered under the names of the **BUNGOMA COUNTY COUNCIL** whose assets have now been taken over by the 1st defendant. That the 2nd and 3rd defendants have constructed schools by the suit land and during the pendency of this suit and with the connivance of the 1st, 2nd and 3rd defendants, the 4th defendant has now registered himself as the trustee of the suit land since 15th May 2017.

The 1st defendant denied in its defence that the deceased was at any one time the owner of the suit land adding that the defunct **BUNGOMA COUNTY COUNCIL** was the first registered proprietor of the same and if the deceased was entitled to any compensation, the plaintiff must strictly prove the same.

The 2nd and 3rd defendants similarly denied the plaintiff's averments adding that there was a previous suit over the same subject matter in 1972 between the plaintiff's mother and the 1st defendant which was decided in favour of the latter.

That this suit is *res judicata* and the plaintiff has no locus to prosecute it. That the suit land was registered in the names of the then **BUNGOMA COUNTY COUNCIL** in 1966 and no objection was raised by the deceased. The 2nd and 3rd defendants denied any agreement as regards compensation for that suit land and added that this suit is infact statute barred.

The 4th defendant filed no defence although I think they are ably represented by the 2nd and 3rd defendants.

The plaintiff testified and called one witness in support of his case and asked the Court to rely on his statement dated 11th May 2015 as well as his list of documents dated the same day and a further list of documents dated 23rd May 2018. In that statement, he states that he is the

son of the deceased who died in 1965 owning 13 acres of land but during the registration period, he was only registered as the proprietor of the suit land measuring 2.8 hectares. That it was the intention of the then **BUNGOMA COUNTY COUNCIL** to compensate the deceased for the land acquired from him but that was never done thus necessitating this suit.

His witness **DONALD WAMALWA MAMATI (PW2)** also asked the Court to rely on his statement dated 5th January 2016 in which he stated that the deceased originally owned land parcel **No. ELGON/KAPSOKWONY/266** out of which the 2nd defendant acquired 6.5 acres which was then registered in the names of the **BUNGOMA COUNTY COUNCIL** and designated as land parcel **No. ELGON/KAPSOKWONY/409**. He added that his father who owned land **No. ELGON/KAPSOKWONY/230** also surrendered 2.5 acres to the 2nd defendant but neither of the two were ever compensated.

The 2nd, 3rd and 4th defendant did not call any witnesses.

There 1st defendant called as its witness the Elgon Ward Administrator **ZADOCK MWANGA (DW1)** who similarly adopted as his evidence the statement dated 11th June 2015 as well as the certificate of search showing that the suit land is registered in the names of the 4th defendant. He added that the previous owner of the suit land was fully compensated by the then Bungoma County Council and that at no time did the deceased have any proprietary interest in the suit land and neither was there any promise to compensate him.

Submissions have been filed both by the firm of **OMUKUNDA & COMPANY ADVOCATES** appearing for the plaintiff jointly with **MAKALI & COMPANY ADVOCATES** while **Mr. OCHARO KEBIRA & COMPANY ADVOCATES** appeared for the 1st defendant.

I have considered the evidence by both parties as well as the submissions by Counsel.

The defendants have in their pleadings raised the issue that this suit is not only *res judicata* but also statute barred. Those are issues that go to the jurisdiction of this Court and I must determine then at the earliest opportunity. Indeed the 2nd and 3rd defendants through the Attorney General filed a Preliminary Objection on 4th June 2016 pleading, inter alia, that this suit is time barred and brought contrary to the express provisions of **Section 7 of the Limitation of Actions Act** which prohibits the filing of a suit to recover land after a period of 12 years.

However, this preliminary Objection was not raised prior to the trial nor even the plea of *res judicata*. They have however been raised in the submissions by Counsel for the 1st defendant.

With regard to the plea of *res judicata*, Counsel for the 1st defendant has submitted as follows:

“The plaintiff in his evidence under cross – examination made a confession that his mother had sometimes back sued the COUNTY COUNCIL OF BUNGOMA for recovery of the subject land. He further stated that the suit by his mother was not allowed. Important to note that the plaintiff totally refused to state the number of the case and/or produce the pleadings, proceedings and judgement thereof”.

That may be correct. However, it was not the plaintiff who pleaded *res judicata*. It was the defendants who pleaded that this suit is *res judicata* and it was therefore their duty to lead evidence showing that the suit land was indeed the subject of a previous suit involving the parties herein or their privies and that the same was heard and determined by a competent Court. That is what *res judicata* which is provided for in Section 7 of the Civil Procedure Act is all about.

The burden to prove *res judicata* was on the defendants and not the plaintiff. Section 109 of the **Evidence Act** makes that very clear in the following terms:

“The burden of proof as to any particular fact lies on the person who wishes the Court to behave in it’s existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

Without the evidence of which previous suit were filed by the Plaintiff’s mother, in which Court, against who, and the final decision made thereon, the defendants cannot establish that this suit is *res judicata*. That plea is therefore rejected.

On the issue of limitation, it is clear from the plaint that the plaintiff seeks to persuade the Court to cancel the registration of the 4th defendant as the proprietor of the suit land. This is what the plaintiff has pleaded in paragraph 9(a) of the amended plaint:

9(a) “The registration of the 4th defendant was irregular under the law and no land Control Board consent was sought and obtained as required”

From the copy of the title deed to the suit land which is among the documents filed by the 2nd and 3rd defendants, and which is not controverted, the suit land was registered in the names of the 4th defendant on 15th May 2017 when the said title deed was issued. Clearly therefore, the plea of limitation cannot be sustained.

I therefore make a finding that the plaintiff’s suit is neither *res judicata* nor is it caught up by the Limitation of Actions Act.

I shall now consider the merits or otherwise of the plaintiff’s claim against the defendants.

The plaintiff's claim is that the suit land previously belonged to the deceased and was unlawfully allocated to **KIMOBO PRIMARY SCHOOL** by the then **BUNGOMA COUNTY COUNCIL** with a promise of compensation which was never done. This is what he has stated in his statement dated 11th May 2015:

“That my late father was the owner of parcel of land measuring approximately 13 acres of land. That during land registration he was only registered on a parcel of land which was given No. ELGON/KAPSOKWONY/266 measuring 2.8 hectares.”

In paragraph 6 of the amended plaint, the plaintiff pleaded as follows:

“That the late NDIWA CHEPUNGWEN was the original owner of land parcel No. ELGON/KAPSOKWONY/409 before it was registered”

Having alleged that the suit land belonged to the deceased, it was incumbent upon the plaintiff to lead evidence to prove that ownership. Sections 107, 108 and 109 of the **Evidence Act** place the burden of proving that fact on the plaintiff. Those provisions provide as follows:

107(1) *“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”*

(2) *“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”*

108 *“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

109 *“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”*

Apart from the bare averments quoted above, the plaintiff did not place any evidence before this Court, direct or circumstantial, as proof that the deceased was the proprietor of the suit land or any part thereof. When he was cross examined by **Mr. OCHARO** on this important issue, all he could say was that the suit land belonged to the deceased and that even his (Plaintiff's) mother had filed proceedings against the 2nd and 3rd defendants for putting up a school on the said land which was previously known as **ELGON/KAPSOKWONY/266**. However, the plaintiff did not place before the Court any evidence in support of those allegations. It should have been very easy to avail the pleadings of the suit between his mother and the 2nd and 3rd defendants if any suit existed. And if the suit land was carved out of land parcel **No. ELGON/KAPSOKWONY/266**, nothing would have been easier than for the plaintiff to avail evidence that the said land belonged to the deceased or indeed any member of his family. Since the suit land is registered, and obviously also the original land parcel **No. ELGON/KAPSOKWONY/266**, if the plaintiff's evidence is to be believed, then it was incumbent upon him to produce the document of title in the deceased's names under any of the legal regimes under which land is registered in this Country. No such document was produced before this Court. One does not lay a claim to registered land by word of mouth. That is what the plaintiff has tried to do in this case and this Court must disabuse him of that notion. Clearly therefore, the plaintiff has failed to prove that the deceased was the proprietor of the suit land nor had any interest therein known in law.

The plaintiff also pleaded in paragraph 9 of his amended plaint that the then **BUNGOMA COUNTY COUNCIL** promised to compensate the deceased by paying him the value of his land measuring 6.5 acres. It is not clear how this promise was made, when and by whom. Surely a promise of this magnitude could not have been made orally especially by a Government Institution.

Assuming that the Plaintiff's complaint is that the suit land was compulsorily acquired and no compensation was paid, that would only have been done under the now repealed **Land Acquisition Act (CHAPTER 295 LAWS OF KENYA)**. The procedure for such acquisition is clearly laid down in section 6 of the repealed law and includes the publication of a Gazette Notice to be served upon all persons interested in the land to be compulsorily acquired. Similarly, provisions are found in Section 107 and 110 of the new Land Act. If therefore there was any such compulsory acquisition of the suit land, the plaintiff should have placed before this Court any supporting documents to that effect.

That has not been done and even if this Court were to find in favour of the plaintiff, there would be no evidence to guide me in assessing such compensation.

The up-shot of the above is that after considering all the evidence in this case, I find that the plaintiff has not proved his case against the defendants. He is not therefore entitled to the orders sought in his amended plaint. His case is accordingly dismissed with costs to the 1st defendant only.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018

Judgement dated, delivered and signed in open Court this 15th day of November 2018 at Bungoma.

Mr. Ocharo for 1st defendant present

Mr. Makali for the plaintiff present

Plaintiff present.

Right of appeal.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018