



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 21 OF 2004

KEFA WERE.....PLAINTIFF

VERSUS

BENEDICT CHEPKERING.....DEFENDANT

R U L I N G

1. By a Notice of Preliminary Objection dated **21st May, 2018** the plaintiff raises an objection to the validity of the counter-claim arguing that the court has no jurisdiction to hear and determine the matter as it is *res judicata* as:-

(a) The dispute herein relating to ownership of plot No. 300 KOSPIRIN SETTLEMENT SCHEME was settled by Kwanza Land Disputes Tribunal which ruled in favour of the plaintiff herein.

(b) The Award of the Tribunal was subsequently adopted as an Order of the court in SPMCC Land Case No. 54 of 2003 and a decree issued on 25/6/2004.

(c) That the decree was never challenged neither has it been set aside and/or quashed by a court of competent jurisdiction.

On that basis, the plaintiff prayed that the counter-claim herein should be dismissed with costs.

2. The defendant relied on her replying affidavit sworn on 23rd July, 2018 in her opposition to the preliminary objection. According to the defendant, the dispute is not *res judicata* and that the court has jurisdiction to hear and determine it. It is the defendant's contention that the preliminary objection was not raised at the earliest opportune moment as it has been raised after about 14 years since the suit was filed.

3. The defendant, relying on advice posits further that the Kwanza Land Disputes Tribunal had no jurisdiction to hear and determine the dispute relating to land under Land Adjudication and Settlement. The defendant contends that the present dispute involved land which was under adjudication section under the Settlement Department of the Ministry of Lands and the Land Adjudication Act had its own mechanisms of resolving disputes such as the present one.

4. The defendant deposes that she was never served with the court order that was allegedly made on 17/12/2002 and that even if the plaintiff obtained such orders, the plaintiff filed this suit on 3/2/2004 before six months lapsed from the date of the order and that the defendant had legitimate expectations to ventilate the issues therein in this suit.

5. Again relying on advice, the defendant avers that there were two options to challenge the decision of the Tribunal, either to appeal to the Provincial Disputes Tribunal or filed a Judicial Review within six months in the High Court. It is the defendant's contention that she chose to challenge the issue in the present case because the plaintiff filed the present suit on 3/2/2004 even before six months had lapsed. The defendant argues that if the plaintiff was serious about the court order he would have sought to execute it instead of filing the present suit.

6. The defendant posits further that the preliminary objection is an abuse of the court process and has been brought after inordinate delay and is not brought in good faith and therefore ought to be dismissed with costs. The defendant urged the court to hear her counter-claim against the plaintiff who has withdrawn his suit against the defendant.

7. In his submissions, Mr. Waweru, counsel for the plaintiff submitted that the dispute over the suit property, Plot No. 300 Kospirin Settlement Scheme was determined by the Kwanza Land Disputes Tribunal whose award was adopted as an order of the court in **Kitale SPMCC Land Case No. 54 of 2003** and subsequently a decree issued on 25th June, 2003. That the judgment or decree in **SPMCC Land Case No. 54 of 2003** has never been set aside. It is his submission that in the circumstances, the counter-claim is *res judicata* and should be dismissed with costs.

8. Mr. Sambu, learned counsel for the defendant relied on the replying affidavit filed. He submitted that the Tribunal did not have

jurisdiction to determine the dispute between the parties because **Section 2 of the Land Disputes Tribunal Act** (now repealed) excluded Land under the Land Adjudication Act. He submitted that the objection had been raised belatedly.

9. In response, Mr. Waweru submitted that the counter-claim was only filed on 7th November, 2016 despite the order allowing the filing given on 24th July, 2007. He added that the defendant was aware of the decree resulting from the tribunal case and urged the court to look at the affidavit on record sworn by the defendant on 5th December, 2009.

10. I have considered the preliminary objection, the replying affidavit and the submissions made. The only issue for determination is whether the defendant's counter-claim herein is *res judicata*.

11. The doctrine of *res judicata* has been sufficiently decided upon by courts of law. The substantive law on *res judicata* is found in **Section 7 of the Civil Procedure Act Cap 21** which provides that:-

“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”.

12. The doctrine of *res judicata* is important in adjudication of cases and serves two important purposes; (1) it prevents multiplicity of suits which would ordinarily clog the courts and cause parties to incur unnecessary costs to litigate and defend two suits which ought to have been determined in a single suit; and (2) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

13. The test in determining whether a matter is *res judicata* was stated and is summarized in ***Bernard Mugo Ndegwa -vs- James Nderitu Githae & 2 Others [2010] eKLR*** as follows: (1) that the matter in issue is identical in both suits; (2) the parties in the suit are the same; (3) sameness of the title/claim; (4) concurrence of jurisdiction; and (5) finality of the previous decision.

14. In the case of ***Nancy Mwangi T/A Worthlin Marketers -vs- Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR*** it was stated:-

“Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings - of the previous case and the instant case - to ascertain; (1) what issues were really determined in the previous case; and (2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

15. The plaintiff instituted this suit via the plaint dated 3rd February, 2004 in which he claimed that he was allocated Plot No. 300 Kosprin Settlement Scheme in 1998 and sought an injunction to restrain the defendant from interfering with the said plot.

16. In the amended statement of defence and counter-claim dated 4th November, 2016 and filed on 7th November, 2016, the defendant denied the plaintiff's claim and contended that she was allocated the suit land in 1986. In the amended defence and counter-claim, the defendant has pleaded that the plaintiff proceeded and secretly instituted a land claim against her at Kwanza Location Land Disputes Tribunal which Tribunal in its decision dated 1st April, 2003 which was adopted as judgment of the court in ***Kitale SPMCC Land Case No. 54 of 2003*** ordered that the suit piece of land be transferred to the plaintiff herein. In addition, the defendant in the counter-claim is seeking an order of declaration that the tribunal had no jurisdiction to entertain the plaintiff's claim. In her affidavit sworn on 5th December, 2009 and filed on 14th December, 2009, the defendant has deponed that in her statement of defence and counter-claim she has sought to challenge the award of the panel of elders, Kwanza Division adopted as the judgment of the court in ***Kitale SPMCC Land Case No. 54 of 2003***.

17. From the foregoing, it is not in dispute that the plaintiff filed his claim against the defendant before the Land Disputes Tribunal to assert his right of ownership or title to Plot No. 300 Kosprin Settlement Scheme. The law existing at the time provided for an avenue for appeal for any party dissatisfied with the decision of the Land Disputes Tribunal. A party who was dissatisfied could also move to the High Court by way of Judicial Review to quash the decision of the Land Disputes Tribunal, including raising the issue of jurisdiction. The defendant herein has not taken either of the avenues stated above. Instead, the defendant has filed the counter-claim in this suit challenging the decision of the Land Disputes Tribunal. In my view, this court is not seized of the jurisdiction to re-examine the merits of that decision and it would be futile to do so in this suit. The defendant is litigating under the same title and the plaintiff was the same. The subject matter of the suit before the Tribunal which was adopted as an order of the court in ***Kitale SPMCC Land Case No. 54 of 2003*** was Plot No. 300 Kosprin Settlement Scheme. There is no evidence that the land was under an adjudication section as submitted by the defendant.

18. The ***Court of Appeal in Njue Ngai -vs- Ephantus Njiru Ngai & Another [2016] eKLR*** considered the issue whether a suit filed by the appellant was *res judicata* after the matter had been decided by the Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee. The Court of Appeal held that the fresh suit was *res judicata* and stated that:-

“The fresh suit filed by Njue was christened a “declaratory suit” which he contended was an alternative to “Judicial Review”. By whatever name called, it was anew suit and, as earlier stated, he was time barred in filing a Judicial Review Application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cu-de-sac).....it is clear to us, as it was to the trial court, that the declaratory suit raised the same or substantially the same issues decided before the Appeals Committee and confirmed by the High Court in dismissing the appeal. The filing of it was in breach of Section 7 of the Civil Procedure Act and a matter that

satisfies the tests for a defence of *res judicata* as stated above”.

19. It is clear to me that the defendant’s counter-claim herein raises the same issues decided before the Kwanza Land Disputes Tribunal which was adopted as an order of the court in *Kitale SPMCC Land Case No. 54 of 2003*. The filing of it was in breach of **Section 7 of the Civil Procedure Act** and is a matter that satisfies the tests for a defence of *res judicata*.

20. The upshot of this is that the preliminary objection is merited and is upheld. The defendant’s counter-claim herein is incompetent and is an abuse of the court process. The same is dismissed with costs.

Dated, signed and delivered at Kitale on this 6th day of December, 2018.

C. K. YANO

JUDGE

6/12/2018

Coram:

Before - C.K. Yano, Judge

Court Assistant - Collins

Plaintiff present in person

Defendant present in person

ORDER

Ruling delivered in open court in the presence of the plaintiff and the defendant and in the absence of their advocates.

C.K. YANO

JUDGE

6/12/2018