



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 296 OF 2014

BENARD OTIENO ALOSI.....1ST PLAINTIFF

JAMES OKOTH NYAMWAYA.....2ND PLAINTIFF

(Suing as administrator of the estate of ERASTUS NYAMWAYA ALOSI

VERSUS

KEPHA OMULO OPAP.....1ST DEFENDANT

JOHN ONGIRI ARIWO.....2ND DEFENDANT

LAND REGISTRAR HOMABAY.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

1. The 1st and 2nd defendants/applicants vide an application dated 14th October 2014 brought under Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act prays for orders that:-

(1) The plaint dated 1st August 2014 filed herein be struck out.

(2) Costs of the application and the suit be awarded to the applicant herein.

The application is based on the following grounds set out on the body of the application:-

(a) The plaintiff's action as filed herein is an abuse of the court process.

(b) There has been a suit heard on merit and determined between the 1st defendant Kepha Omulo Opap and the plaintiffs father Erastus Alosi Nyamwaya (deceased) being Oyugis PMCC No. 110 of 2010 where judgment was delivered on 20th September 2011 in the 1st defendant's favour and the late Erastus Alosi Nyamwaya ordered to vacate the suit parcel.

(c) In the circumstances, this suit is res judicata and it is in the interests of justice that the same be struck out.

(d) The plaint does not disclose certain material facts relevant of these proceedings.

(e) The plaint is otherwise scandalous, frivolous and vexatious.

The application is also supported on the annexed supporting affidavit sworn by the 1st defendant on 14th October 2014.

2. The plaintiffs filed a replying affidavit sworn by James Okoth Nyamwaya in opposition to the defendant's application. The plaintiff deny that their instant suit is *res judicata* Oyugis **PMCC No. 110 of 2010 Kepha Omulo Opap –vs- Erastus Alosi Nyamwaya**. The plaintiffs state that the Oyugis matter related to land parcel number **West Karachuonyo/Kanjira/1336** owned by the 1st defendant and which was a subdivision out of land parcel **Karachuonyo/Kanjira/925** which had been registered in the name of Hezekiah Ariwo Opap who was the 1st and 2nd defendants' father. The plaintiffs state that the issues in the instant suit relate to Plot No. 26 which was allocated to their late father by the defunct South Nyanza County Council. The plaintiffs' state that Plot No. 26 was within land parcel **West Karachuonyo/Kanjira/926** registered in the name of South Nyanza County Council and which was reserved for Pala Market. The plaintiffs thus contend that land parcel **West Karachuonyo/Kanjira/1336** which originated from land parcel **West Karachuonyo/Kanjira/925** and which was the subject matter in the Oyugis Magistrate's Court has no relationship with Plot No. 26 Pala Market which formed part of **West Karachuonyo/Kanjira/926**. On that account the plaintiffs deny the assertion by the instant suit is *res judicata*.

3. In the suit before the Oyugis Principal Magistrates Court, the 1st defendant who was the plaintiff in the suit sought a declaration that he was the owner of land parcel **West Karachuonyo/Kanjira/1336** and the eviction of Rastus Alosi Nyamwaya (deceased father of the plaintiffs herein). The court decreed that the defendant (Rastus Alosi Nyamwaya) vacates land parcel number **West Karachuonyo/Kanjira/1336** and granted a permanent injunction.

4. The plaintiff in the instant suit claim ownership of Plot No. 26 Pala Market which they claim is comprised in land parcel number **West Karachuonyo/ Kanjira/926** registered in the name of South Nyanza County Council. The said land parcel 926 which measures **2.6hectares** was reserved for Pala Market as per the copy of official search included in the plaintiffs' bundle of documents. The plaintiff has exhibited a plot rent card issued by the county council on 11th October 1990 which confirms Erastus N. Alosi as the allottee of Plot No. 26 Pala Market. The plaintiffs by the plaint seek a declaration that Plot No. 26 Pala Market belongs to the plaintiff and further seek a declaration for the demarcation of the boundary between land parcel **West Karachuonyo/Kanjira/1336** and Plot No. 26 Pala Market.

5. The defendant's application dated 14th October 2014 was argued by way of written submissions. The defendants submissions dated 1st November 2016 were filed on 29th November 2016 and the plaintiffs/respondents submissions dated 23rd November 2016. I have reviewed the pleadings and the parties filed pleadings and the issues that call for determination are firstly, whether the instant suit is *res judicata* on account **Oyugis PMCC No. 110 of 2010 Kepha Omulo Opap –vs- Erastus Alois Nyamwaya** and secondly, whether the plaintiffs suit raises a triable issue against the defendants.

6. The plaintiffs do not dispute that the 1st defendant is the registered owner of land parcel **West Karachuonyo/Kanjira/1336** which the evidence shows was a subdivision from **West Karachuonyo/Kanyira/925**. A copy of mutation form included in the bundle of documents shows parcel 925 was subdivided to create parcels 1334-1342. Land parcel **West Karachuonyo/Kanjira/1336** measuring 0.83hectares was registered in the name of Kepha Omulo Opap on 17th June 2010 as per the annexed copy of the title deed. An abstract title (green card) of parcel 1336 furnished by 3rd defendant affirms that parcel 1336 was a subdivision of Plot No. 925. The same abstract of title issued on 2nd September 2015 confirms title of land parcel 1336 was closed on 21st November 2014 on subdivision to create land parcels 1464 and 1465. Further the abstract of title of land parcel 926 shows that the land was registered in the name of South Nyanza County Council on 18th June 1970 and reserved for Pala Market.

7. The doctrine/principle of *res judicata* is espoused under Section 7 of the Civil Procedure Act, cap 21

Laws of Kenya which provides thus:-

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 claims, litigating under the same title, in a court competent or 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.”

The court in the case of **E. T –vs- Attorney General & Another [2012] ekLR** aptly stated the rationale of the doctrine of *res judicata* thus:-

“The rationale behind the said doctrine of res judicata and issue of estoppels is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be reopened. The rule of res judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.”

The court went further to state thus:-

“For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of **Karia and Another –vs- The Attorney General and Others [2005] 1 E. A 83, 90).”**

8. In the present case the plaintiffs claim Plot No. 26 allocated to them by the South Nyanza County Council at Pala Market. They claim their plot is comprised in land parcel **West Karachuonyo/Kanjira/926** owned by South Nyanza County Council and reserved for Pala Market. There is no dispute as to the allocation of the plot by the council to the plaintiffs. The South Nyanza County Council was not a party in the suit before the Oyugis Magistrates Court and neither are they made a party in the present suit. There is evidence that the South Nyanza County Council (now Homa Bay County) allocated Plot No. 26 to the person from whom the plaintiffs’ father bought the plot. Is this plot within parcel 926 which is owned by the council and was reserved for Pala Market or is it within land parcel 1336 owned by the 1st defendant? The South Nyanza County Council could not allocate a plot in land parcel 925 which did not belong to them. They could only have allocated a plot in land parcel No. 926 which was owned by the council and reserved for Pala Market.

9. Although the suit before the Oyugis Magistrates Court related to trespass onto land parcel 1336 there was no technical or expert evidence to show that the plaintiffs Plot No. 26 was actually in parcel 1336. In my view, a surveyor’s report would have been required to establish the plot was not in parcel 926 but in parcel 925 (now parcel 1336 following subdivision). In the present suit my view is that the issue is one that touches on the establishment and fixing of the parcel boundaries which neither the Oyugis Court or this court can determine without the assistance of the land registrar and the surveyor and perhaps also the physical planner from the County Government of Homa Bay. Prayer (c) of the plaintiffs’ plaint captures this issue aptly as it seeks the demarcation of the boundary as relates to parcel 1336 and Plot No. 26 Pala Market.

10. In the premises, I am of the view that the issue that calls for determination in the instant suit though in issue in the Oyugis Magistrate’s Court, was not determined and the magistrate would not have had the jurisdiction to determine the same as issues relating to establishment and fixing of boundaries fall under the mandate of land registrar both under the provisions of the repealed Registered Land Act, Cap 300 Laws of Kenya (Section 21) and the provisions of Section 18 of the Land Registration Act, No. 3 of 2012.

Section 18 (2) of the Land Registration Act, 2012 provides:

18(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

Section 21 (4) of the repealed Registered Land Act, cap 300 Laws of Kenya provided:

21(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

It is evident that the law recognizes that the court lacks the technical ability to determine disputes relating to boundaries and that explains why the land registrar and the surveyor are given that mandate expressly under the law since they are the ones who possess the technical ability to do so.

11. I am accordingly not persuaded this suit is *res judicata* as pleaded by the defendants. Equally I am satisfied the suit raises a triable issue that calls for determination of the respective boundaries of the parcels in dispute. I therefore decline to grant the orders sought in the defendants Notice of Motion dated 14th October 2014 and order the same dismissed with no order as to costs.

12. As the land the subject matter of this suit falls within the jurisdiction of the recently established Migori Environment and Land court, I order and direct that this file be transferred to Migori Environment and Land Court for hearing and determination.

Ruling dated, signed and delivered at Kisii this 31st day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyachiro for Onyore for the 1st and 2nd plaintiffs

N/A for the 1st and 2nd defendants

N/A for the 3rd and 4th defendants

Milcent Court assistant

J. M. MUTUNGI

JUDGE