



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 93 OF 2016

SAFARI KATANA NZAI.....PLAINTIFF

=VERSUS=

KAHINDI KITSAO CHAI..... DEFENDANTS

KENGA KAHINDI KITSAO CHAI

RULING

1. On or about 26th April 2016, the Plaintiff Safari Katana Nzai filed this case against the two defendants, namely; Kahindi Kitsao Chai and Kenga Kahindi Kitsao Chai. In his pleadings, the Plaintiff avers that he is the one and only son of one Katana Nzai Kombo (now deceased). In or about 1956, the Plaintiff's now deceased father bought a parcel of land measuring approximately 110 acres in Vitsapuni Village, Ganze in Kilifi County from one Ngumbao Mwarandu where according to the Plaintiff, he has lived quietly and uninterrupted ever since, he has erected permanent and temporary structures, carried on farming and buried his dead relatives. In recent times however, the Defendants have encroached on the Plaintiff's said parcel of land "and have started selling, constructing, sub-dividing and burning charcoal on the parcel of land without the consent of the plaintiff.

2. Contemporaneous with the plaint, the Plaintiff filed a Notice of Motion application dated 22nd April 2016 seeking, inter alia the following

(i) THAT a temporary injunction be issued restraining the defendants by themselves, agents, employees, servants and/or assigns from selling, trespassing, evicting, sub-dividing, alienating, burning charcoal and/or undertaking any form of construction on the plaintiff's surveyed parcel of land in Vitsapuni Village, Ganze, Kilifi measuring approximately 110 acres, or in any other way or manner interfering with the said parcel of land, pending the hearing and determination of this application herein(sic)

(ii) THAT a temporary injunction be issued restraining the defendants by themselves, agents, employees, servants and/or assigns from selling, trespassing, evicting sub-dividing, alienating, burning charcoal and/or undertaking any form of construction on the plaintiff's unsurveyed parcel of land in Vitsapuni Village, Ganze Kilifi measuring approximately 110 acres, or in any other way or manner interfering with the said parcel of land, pending the hearing and determination of this suit.

3. Upon receipt of Summons, the Defendants moved to court on 23rd May 2015 and filed both a

Statement of Defence and a Notice of Preliminary Objection. In their Statement of Defence, the Defendants deny knowledge of and/or connection with one Katana Nzai Kombo (the Plaintiff's father) and more particularly knowledge of the fact that he bought the alleged or any property in Vitsapuni village measuring 110 acres. The defendants however aver that they are beneficial owners of a property at Vitsapuni measuring approximately 48 acres which property they bought from one Charo Chea Kathima. It is the defendant's position that their said property has suffered occasional illegal incursions from trespassers including the Plaintiff who was at one time summoned by the (Area) Chief and was warned to desist from such trespass. Ultimately, the Defendants aver that this matter is res judicata as it was heard and decided before the Land Disputes Tribunal Ganze and a decision was made in favour of the 1st Defendant as against the father of the plaintiff. The said Tribunal decision was later adopted as a Judgement of the court in Kilifi SRMC in land Case No. 2 of 2003. The Notice of the Preliminary Objection to the suit and the Motion herein echoes this averment and concludes that this matter is accordingly not properly before this court.

4. On 11th July 2016 when the Notice of Motion application came up for hearing, it was agreed by the parties that the Preliminary Objection dated 23rd May 2016 shall be argued together with the Motion. Parties were then allowed to file written submissions and authorities before the matter came before me on 20th February 2017.

5. I have read the pleadings filed in this suit. I have also considered the rival arguments made by Counsel for the Plaintiff and counsel for the Defendants. I have also read the authorities referred to me by counsel for the Plaintiff. Before I can deal with the issues raised in the application, I think it is proper that I first determine whether the Defendants properly raised the preliminary objection in this suit.

6. The law as regards what constitutes a preliminary point of law was restated in the oft-quoted case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696* where it was held at page 700E that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701B

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. Having considered all the issues that were raised by the parties to this suit, I do find that the respondents properly raised the preliminary objection. The object of the preliminary point of law raised by the respondents is to dispose of the suit by the Applicant. The Respondents have argued that the subject matter of the suit filed by the Applicant was the same one in Kilifi Land Disputes Tribunal under Reference No. OD/LND.8/2002 which matter was decided by the Tribunal in favour of the 1st Defendant as against the Plaintiff's father. It is the Respondents' argument that this decision was later adopted as a Judgment of the court in the Senior Resident Magistrates Court at Kilifi in Land Case No. 2 of 2003 which decision was never appealed.

8. Section 7 of the Civil Procedure Act provides as follows in regard to the doctrine of res Judicata:

“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 hard and finally decided by such court.”

9. A perusal of the proceedings before the Ganze Divisional Land Disputes Tribunal Reference No. OD/LND.8/2002 annexed to the Replying Affidavit sworn by the 2nd Defendant (and marked “KKKC1”) reveals that there was a dispute between one Charo Chea and Kitsao Nzai Kombe over a parcel of land whose particulars are not very clearly shown but which the Panel of Elders dealing appeared to be familiar with. In their decision apparently rendered on 6th September 2002(as per the date on the proceedings) the elders agreed that the land belonged to Charo Chea and that it would remain in the ownership of Kahindi Kitsao who had bought it. While the land is not clearly defined, a reading of the proceedings and the decision made clearly shows that the dispute relates to the suit land. Indeed a perusal of the pleadings herein reveal that the said Charo Chea to whom the land was awarded is the one from whom the defendants derive their title on the basis that they purchased the land. While the Plaintiff herein claims to be the son of the former owner of the land however, the proceedings and the defendants pleadings herein would appear to suggest that the dispute was actually between the said Charo Chea and a brother to the Plaintiff’s father one Kitsao Nzai Kombe.

10. Any doubt that the dispute concerned the parcel of land is indeed cleared when one looks at the Plaintiffs’ Supplementary Affidavit. First and foremost, it is instructive that the plaintiff acknowledges that the Defendants bought the land from the said Charo Chea (described therein as deceased). All that the Plaintiff disputes is that the said Charo Chea and his brother had a right to sell the land to the Defendants without the Plaintiff’s father’s consent. Second and more important, the Plaintiff annexed to the Supplementary Affidavit a letter dated 27th December 2013 from one Anderson P. Kahindi-Senior Chief Ganze Location and addressed to the Kilifi Environment and Land Court. The letter reads, in part as follows:

“The above named person had a land dispute which was resolved in the year 2003. The dispute has erupted again with new and enforceful(sic) evidence as follows:

(i) The Defendant of that case that time was Kitsao Nzai Kombe and was not the correct owner of the piece of land. The proper owner is Safari Katana Nzai (the Plaintiff) who is the son of the buyer-Katana Nzai Kombe now deceased.

(ii) The Panel of Elders who were in the tribunal that time were not trustworthy people as claimed.

(iii) The Original Owner of the land who sold that disputed land in 1956 is still alive and can give vivid evidence of that piece of land and still has a portion which is not yet sold upto date.

(iv)The case has been to the tribunal and panel of elders and cannot be handled locally anymore.”

11. A reading of the Senior Chief’s letter aforesaid dispels any notion that the dispute referred to herein could have been over a different parcel of land. It was the plaintiff’s contention that the proceedings annexed to the Affidavit have not been signed by the elders and that the court cannot rely thereon. I however take note of the fact that the award by the Tribunal was adopted and entered as a Judgement of the Senior Resident Magistrate Court at Kilifi in Land Disputes Case No 2 of 2003 annexed to the Replying Affidavit sworn by the second Defendant and marked as annexure “KKKC2” on 19th June 2003. Before adopting the same, the court must have considered them and found them worthy of adoption.

12. The Provision for a Land Disputes Tribunal award being adopted as an order of the court was in Section 7 of the Land Disputes Tribunal Act (now repealed) which stated as follows:

(i) The Chairman of the Tribunal shall cause the decision of the tribunal to be filed in the

Magistrates court together with any depositions or documents which have been taken or proved before the Tribunal.

(ii) The court shall enter Judgment in accordance with the Decision of the tribunal and upon Judgement being entered a decree shall issue and shall be enforced in the manner provided for under the Civil Procedure Act.

13. It is not disputed that the award of the tribunal was neither challenged nor appealed. In my view, by adopting the award of the Ganze Divisional Land Disputes Tribunal, the Senior Resident Magistrate's Court Kilifi clothed the award with the authority and finality of a court decision. Indeed, section 8(9) of the repealed Land Disputes Tribunal Act had provided clear procedures as to how the tribunal's award could be challenged, which was by way of an appeal to the High Court on questions of law and within a specified time. The plaintiff has not followed this procedure.

14. Commenting on the doctrine of res judicata, the court of Appeal in *William Koross-vs- Hezekiah Kiptoo Komen & Others, Civil Appeal No. 223 of 2013(2015) eKLR* had this to say:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful Litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

15. In the present circumstances, there really can be no serious doubt that the issues for determination in the matter before the Land Disputes Tribunal and those raised in this suit fall within the purview of res Judicata. True enough, the parties names are different, the plaintiff herein being the son or nephew (whichever the case) of the Respondent in the case before the Tribunal and the Defendants being the purchasers from the claimant in the Tribunal Case. However, the common denominator between the two cases is the issue of title or ownership of this apparently, unsurveyed land in Vitsapuni Village, Ganze in Kilifi County. Both the Claimant in the Tribunal and the plaintiff herein have laid a stake to the ownership of the property as the basis for the prayers sought. Ownership of the land is therefore directly and substantially in issue in both. As we have seen, the Tribunal awarded the dispute in favour of the Respondents and the same was adopted as a Judgment of Kilifi Senior Resident Magistrate's Court Land Dispute Case No. 2 of 2003.

16. In my view the rights of the parties with regard to all or any of the matters in controversy were conclusively determined by the Tribunal and in Kilifi SRMC Land Disputes Case No. 2 of 2003. Accordingly it is not open for me to revisit the issue as to do so would be visiting violence upon the doctrine of res Judicata as by law established.

17. The upshot is that I uphold the Preliminary Objection and strike out this suit with costs to the Defendant/Respondents.

Dated, delivered and signed at Malindi this 17th day of March 2017.

J. O. OLOLA

JUDGE