



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 22 OF 2015

JACKSON EKIM OMAIDO.....PLAINTIFF

-VERSUS-

LUCIA NGAIRA OMUNGA & 11 OTHERS.....DEFENDANTS

RULING

1. The second defendant/applicant brought a Notice of Motion dated **28th December 2015**, but filed in court on **12th September 2016**. The application seeks to have the suit by the plaintiff struck out on two grounds; namely that it is subjudice and that it is also res-judicata.

2. The applicant contends that the plaintiff had filed **Kitale ELC No. 9 of 2014**, against her and two others. That she and the two others raised a counter-claim. The suit was heard and determined. She was aggrieved by the judgement of the court and she preferred an appeal to the court of appeal. That the appeal to the Court of Appeal is pending and therefore the filing of the present suit is subjudice.

3. The applicant further contends that this suit is res-judicata because the issues which are being raised in this suit were raised in the previous suit and were finally decided or ought to have been raised.

4. The applicant's application is opposed by the Plaintiff/Respondent through grounds of opposition dated 17th September 2016, and filed in Court on 19th September 2016. The Respondent contends that the applicant's application is misconceived and is an abuse of the process of the court. That the suit is neither subjudice nor res judicata as there is no case pending before the court of Appeal judgement having been delivered on 4th March 2016. That the suit is not *res-judicata* as the previous case in the Environment and Land Court concerned a burial dispute.

5. I have considered the applicants application as well as the opposition to the same by the Plaintiff/Respondent. The only issue for determination in this application is whether the suit is subjudice or res-judicata.

6. I will first deal with the issue of subjudice. Section 6 of the Civil Procedure Act provides as follows;-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

7. The applicant is contending that there is a pending appeal touching on the same subject matter and

parties. What the applicant is referring to is Kisumu Civil Appeal No. 21 of 2015 between the applicant & 2 others and the Plaintiff. Though the present application is dated 28th December 2015, it was filed in Court on 12th September 2016. As at the time the application was filed, the pending appeal had been determined. The appeal was determined on 4th March 2016. To this extent, I do not find that the present suit is subjudice.

8. On the issue as to whether the suit is *res-judicata*. I need to quote the section of the Civil Procedure Act on which the principle is anchored. Section 7 of the Civil Procedure Act provides as follows;-

“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”.

9. In the former suit that ELC No. 9 of 2014, the current plaintiff had filed a suit against three widows of the late ***Collins Otwane Omunga***. The plaintiff wanted a permanent injunction restraining the widows from burying the remains of ***Omunga*** on his land. The widows also raised a counter-claim that the plaintiff was holding an equal share of the property in issue in trust for the deceased and his dependants including the three widows.

10. The Court found infavour of the plaintiff that the three widows had no right to bury their deceased husband on the plaintiff’s property. The Court also found that the plaintiff was not holding the land in trust for the deceased or his dependants. The three widows moved to the court of appeal which upheld the judgement of the court below.

11. In the instant suit, the plaintiff is seeking to evict two of the widows of the deceased including 10 others. The dispute in the former suit was a burial dispute which is quite different from the issue in the present case. I am aware there was a counter claim. As I have explained herein above, the aspect of the counter claim related to the deceased whose dependants wanted an order that the plaintiff was holding the suit property in trust for the deceased and his dependants in equal shares. The plaintiff in the present suit has sued 10 other defendants. There is no way the plaintiff would have been expected to raise a defence which would have addressed the issue of the trespass of the defendants in that burial dispute. I therefore find that this suit is not *res-judicata*.

12. For the reasons given herein above, I find that the applicant’s application lacks merit. The same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Signed at ***Nairobi***.

E.O.OBAGA

JUDGE

Dated, and delivered at ***Kitale*** on this ***6th*** day of ***March 2017***.

F. M. NJOROGE

JUDGE

In the presence of :-

Mr Teti for Plaintiff

M/s Wanyama for Mr Nyamu for 2nd Defendant

No appearance for the other defendants

Court Assistant : Isabella

F. M. NJORGE

JUDGE