



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 205 OF 2014

DAVID MWANGI MANYEKI.....PLAINTIFF

VERSUS

TARSIANA NTHUA NYAGA.....DEFENDANT

RULING

By his plaint filed herein on 2nd May 2006, the plaintiff sought the main order that the defendant, her family members, agents or servants do give vacant possession and/or remove themselves, their houses and/or structures and properties from land parcel No. NTHAWA/RIANDU/2229 (the suit land) within 30 days from the date of judgment and that in default, the defendant, her family members, houses and properties be forcefully removed and/or evicted from the suit land and that thereafter, the defendant, her family members, agents and/or servants be permanently restrained from entering upon, occupying, using and/or in any other manner interfering with the suit land and the plaintiff's use, occupation and exercise of plaintiff's proprietary rights over the said land.

The defendant filed a defence denying the claim and pleading in paragraph three (3) thereof, which is relevant for purposes of this ruling, that the parties had previously litigated over the same subject matter in **SIKAGO PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 37 of 2005** (the Siakago Case) in which a judgment was delivered on 19th April 2006 and the plaintiff ought to have filed an appeal against that judgment rather than a fresh case.

In a reply to that defence, the plaintiff pleaded that the Principal Magistrate's Court that heard the Siakago Case had no jurisdiction to determine the dispute and therefore, the plaintiff could not have appealed from the said judgment which arose from proceedings that were a nullity in law.

The defendant then filed a Preliminary Objection dated 28th February 2012 on the ground that this suit is Res-judicata. That Preliminary Objection is the subject of this ruling and on 10th May 2016 when this file was placed before me during my tour of duty at Embu High Court, it was agreed by **Mr. MUYODI** advocate for the plaintiff and **Mr. MOMANYI** advocate for the defendant that the Preliminary Objection would be canvassed by way of written submissions with **Mr. MOMANYI** filing his within seven (7) days and **Mr. MUYODI** also replying within the same period after service. The file would then be sent to **KERUGOYA ELC** to enable me draft the ruling.

From the record however, by the time the file was dispatched to me on 1st November 2016, only **Mr. MOMANYI's** submissions were on record. I have therefore not had the advantage of any submissions from counsel for the plaintiff.

The defendant's Preliminary Objection is premised on the fact that the parties herein have previously litigated over the same suit land in the Siakago Case in the same capacities. According to the plaint in

that case, the plaintiff filed **CIVIL SUIT No. 37 of 2005** seeking the following main order against the defendant:

“An order for eviction or a permanent injunction restraining the defendant from interfering with land parcel No. NTHAWA/RIANDU/2229”.

That the parties herein have previously litigated over the same subject matter in the Siakago Case is not really in dispute. The plaintiff's suit in the Siakago Case was dismissed with costs in a judgment delivered on 19th April 2006 by **F.M. OMENTA PRINCIPAL MAGISTRATE**. There appears to have been no appeal filed against that judgment. The plaintiff's response to the plea of Res-judicata is found in paragraphs three (3) and five (5) of his reply to defence in which he has pleaded that the Principal Magistrate who delivered that judgment had no jurisdiction to determine the dispute and therefore the plaintiff could not have appealed against proceedings that were a nullity in law.

Res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following terms:-

“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”.

From the above, it is clear that before the plea of res-judicata can be successfully raised, the issues in dispute in the former suit must be directly and substantially in dispute between the same parties or parties under whom they or any of them litigate, the former suit must have been heard and finally determined by a competent Court. The doctrine of res-judicata was ably captured in the following words in the case of **HENDERSON VS HENDERSON (1843) 67 E.R 313:**

“... where a given matter becomes the subject of litigation in and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”

The above has been adopted by our Courts including the Court of Appeal in the case of **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS 2015 e K.L.R** where the Court went on to state that:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter”

Res-judicata therefore aims at preventing a multiplicity of suits involving the same parties or those acting under them over the same subject matter that has been heard and determined by a Court of competent jurisdiction. As I have already indicated above, the parties herein have previously litigated over the same suit land in the Siakago Case. That is not really in contention. What the plaintiff argues, however, is that infact the Siakago Case was determined by a Court without the requisite jurisdiction and therefore those proceedings were a nullity. If that argument is correct, then the plea of res-judicata is not available to the defendant. But is that the position?

The Siakago Case was determined on 19th April 2006 when the Principal Magistrate delivered his judgment and I have already found above, no appeal was preferred against that judgment. Indeed this Court has not been told that there was any appeal against that judgment and with what results. Therefore, on 19th April 2006 when the Court delivered its judgment in the Siakago Case, the dispute between the parties was “**heard and finally decided by such Court**” as is required by **Section 7 of the Civil Procedure Act**. And apart from the bare statement in the plaintiff’s reply to the defence that the Principal Magistrate’s Court at Siakago had no jurisdiction to determine the Siakago Case, no evidence has been placed before me to demonstrate that perhaps the value of the suit land was beyond the pecuniary jurisdiction of the trial Court or that the suit land was outside that Court’s geographical jurisdiction or even that the remedies being sought by the plaintiff were not within the power of the trial Court to grant. What was being sought by the plaintiff in the Siakago Case, as I have already shown above, was an order of eviction of the defendant from the suit land or a permanent order of injunction restraining him from interfering with the said land parcel. Those are the same orders being sought in this suit. I have no doubt in my mind that the Principal Magistrate’s Court at Siakago had the requisite jurisdiction to determine the dispute before it. If perhaps the plaintiff is seeking refuge in the ***Environment and Land Court Act***, that law which established the ***Environment and Land Court*** commenced in August 2011 some five (5) years after the Court had determined the Siakago Case. It is therefore obvious to me that the defendant has correctly raised the plea of res-judicata which I must up-hold.

Ultimately therefore, the defendant’s Preliminary Objection that this suit is res-judicata is hereby up-held. The result is that this suit is struck out with costs.

B.N. OLAO

JUDGE

3RD MARCH, 2017

Ruling dated, delivered and signed in open Court this 3rd day of March 2017

Mr. Macharia holding brief for Mr. Muyodi for the Plaintiff and also holding brief for Mr. Momanyi for the Defendant .

B.N. OLAO

JUDGE

3RD MARCH, 2017