



**REPUBLIC OF KENYA**

**THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 166 OF 2017**

**HENRY KARAKACHA TAMATA.....:PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEM KULOVA KARAKACHA.....DEFENDANT/RESPONDENT**

**JUMA MWANY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PELEPETWA NALIAKA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**PASILITA MAKOKHA KARAKACHA.....4<sup>TH</sup> DEFENDANT**

**/RESPONDENT**

**RULING**

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants raised a preliminary objection under order 51, rule 14 of the civil procedure rules 2010 on the plaintiff's entire suit and the application dated 25<sup>th</sup> May, 2017 on the following grounds:- that this honourable court lacks jurisdiction to hear and determine this suit and the application dated 25<sup>th</sup> May, 2017. That this suit is Res-Judicata in view of Kakamega High Court succession Cause No. 307 of 2000 which was heard and determined. That the exercise of jurisdiction of this court in this matter amounts to sitting on an appeal arising from Kakamega High Court Succession CauseNo.307of2000.

The contents of Notice of Preliminary Objection dated 12<sup>th</sup> June, 2017 have been served upon the plaintiff that the plaintiff responded thereto and counter-states as follows:- that , the cause of action herein elaborates on fraud and mis-representation hence the Environment and Land Court has the jurisdiction to hear and determine the dispute as jurisdiction is bestowed to it by the Environment and Land Court Act Cap 19 sub-section 2 (b). That, the 2<sup>nd</sup> defendant/respondent became the registered owner of LR. No. KAKAMEGA/SHAMBERERE/1852 on 31/5/1993 long before succession was filed in the year 2000. This automatically reveals that registration of the 2<sup>nd</sup> defendant/respondent was irregular and/or fraudulent. That the registration and ownership of the 2<sup>nd</sup> defendant/respondent was outside the mode of distribution dictated in the certificate of confirmation of grant dated 23/1/2015. That the Succession Act Cap 300 of 1989 does not have the original jurisdiction to dwell on cancellation and or nullification of registration and ownership obtained by fraud but the Environment and Land Court is empowered with such jurisdiction under section 13 sub clause 2 (b) if the Environment and Land Act Cap 19 Laws enacted in 2011. The plaintiff reiterates that this suit is not res-judicata. The dispute before this court elaborates on fraud which is a dispute this court if any other court has never heard and determined before. That the notice of preliminary objection should be dismissed with costs for failing to raise any points of law or fact.

This court has considered both the plaintiff's and the defendant's submissions on the preliminary objection. It is not disputed that there was a succession cause namely, Kakamega High Court succession Cause No. 307 of 2000 which was adjudicated upon and concluded by the family court touching on the same subject matter or parcel on land namely KAKAMEGA/SHAMBERERE/1852 among others. It is also not in dispute that the parties are the same and are relatives. The plaintiff has now come to court alleging that there was some fraud even before the succession matter was heard and determined.

The provisions of proving res judicata are clearly spelt out in section 7 of the Civil Procedure Act 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 subsequently decided by such court”.***

I find that these parties are the same as in the succession case Kakamega High Court succession Cause No. 307 of 2000 and the subject matter (land) is the same. Any issues submitted to be new issues raised in this matter namely fraud ought to have been raised in the previous suit. This was also held in the case of John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Ltd & 3 Others (2016) eKLR. I am satisfied that the respondents have proved the doctrine of res judicata in regard to this suit and the application dated 25<sup>th</sup> May 2017. I find merit in the objection that this suit and the application dated 25<sup>th</sup> May 2017 is res judicata in view of the fact that Kakamega High Court succession Cause No. 307 of 2000 was heard and determined by a court of competent jurisdiction. I concur with the respondents that the exercise of jurisdiction of this court in this matter amounts to sitting on an appeal arising from Kakamega High Court Succession Cause No. 307 of 2000. Consequently I strike out the suit and the application dated 25<sup>th</sup> May 2017 with costs to the respondents.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> DAY OF JUNE 2017.**

**N.A. MATHEKA**

**JUDGE**