



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.168 OF 2015

HABIL OGANDA OTIENO.....1ST PLAINTIFF

TOBIAS OKINYO AWICH.....2ND PLAINTIFF

JOHN OGOLA AWICH.....3RD PLAINTIFF

ELLAB OCHIENG AWICH.....4TH PLAINTIFF

VERSUS

FRANCISCA WAYODI ADHINGA.....1ST DEFENDANT

ANASTASIA AWINO ADHINGA.....2ND DEFENDANT

OMOLO ADHINGA.....3RD DEFENDANT

ODADO ADHINGA.....4TH DEFENDANT

RULING

1. The Plaintiffs commenced this suit through the plaint dated 2nd July 2015, and filed in court on the 3rd July 2015, seeking to have the Defendants evicted and injuncted permanently from land parcel **Siaya/Kocheing B/571**. The Plaintiffs claim is denied by the Defendants through their defence dated 10th August 2015. The Defendants raised the defence of adverse possession averring that they have been on the suit land since 1971.

2. The Defendants also gave notice to raise objection to the suit on points of law. The notice raises the following two points;

- i) That the Honourable court do strike out this suit for being an abuse of the due process of the court.
- ii) That this suit and pleadings offends the provisions of **Section 7** of the Civil Procedure Act.

3. The preliminary objection came up for hearing on the 22nd February 2017 when Mr. Singahachi and Orengo, learned counsel for the Defendants and Plaintiffs respectively, made their submissions. The submissions are summarized hereinbelow:

A. DEFENDANTS' COUNSELS SUBMISSIONS;

- That the suit offends **Section 7** of the Civil Procedure Act as the issues had been decided in **Siaya Land Disputes Tribunal in SYA/807/2001** and **Siaya PMCC No.3 of 2008** which upheld the tribunal award in the Defendants favour.
- That this suit is therefore an abuse of the court's process as it is over the same subject matter and should be struck out with costs.
- That the parties in the previous suit and this suit are the same as are litigating under the same title.

B. PLAINTIFF'S COUNSEL'S SUBMISSIONS:

- that the SIAYA Land Disputes Tribunal and Siaya Magistrate'S Courts did not have jurisdiction to hear and determine the matters that were before them and the decisions thereof do not make this suit res judicata.
- That **Section 3 (1)** of the Land Disputes Tribunal Act No.18 of 1990 gave jurisdiction on matters to do with trespass to the tribunals. That the Magistrates Court had no jurisdiction to deal with the question of trespass to land in Siaya PM CC NO.3 of 2008.
- That the tribunal had no power to deal with land ownership and its award of 2001 was without jurisdiction.
- The learned counsel referred the court to the decision in **Nduati –V- Mukami** [2002] 2 KLR 778 and **Vincent Kipsongok Rotich –V- Orphah Jelagat Ngelechei** [2014] KRL and submitted that the proceedings of the Tribunal that awarded title to land were null and void and cannot be the basis of making this suit res judicata.
- That the parties in this suit is slightly different from the parties in the previous suits and as there has been continuous trespass, the preliminary objection should be dismissed with costs.

4. The issues for determinations are as follows:

- a) Whether this suit is res judicata in view of the Siaya Land Disputes Tribunal and Siaya Magistrate Court's decisions.
- b) Whether the suit is an abuse of the courts process.
- c) What orders to issue
- d) Who pays the costs.

5. The court has carefully considered the two grounds on the notice of preliminary objections, the submissions by counsel and come to the following determinations:

- a) That though the Plaintiffs have averred at paragraph 10 of the plaint and deposed at paragraph 4 of the verifying affidavit that there has been no previous proceedings between the Plaintiffs and Defendants, they have conceded through submissions by their counsel that there had been Siaya Land Disputes Tribunal and Siaya Magistrates Court cases over the same subject matter being **Siaya/Kocheing B/571**.
- b) That the proceedings and award of Siaya Land Disputes tribunal case **No.SYA/807/2001** has not been availed to this court. The court is not therefore in a possession to determine whether the Tribunal had or did not have jurisdiction to deal with the matter before it or issue the award it reportedly made. That the portion of the Tribunal award cited at page 2 of the judgment in **Siaya PM CC No.3 of 2008** is to the effect that the "claim by **Adhinga Omondi** is upheld and the tribunal allowed him to have ownership of the area of parcel No.571". That without the court having a copy of the tribunal proceedings, it is not possible to determine the nature of the claim that had been lodged so as to understand what the tribunal meant by upholding the claim by Adhinga Omondi.

c) That the learned Trial Magistrate's decision in **Siaya PM CC NO.3** of 2008 was as summarized at page 3 paragraphs 2 and 3 of the judgment which is as follows:

“After careful consideration of all the evidences in this case, I find there exists proceedings and a judgment over the Land in issue. If the Plaintiff and his family members were not satisfied by the Land Disputes Tribunal judgment, they ought to have appealed. As for me, I am estopped from deliberating over this matter. For these reasons, I proceed to dismiss the Plaintiffs case with costs to the Defendants.”

That contrary to the submissions by counsel for the Plaintiffs, the learned Trial Magistrate's decision was on merit as the parties had been heard. The learned Trial Magistrate at page 2 paragraph 3 of the judgment stated as follows:

“ It is clear from the pleadings and evidence that the Defendant pleads res judicata with regard to the Land Disputes Tribunal Case No.SYA/807/201. This ought to have been taken as a preliminary objection. I will not make any adverse comments on this lapse but will consider the issue at this stage so as to give the parties substantial justice at this stage.”

That the foregoing leads this court to find and hold that the decision of the Learned Trial Magistrate was that the suit before him was res judicata as the issues in respect of the subject matter and the parties before the court had been determined by the Siaya Land Disputes tribunal in SYA A/807/2001.

d) That there has been no appeal filed on the judgment of the learned Trial Magistrate in the said case. The judgment cannot be wished away by submitting that the learned trial magistrate had no jurisdiction to determine the issue of trespass as it does not contain any determination on the issue of trespass.

e) That in the absence of the tribunal proceedings the court is unable to determine whether or not the Tribunal had jurisdiction to determine the claim before it at this juncture. That issue may be pursued further during the main hearing and if it is found that the Tribunal had no jurisdiction, the position held in **Vincent Kipsongok Rotich –V- Orphah Jelagat Ngetechi** [2004] eKLR and **Nduati –V- Mukani** (2002) 2 KLR 778 on such proceedings being null and void and hence incapable of making subsequent proceedings over the same issue and between the same parties res judicata may be applied.

f) That in view of (e) above the court finds that on the material evidence availed so far, there is not sufficient evidence to make this case an abuse of the process of the court.

g) That the court is of the considered opinion that paragraphs 4 of the plaint require to be amended to provide the span covered in the phrase **“on diverse dates”** That further paragraph 10 of the said plaint requires to be amended to capture the existence of SYA/807/2001 and Siaya PM CC No.3 of 2001.

6. That flowing from the foregoing the court finds no merit in the preliminary objection raised by the Defendants and the same is rejected with costs in the cause. The court on its own motion directs as follows:

a) That the Plaintiff do file and serve an amended plaint on the paragraphs detailed above in 14 days.

b) That the Defendants be at liberty to file and serve an amended defence in 14 days after service.

c) Both parties do comply with **Order 11** of the Civil Procedure Rules in 60 days and a mention date before the Deputy Registrar taken to confirm compliance before a hearing date can be fixed.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiffs 1st present

Defendants Absent

Counsel Mr. Orengo for the Plaintiff

M/S Alieta for the Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2017

S.M.Kibunja Judge

1st Plaintiff present

Mr Orengo for the Plaintiff

Court: The Ruling dated and delivered in open court in presence of the 1st Plaintiff Mr Orengo and M/S Alieta for Plaintiffs and Respondents respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017