



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CAUSE NO. 163 OF 2013

DAVID KIPKETER CHUMO.....PLAINTIFF

VERSUS

GEOFFREY J. KOSKEI.....DEFENDANT

RULING

INTRODUCTION:

This ruling is in respect of an application brought by filing of Notice of Motion dated 18th August, 2015 by the Defendant/Applicant seeking for the following orders:

- 1) That the suit be struck out on the grounds of *Res Judicata*.
- 2) That costs be provided for.

The application came up for hearing *inter partes* on 18.9.2017. Counsel for the applicant submitted that the suit is *res judicata*. He submitted that a decision was made in respect of the same parties and the same subject matter. An award was adopted in this matter as judgment of the court on 25th November, 1999.

Mr. Chemwok counsel for the Defendant/Applicant further submitted that parties have been litigating in different names over the same subject matter. He stated that the first suit was Land Dispute No. 38 of 1999 which culminated into Civil Case No. 27 of 1999 whereby the court held that the matter was *res judicata*.

Counsel also submitted that the parties brought another suit in 2001 being Eldoret Civil Suit No. 50 of 2001. Same parties and same subject matter which is still pending. It was submitted that suits Nos. 93 of 2010 and 163 of 2013 involving the same parties and same subject matter are also pending before the court.

Mr. Chemwok submitted that this is an abuse of the court process and the suit ought to be struck out. He further submitted that it is on record that Plaintiff filed an Appeal No. 44 of 2001 in respect of the Land Dispute Tribunal No. 38 of 1999 which appeal was dismissed for want of prosecution.

The application was opposed by Mr. Chepkwony for the Plaintiff/Respondent. He relied on the replying affidavit sworn by David Kipketer Chumo filed on 21.3.2017 together with the annexures. Counsel

submitted that the decree in Land Dispute Tribunal No. 38 of 1999 in the Lower Court purported to award ownership of land to a party. The Kapsabet court decision was null and void as the Land Dispute Tribunal did not have jurisdiction to deal with ownership of land issues.

It was further submitted by counsel that the Civil Appeal was dismissed for want of prosecution and as such it does not fall under the *res judicata* rules.

Mr. Chepkwony submitted that Civil Suit NO. 50 of 2001 has one plaintiff and three defendants and the subject matter is also different as it is LR No. 148/7 marked as NO. 22 and 26. He stated that the subject matter in the current suit is KAPKORIO/CO-OPERATIVE (KABUTI)/22.

In response to the existence of Eldoret HCC No. 93 of 2010 and the current suit No. E &L No. 163 of 2013, Counsel submitted that HCC No. 93 of 2010 is the current E&L 163 of 2013 which was transferred after the creation of the Environment and Land Court. It is therefore the same suit.

Counsel submitted that there is no duplicity of suits and this case does not fall under the *res judicata* rules. He urged the court to dismiss the application and set down the suit for hearing.

Analysis and determination:

This is an application for striking out a suit on the grounds of *res judicata*. For the court to determine whether a suit is *res judicata* or not, the court should be guided by the provisions of Section 7 of the Civil Procedure Act.

The only issue that I need to determine in this application is whether the current suit is *res judicata* or not. The law pertaining to the doctrine of *res judicata* as provided for under Section 7 of the Civil Procedure Act states 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”.

Having said this, I have looked at the court record and found a ruling dated 6th February, 2013 by Mshila J in this case which dealt with the matter of *res judicata*. The judge stated in her ruling at page 4:-

“The court notes the existence of another HCCC NO. 50 Of 2007 and notes that the Applicant and the Respondent are cited as parties therein, but reiterates that the issue of multiplicity of suits, res judicata and abuse of due process should be canvassed at a full trial.”

I will therefore not deal with issue that has been adjudicated upon by the court. The upshot is that this application is dismissed as it lacks merit with costs to the Plaintiff/Applicant. Parties to comply with order 11 within 30 days.

Dated and delivered in Eldoret this 3rd day of October, 2017

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Rugut holding brief for Mr. Chepkwony for Plaintiff/Respondent.

Koech: Court Assistant