



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L 751 OF 2012

KIPTOO ARAP CHELULE..... PLAINTIFF

VERSUS

1. THE SETTLEMENT FUND TRUSTEES)

2. THE ATTORNEY GENERAL).....DEFENDANTS

3. PETER KIPKOECH)

4. THE DISTRICT LANDS REGISTRAR)

RULING

Kiptoo Arap Chelule (*hereinafter referred to as the plaintiff*) a male adult, and the registered owner of land parcel No: Nandi/Lessos/351 has sued the Settlement Fund Trustees, the Attorney General of Kenya, Peter Kipkoech and the District Lands Registrar (*hereinafter referred to as the defendants*) claiming that at all material times to this suit the plaintiff was the registered owner of land parcel **No.Nandi/Lessos/351** acquired after having successfully paid a loan to the first defendant. The first defendant then issued a discharge of Charge dated 10th September, 2009 and directed the 4th defendant to register the discharge of charge and Transfer the whole of land parcel **Nandi/Lessos/351** to the plaintiff. The plaintiff claims that the 4th defendant acting on an illegal order issued by the 3rd defendant through an arbitration conducted at the Kilibwoni District Officers office on **24th October, 1997** Sub-divided the Plaintiff's land into several portions and closed the Green Card register at the Nandi District Lands Registry in respect of the original land parcel **Nandi/Lessos/351**. The plaintiff claims that the said sub division by the 4th defendant was illegal for lack of consent of the Land Control Board under Cap 302, Laws of Kenya.

The Tribunal award dated **24th October, 1997** issued by the 3rd Defendant was all illegal for lack of jurisdiction on the part of the said Kilibwoni Land Dispute Tribunal, 3rd defendant herein. The plaintiff's other complaint is that the 3rd defendant arbitrated over land which was then registered in the name of Settlement Fund Trustees and the 4th defendant caused the sub division of the said land while the said Settlement Fund Trustees had not been enjoined in the proceedings at the Tribunal held at Kilibwoni Division. The plaintiff avers that the award dated **24th October, 1997** issued by the 3rd defendant against the Plaintiff's land parcel **Nandi/Lessos/351** the subsequent sub division of the Plaintiff's land by the 3rd defendant is clearly illegal and the same should be nullified and land parcel **Nandi/Lessos/351** reinstated in favour of the plaintiff. The Plaintiff claims to have had successfully repaid the full loan to the 1st defendant who then issued a Discharge of charge in favour of the Plaintiff but which the 4th Defendant ignored and or refused to transfer the land to the plaintiff.

The Plaintiff's claim against the 1st defendant is for an Order directing it to Transfer land parcel

Nandi/Lessos/351 to the Plaintiff as per the Discharge of Charge dated **10th September, 2009**. The plaintiff claim against the Chairman of the Land Dispute Tribunal is for declaration that the Tribunal award dated **24th October, 1997** and subsequent Decree in **Kapsabet Srm Land Dispute Tribunal Case No 81 Of 1997** arising from the adoption of the said award are all illegal and should be nullified by the court. The 1st defendant failed to direct the 4th defendant to **TRANSFER NANDI/LESSOS/351** to the plaintiff. The plaintiff's claim against the 4th defendant is for Orders that the unilateral actions of the District Land Registrar to close and cancel the register against Title **No. Nandi/Lessos/351** and Sub Division of the same into 6 portions without first **obtaining the consent of Land Control Board** is also illegal and the Lands Registrar should be Ordered to reinstate the Original Title **Nandi/Lessos/351** to the Plaintiff Kiptoo Chelule.

The plaintiff prays for a Declaration that the award of **Kilibwoni Land Disputes Trribunal** dated **24th October 1997** and Decree dated **15th June 1998** and Decree dated **30th April, 1998** and **24th July, 2009** or any other Decree arising from the said award against land parcel **Nandi/Lessos/351** is **null and void ab-initio** and that, the sub-division of the original land parcel **NANDI/LESSOS/351** and closure of the Register by the **Nandi District Lands Registrar** is also illegal and the Nandi District Lands Registrar be ordered to reinstate the original Title **Nandi/Lessos/351** in the name of the plaintiff Kiptoo A. Chelule. Lastly, but not least he prays for costs of this suit.

The 5th to 10th Defendant filed a defence stating that Land parcel No. **NANDI/LESSOS/351** had been subdivided into various plots way back in 1997 pursuant to a court decree and title deeds for the same have since been issued before the date of filing of the suit and that the proceedings prior to the subdivision of the said land parcel were legal and in accordance with the law and procedure and aver that this instant is *res judicata*. On the 14th Feb. 2013, the 5th-10th defendants filed a preliminary objection that the suit is fatally defective and that the same is *res judicata*.

The 1st – 4th Defendant also filed a joint statement of defence denying that the plaintiff was the registered owner of the suit land as the same was at all material times prior owned by the Settlement Fund Trustees and that the suit land had in or about 1973 been allocated to one Kipkemei Arap Kaila. Subsequent to a claim by the Plaintiff as a purchaser from the initial allottee, investigations were undertaken by the Settlement Fund Trustee to ascertain the claim and it was ascertained that in or about 1977, the suit land was formally repossessed and reallocated to the Plaintiff upon accepting the offer to purchase. It is the 1st to 4th Defendants' case that the suit land was owned by the Settlement Fund Trustee and it was a condition that title could only issue upon settlement of the suit land development loans by the Plaintiff. The Defendants aver that the purchase price/development loan was settled in full in or about 2008 upon repayment of the sum of Kshs.13,513 by one Jerop T. Ngetich.

The Defendants submit that the suit is *res-judicata* and fatally defective and that the dispute between the parties over the said land parcel known as **Nandi/Lessos/351** was first heard before the Land Disputes Tribunal and the award adopted in **Kapsabet Land Disputes Tribunal case No. 81 of 1997**. The plaintiff was aggrieved by the decision of the Tribunal and preferred appeal No: **Eld HCCA No: 113 of 2002** which appeal was determined in favour of the 5th defendant. instead of filing an appeal in the Court of Appeal, the plaintiff filed another suit thus **Eldoret Hccc No. 200 of 2009** on the same subject matter save that in the subsequent suit the subject matter were Land parcels **Nandi/Lessos/559**, **Nandi/Lessos/660**, and **Nandi/Lessos/661**, **Nandi Lessos 663** which parcels were created out of **Nandi Lessos 351** which was subject matter in **High Court Civil Appeal No. 113 of 2002**. The court held in **Hccc No 200 of 2007** that the suit was *res-judicata* prompting the plaintiff to file this suit touching on **Nandi/Lessos/351** and added 3 parties.

The plaintiff on his part submits that the suit is not *res-judicata*. He contends that the issue is the same but the parties are different as suit No. **E&L 751 of 2012** incorporates four new parties that were not parties in the previous suit. Thus the settlement funds trustees who have been incorporated to expound the individual rights of the parties in the suit which was not diligently and subsequently dealt with in the previous suit as they were not parties.

The suit also incorporates the Chairman of the **Kilibwoni LDT** to facilitate the facts and shine light on

issues that led to the 1997 decision by the LDT. It incorporates to Attorney General and Land Registrar Nandi County.

Mr Ngumbi for the Attorney General argues that the suit is *res-judicata* as it was filed after dismissal of ***Eldoret Hccc No. 200 of 2007 Kiptoo Chelule -VS- Jerop Taprandich Ngetich***, which was equally held to *res-judicata*.

I have considered the Preliminary Objection and submissions of all parties and do find that the Kilibwoni Land Disputes Tribunal made an order that Nandi/Lessos/351 to be shared between the parties in the respective terms and as a result of the order the land was subdivided into 6 parcels of land and shared amongst parties. The plaintiff was aggrieved by the decision of the Kilibwoni Land Disputes Tribunal and appealed in ELD High Court Civil Appeal No. 113 of 2002 which appeal was determined in favour of the 5th defendant. The plaintiff filed a fresh suit in the ELD High Court and being ELD High High Civil Case No 200 of 2009 in respect of the parcels resultant from Nandi/Lessos/351. Ho Mr **Justice Azangalala** held that the suit was *res-judicata*. The plaintiff did not tire hence filed this suit. The principles of *Res-judicata* are clear. Section 7 of the C.P.A provides that 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. The makers of the civil procedure Act deemed it proper to give explanations of *res-judicata* as follows;

Explanation. —(1)The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2)For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3)The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4)Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5)Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6)Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The first condition to be satisfied for this principle to apply is that there must be a former suit (application) in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties which has been decided by a competent court. This court observes that the addition of many parties in this suit might have intended to evade the principle of *res-judicata* and holds that as long as it is the plaintiff who brought in the parties, the matter remains *res-judicata*. The suit is an abuse of court process as there are no new issues raised by the plaintiff other than adding new parties. The issue before this court was subsequently the issue before the court in Eld 200 of 2009, thus the legality of the decision of the Land Dispute Tribunal which was determined by hon justice Azangalala when he dismissed the suit for being *res judicata*. The plaintiff had the right to appeal but did not. Ultimately the Preliminary Objection is upheld and the suit is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE