



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 105 OF 2015

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....PLAINTIFF

-versus-

RUWA MWARUWA KURERA..... 1ST DEFENDANT

AMOS WAMUYU 2ND DEFENDANT

KISIMA PROPERTIES LIMITED3RD DEFENDANT

FOUNTAIN ENTERPRISE PROGRAME LIMITED..... 4TH DEFENDANT

THE REGISTRAR OF TITLES 5TH DEFENDANT

THE HON. ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. The Plaintiff filed this case on 20th May 2015 claiming that it is the registered owner of property known as **KWALE/KIWEGU JEGO/47** (hereinafter “the suit property”) having purchased the same on 20th March 2012 from the 1st Defendant. The Plaintiff’s case is that on 13th February 2012, the 2nd Defendant, without any colour of right and without the consent of the Plaintiff, subdivided the suit property into three (3) parcels namely; **KWALE/KIWEGU JEGO/778**, **KWALE/KIWEGU JEGO/779** and **KWALE/KIWEGU JEGO/780**. That the 2nd Defendant subsequently sold the three subdivisions to the 3rd Defendant who has now instructed the 4th Defendant to settle squatters on the three parcels.
2. It is the Plaintiff’s case that the suit property is still registered in its name following a search conducted on 31st March 2015. The Plaintiff seeks a declaration that it is the legal owner of the suit property and that the subdivision done by the 2nd Defendant to be declared as null and void. The Plaintiff also seeks a declaration that the transfer of the three portions to the 3rd Defendant is null and void and that the 5th Defendant be ordered to correct the Land Register to reflect the Plaintiff as the legal owner of the suit property. Contemporaneously with the Plaintiff the Plaintiff filed a Notice of Motion Application dated 15th May 2015 seeking to bar the Defendants from dealing with the suit property pending hearing and determination of the suit.
3. The 2nd Defendant filed a Replying Affidavit to the Plaintiff’s Notice of Motion on 2nd September 2015 and his Statement of Defence on 5th October 2015. The 2nd Defendant denied the Plaintiff’s allegation and averred that he was the registered owner of the suit property having been so registered on 25th October 1988.
4. The 2nd Defendant stated further that his land was invaded by squatters compelling him to file MOMBASA HCCC No. 392 of 2009: **AMOS WAMUYU V. NYAE KADUNGO NYAE & 16 OTHERS** (hereinafter “HCCC No. 392 of 2009”). That the said case was determined vide a

- judgment delivered by Odero, J. on 26th May 2010 by which the claim was allowed and the 2nd Defendant given vacant possession of the property.
5. On 20th July 2015 when the Plaintiff's Notice of Motion Application dated 15th May 2015 came up for hearing, KISIMA REAL ESTATE LIMITED (hereinafter "the Interested Party") was allowed to be enjoined to this case as an Interested Party. It is case of the Interested Party that it is the lawful and rightful proprietor of KWALE/KIWEGU JEGO/778, KWALE/KIWEGU JEGO/779 and KWALE/KIWEGU JEGO/780 having purchased the same from the 2nd Defendant.
 6. On the said hearing date, both the 2nd Defendant's and the Interested Party's learned counsel raised an objection that the entire suit is *res judicata*. They argued that the key issue this court is being asked to determine was determined in HCCC No. 392 of 2009, being the question of ownership of the suit property.
 7. In response, the Plaintiff's learned counsel submitted that the Plaintiff was not a party to HCCC No. 392 of 2009 hence the doctrine of *res judicata* does not apply. Counsel urged court to let the issues raised be determined at full trial.
 8. I have looked at the Plaint and the pleadings & judgment in HCCC No. 392 of 2009. The Plaintiff in that case (the 2nd Defendant herein) had brought a claim against the 17 Defendants in that case on the basis that the said Defendants were squatters who had encroached on his property. He sought and was granted, *inter alia*, an order for vacant possession of the suit property. In my understanding of the orders sought and granted, HCCC No. 392 of 2009 was based purely on trespass. The question of ownership of the suit property was not pleaded and addressed in the said case.
 9. For a suit to be founded to be *res judicata*, the matter in issue must be directly and substantially in issue in the former suit. Secondly, the former suit must be between the same parties or parties under whom they or any of them claim, litigating under the same title. In the instant case, there are rival titles over the suit property which was not in issue in the former suit because the question as to who between the Plaintiff on the one hand and the 2nd Defendant, the 3rd Defendant and the Interested Party on the other hand is the rightful owner of the suit property was not determined in HCCC No. 392 of 2009. Further the present plaintiff was neither a party in the former suit nor could it have litigated or made claims through the squatters who were defendants in that former suit.
 10. It is my considered view that *res judicata* does not apply in this instance. I find the objection is unmerited and hereby dismiss it with costs.

Ruling Dated Delivered in Mombasa this 12th day of February 2016

A. OMOLLO

JUDGE