



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 299 OF 2014

ZIPPORAH KERU KIBIA.....PLAINTIFF

(Suing for and on behalf of the Estate of ELIUD KIBIA MUTHIGANI (DCD))

VERSUS

SALESIO GANA NJERU.....1ST DEFENDANT

HANNAH WANJIRU NDUATI.....2ND DEFENDANT

JACKSON WAMWEYA HARON.....3RD DEFENDANT

RULING

The plaintiff/respondent filed this suit on 18th November 2014 seeking the main prayers that a public auction conducted on 28th March 2011 with respect to plot No. 329 Kagio Market be declared to have been fraudulent, illegal, null and void and that an order for cancellation of the transfer of the plot No. 329 Kagio to the 1st defendant/applicant be made together with an order for the eviction of the 1st defendant/applicant from the said plot. From the pleadings, it would appear that although orders were obtained in Kerugoya Principal Magistrate's Court Civil Case No. 199 of 2010 which culminated in the sale and transfer of plot No. 329 Kagio Market (the plot) to the 1st defendant/applicant purportedly in execution of a decree obtained by the 3rd defendant against the 2nd defendant, the said plot was all along the property of one **ELIUD KIBIA MUTHIGANI** (deceased) on whose behalf this suit is filed and was never the property of the 2nd defendant.

The 1st and 3rd defendants filed their defences. An earlier interlocutory judgment obtained against the 3rd defendant was by consent of the parties set aside on 7th April 2015. There is on record an interlocutory judgment against the 2nd defendant.

In his defence, the 1st defendant/applicant resisted the claim stating that the sale of the plot became absolute on 30th March 2011 when the certificate of sale was issued and therefore cannot be challenged.

Most importantly, the 1st defendant/applicant averred that this suit was res-judicata in view of Kerugoya SPMCC No. 199 of 2010 and a Preliminary Objection would be raised.

That Preliminary Objection was promptly raised on 14th April 2015 and is the subject of this ruling. The gist of that Preliminary Objection is:-

1. ***This suit is res-judicata in view of Kerugoya SPMCC No. 199 of 2010.***
2. ***That the Public Auction or dealing of the suit plot cannot be decided on a separate suit and therefore this suit is incompetent and an abuse of the process of this Court.***

Submissions have been filed by the firm of Mugambi Njeru Advocate for the 1st defendant/applicant and that of Ndata Mugo Advocate for the plaintiff/respondent.

I have considered the Preliminary Objection and submissions by counsel.

A Preliminary Objection was defined by LAW J.A in the case of MUKISA BISCUITS COMPANY LTD VS WEST END DISTRIBUTORS (1968) E.A 896 in the following terms:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleading, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

And as Ojwang J (as he then was) expressed himself in ORARO VS MBAJA 2005 1 K.L.R 141,

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the basis that all facts pleaded by the opposite side are correct”

A Preliminary Objection, therefore must only raise matters of law and must not contain matters of fact that require to be proved through evidence or matters that are in controversy.

With that in mind, I now pose to consider whether the issue regarding the public auction and whether it can be raised in this suit is a Preliminary Objection as understood in law. The clear answer to that is No. The plaintiff/respondent has pleaded in her plaint that the public auction conducted on 28th March 2011 by which the plot was transferred to the 1st defendant/applicant was done fraudulently and was therefore illegal, null and void. The 1st defendant/applicant has resisted that claim and pleaded that he was a bona fide purchaser for value without notice of any defect to the title and in any event, the sale became absolute long time ago and cannot be challenged in this suit. Those are not pure points of law. Whether or not the public auction was fraudulent are issues to be determined on evidence at the trial. That is therefore not an issue that can be raised as a Preliminary Objection.

The issue of this suit being res-judicata in view of Kerugoya PMCC No. 199 of 2010 is, on the other hand, a pure issue of law that can be raised as a Preliminary Objection. Res-judicata is provided for in Section 7 of the Civil Procedure Act in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially an 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 ingredients of res-judicata have been set out in the Court of Appeal case of UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & OTHERS CIVIL APPEAL NO. 36 OF 1996 as follows:-

- a. ***There must have been a previous suit in which the same matter was in issue.***
- b. ***The parties in the former suit must be the same or litigating under the same title as the parties in which the plea is raised.***

- c. *The matter in dispute must have been heard by a competent Court.*
- d. *The issue must have been raised once again in the fresh suit.*

Looking at the pleadings both in this case and in Kerugoya SPMCC No. 199 of 2010, it is clear that although the subject matter in both cases is the plot No. 329 Kagio Market, the parties in Kerugoya PMCC No. 199 of 2010 were the 3rd defendant herein (as plaintiff) and the 2nd defendant herein (as defendant). The 1st defendant herein was not a party and neither was the plaintiff herein or the late **ELIUD KIBIA MUTHIGANI** for whose Estate this suit is brought. Further, the issues being raised herein relate to the fraudulent disposition of the plot No. 329 Kagio Market which issues could not have been raised in Kerugoya PMCC No. 199 of 2010 because the deceased **ELIUD KIBIA MUTHIGANI** who it is pleaded was the registered proprietor of the plot No. 329 Kagio Market was not a party to that suit. In the circumstances therefore, the plea of res-judicata cannot be sustained in this suit.

From the foregoing, it is clear that the Preliminary Objection is devoid of merit. The same is accordingly dismissed with costs.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Ruling dated, delivered and signed in open Court this 22nd day of April, 2016

Mr. Gikonyo for Mr. Ndana for Plaintiff present

Mr. Njiru for 1st Defendant absent

Mr. Ngangah for 3rd Defendant absent

2nd Defendant absent (Interlocutory judgment entered against her).

B.N. OLAO

JUDGE

22ND APRIL, 2016