



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC NO. 261 OF 2012**

**BENSON ONDUSO MOGOI..... PLAINTIFF**

**VERSUS**

**ISAAC OBAI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 3<sup>rd</sup> July 2012 seeking the following reliefs;
  - a. A declaration that Plot No. 16B Ikoba Market (hereinafter referred only to as “the suit property”) belongs to the plaintiff.
  - b. A permanent injunction to restrain the defendant from entering, erecting any structures and/or interfering with the suit property.
  - c. An order of eviction of the defendant from the suit property.
  - d. Cost of the suit.

In his plaint dated 12<sup>th</sup> June 2012, the plaintiff averred that at all material times, he was the owner of a parcel of land known as Plot No. 29B Ikoba Market (“Plot No.29B”) while the defendant was the owner of all that parcel known as Plot No. 16B Ikoba Market (**“the suit property”**). The plaintiff averred that on 15<sup>th</sup> October, 1997, he entered into an agreement with the defendant whereby they agreed to exchange the two parcels of land. Under the said agreement, he was to hand over Plot No.29B to the defendant and the defendant was to do likewise with the suit property. The plaintiff averred that following the said agreement, he took possession of the suit property which he enjoyed peacefully until sometimes in April, 2012 when the defendant without his consent or permission entered the suit property and started putting up a pit latrine on a portion thereof. The plaintiff averred that the aforesaid act by the defendant was likely to waste the suit property and was intended to dispossess him of the same.

The defendant entered appearance and filed a statement of defence on 25<sup>th</sup> November 2014. In his statement of defence, the defendant admitted that he entered into an agreement with the plaintiff to exchange the suit property with the plaintiff’s Plot No. 29B. The defendant averred that following that agreement, he transferred the suit property to the plaintiff in good faith. The plaintiff did not however reciprocate this gesture. The defendant averred that he later on discovered that Plot No. 29B did not belong to the plaintiff but to one, Onduso & Company and as such the plaintiff lacked the capacity to transfer the ownership of the same to the defendant. The defendant averred further that the suit property was the subject of another suit namely, Kisii HCCC No.20 of 1999, between the plaintiff herein, the defendant and Gusii County Council (**“the former suit”**) which suit was heard and

determined in favour of the defendant. The defendant averred that this court has no jurisdiction to entertain this suit in that the issues raised in the suit had been raised by the plaintiff in the former suit and were fully and finally determined by a court of competent jurisdiction.

The suit came up for hearing on 24<sup>th</sup> June, 2015 when the parties gave evidence and closed their respective cases without calling any witness. In his evidence, the plaintiff reiterated the contents of the plaint which I have highlighted herein above. The plaintiff added that upon taking possession of the suit property, he fenced the property, put up two semi-permanent structures and dug a borehole thereon. The plaintiff stated further that in April 2012, the defendant entered the suit property without his permission and started putting up structures thereon. He stated that Plot No. 29B which he exchanged with the defendant still belongs to the defendant and he has no claim over it.

In cross-examination, the plaintiff admitted that he had filed a case against the defendant in 1999 over the suit property and that the case was dismissed. The plaintiff also admitted that when he exchanged Plot No.29B with the suit property, the suit property was in the name of third parties namely, Augustine Orangi and Michael Gori.

In his testimony, the defendant also reiterated the contents of his statement of defence. He admitted that indeed he entered into an agreement with the plaintiff for the exchange of the suit property with Plot No.29B that belonged to the plaintiff. The defendant stated that after the exchange, all was well until he found out that Plot No.29B which had been given to him by the plaintiff in exchange was in the names of third parties. The defendant stated that he drew the attention of the plaintiff to this anomaly but the plaintiff did not bother to rectify the situation. In view of this development, he decided to take back the suit property which he had exchanged with the plaintiff's plot aforesaid. The defendant stated that after taking back the suit property he developed the same by putting up a shop thereon. He stated that after he took back the suit property, the plaintiff sued him in 1999 claiming the suit property.

After the close of the defendant's case, the parties informed the court that they did not wish to make any closing submissions. They were both contented with the evidence on record. I have considered the plaintiff's claim and the defence that was put forward to it by the defendant. I have also considered the evidence that was adduced by both parties in proof of their respective cases. The issues that arise for determination are as follows;

1. Whether the plaintiff's claim against the defendant is competent or maintainable a similar claim having been heard and determined?
2. Whether the suit property belongs to the plaintiff and if it is, whether the defendant has trespassed thereon?
3. Whether the plaintiff is entitled to the reliefs sought?

I am of the view that if the first issue is determined in the affirmative, it will be sufficient to dispose of this suit. In paragraph 7 of the plaint, the plaintiff stated that he had been involved in a previous suit with the defendant over the suit property namely, Kisii HCCC No.20 of 1999(the former suit). In paragraph 6 of the statement of defence, the defendant stated that the plaintiff had brought the former suit against him over the suit property. In paragraph 8 of the defence, the defendant stated that the former suit was heard and determined by the High Court.

In his evidence in cross-examination, the plaintiff admitted that he had filed the former suit against the defendant because the defendant had changed his mind over the agreement which he had entered into with the defendant concerning the exchange of the suit property with Plot No.29B. The plaintiff also admitted that the former suit was dismissed. In his testimony, the defendant stated that when he changed his mind and went back to the suit property, the plaintiff filed the former suit claiming the suit property. The defendant produced in evidence the proceedings of the former suit. He stated in cross-examination that the former suit that the plaintiff had brought against him was dismissed.

I have perused the proceedings of the former suit. I have noted that the suit was heard by

Wambilyanga J. who dismissed the same on 12<sup>th</sup> June, 2001. From what I have set out above, there is no dispute that the subject matter of the former suit was the suit property and that the issue that was before the court for determination as between the plaintiff herein and the defendant who were parties to that suit was the ownership of the suit property. It is also not in dispute that the former suit was heard and fully determined by a court that was competent to hear it and that the plaintiff's claim over the suit property was dismissed.

Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya provides 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 their 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 determined by such court.”*

Explanation 4 to section 7 of the Civil Procedure Act aforesaid provides that:

*“Any matter which might and ought to have been made a 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.”*

In the case of **Uhuru Highway Development Ltd. vs. Central Bank of Kenya & Others CA No. 36 of 1996**, the court stated that;-

*“The Plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

I am in agreement with the defendant that the plaintiff's claim herein is barred by the provisions of section 7 of the Civil Procedure Act, Cap. 21 Laws of Kenya and cannot be entertained by this court. The plaintiff having lodged his claim against the defendant over the suit property in the former suit and the claim having been heard and determined against the plaintiff by a competent court, this court cannot entertain a similar claim. It is my finding therefore that the plaintiff's suit is res judicata and as such incompetent.

In view of the finding that I have made above, is not necessary to consider the merit of the plaintiff's claim. I would wish to state however that even on merit, I am not satisfied that the plaintiff has proved his claim against the defendant. It is not in dispute that there was an agreement between the plaintiff and the defendant for the exchange of the suit property with Plot No.29B. What is in dispute is whether or not the plaintiff fulfilled his part of the agreement. On the material before me, I am not satisfied that he did so. There was therefore no consideration for the transfer of the suit property by the defendant to him. In the circumstances the agreement failed for want of consideration and there is no basis therefore upon which the plaintiff can be declared the owner of the suit property.

The upshot of the foregoing is that the plaintiff's suit is incompetent and not proved. The same is accordingly dismissed with costs to the defendant.

**Signed at Nairobi this.....Day of .....2016**

**S. OKONG'O**

**JUDGE**

**Delivered, Dated and Signed at Kisii this 8<sup>th</sup> day of April 2016**

**J.M.MUTUNGI**

**JUDGE**

**In the presence of**

.....**for the Plaintiff**

.....**for the Defendant**