



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.146 OF 2013

SAMUEL THUITA KAMAU.....PLAINTIFF

VERSUS

LYDIA WACHUKA KIBOCHO.....1ST DEFENDANT

LAND REGISTRAR NYAHURURU.....2ND DEFENDANT

RULING

(Application to dismiss suit for being res judicata; plaintiff having had a suit with predecessor in title of the defendant and having lost; the land then being subdivided and transferred to defendant; plaintiff filing another suit against the new owners; whether such case is res judicata; held that the case is res judicata; application allowed; suit dismissed with costs)

1. The application before me is that dated 3February 2015 filed by the 1st defendant. It seeks orders that this suit be dismissed for the reason that it is res judicata. It is averred by the 1st defendant that there have been two previous suits over the same subject matter in this case, that is *Nairobi HCCC No. 1755 of 1988 (Wanyoike Kibocho vs Kamau Nganga)* and *Nyahururu SPMCC No. 42 of 2011 (Wanyoike Kibocho vs Samuel Thuita Kamau)*.

2. This application is opposed by the plaintiff who filed Grounds of Opposition drawn as follows :-

(i) *That the application is fatally defective and bad in law.*

(ii) *That the application is incompetent, and an abuse of the court process.*

(iii) *That the application is scandalous, vexatious and frivolous.*

3. Since the claim in this application is that this suit is res judicata, I need to assess and compare the pleadings herein with the pleadings in the two alleged previous cases.

4. In this suit, the plaintiff is Samuel Thuita Kamau and he has sued two persons, Lydia Wachuka Kibocho as 1st defendant and the Land Registrar, Nyahururu, as 2nd defendant. The plaint which was filed on 24 July 2012. 5. In the plaint, the plaintiff pleaded that he is the bona fide owner of the land parcel Nyandarua/Kanyagia/500 (hereinafter land parcel No. 500) which he claimed has now been fraudulently subdivided into the land parcels Nyandarua/Kanyagia/ 792, 793 and 794. He pleaded that he was on the land until one Wanyoike Kibocho sued him over the ownership of the same and later

Wanyoike Kibocho evicted him from the land. He averred that he has filed an appeal in relation to the suit by Wanyoike Kibocho but despite the appeal, he was shocked to discover that the land has been subdivided into three portions and title deeds issued to the 1st defendant. In this suit, the plaintiff has inter alia asked for an order to have the titles Nyandarua/Kanyagia/ 792, 793 and 794 (hereinafter land parcels Nos. 792, 793 and 794) cancelled.

6. In her defence, the 1st defendant pleaded that she is the owner of the land parcel No. 792 having purchased it from the previous owner. She denied that the plaintiff was ever the owner of the land parcel No. 500. She averred that the plaintiff was sued by the initial owner of the land parcel No. 500 through the cases Nairobi HCCC No. 1755 of 1988 and Nyahururu SPMCC No. 42 of 2011 where a declaration was issued that the plaintiff has no interest in the land parcel No. 500 and they were ordered to vacate the same. It is pleaded that the plaintiff was thereafter evicted from the land parcel No. 500. The defendant in the case Nairobi HCCC No. 1755 of 1988 was said to be the plaintiff's father and the plaintiff was defendant in the case Nyahururu SPMCC No. 42 of 2011.

7. In the supporting affidavit to the application before me, the 1st defendant/applicant has annexed copies of the decrees in Nairobi HCCC No. 1755 of 1988 and Nyahururu SPMCC No. 42 of 2011. I have noted that the decree in Nairobi HCCC No. 1755 of 1988 was over 10 acres of land to be excised from a land parcel No. 001 Kanyagi Settlement Scheme. The decree in the case Nyahururu PMCC No. 42 of 2011, shows that the plaintiff was one Wanyoike Kibocho and the defendant was Samuel Thuita Kamau (the plaintiff herein). Orders were issued for a declaration that Wanyoike Kibocho is the owner of the land parcel Nyandarua/Kanyagia/500 and the defendant (plaintiff herein) was ordered to vacate the said land failing which he will be evicted. A permanent injunction was also issued restraining the defendant (plaintiff herein) from entering or in any other manner interfering with the said land. The plaintiff herein appears to have filed an appeal against the said judgment being Nakuru HCCA No. 31 of 2012.

8. The applicant has averred that Wanyoike Kibocho was her grandfather and in the case Nairobi HCCC No. 1755 of 1988, he sued the plaintiff's father resulting in judgment in his favour. However, the plaintiff continued occupying the land which led to the filing of the suit Nyahururu PMCC No. 42 of 2011. She has deposed that after judgment in favour of her grandfather, the plaintiff herein was evicted. It is her view that the avenue of the plaintiff is to pursue the appeal Nakuru HCCA No. 31 of 2012. She further averred that her grandfather has now subdivided the land parcel No. 500 into several portions and sold them off. On her part, she purchased the land parcel NO. 792.

9. The plaintiff did not file any affidavit to contest the above facts. It is my view that the plaintiff has already litigated over the same land that is the subject matter of this suit and lost. Litigation was over the land parcel No. 500 from which the present titles are derived from after the said land was subdivided. I think the plaintiff is trying to have a second bite at the cherry which is not allowed by Section 7 of the Civil Procedure Act. The same is drawn as follows :-

7. Res judicata

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.

10. The parties in the two previous cases may not have been the same as in this suit, but it is clear to me that the subject matter was the same and the 1st defendant's position is that she claims title from a party who was in the previous litigation. The suit herein is therefore captured by the *res judicata* rule.

11. The plaintiff herein has a pending appeal and it is upon him to pursue that appeal. He can weigh his options if he succeeds in the same. But for now I find this case to be untenable and it is hereby dismissed with costs.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

IN PRESENCE OF :-

Parties : absent

M/s D.K Kaburu & Company for defendant/applicant – absent.

M/s B. W. Mathenge & company for plaintiff/respondent : Absent

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU