



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 671 OF 2014

DAVID KINGAU NJOROGE.....PLAINTIFF

VERSUS

JOHN GITHII MUTHUA..... DEFENDANT

RULING

The Preliminary Objection

The Plaintiff filed an application by way of a Notice of Motion dated 28th May 2015, seeking orders of a temporary injunction restraining the Defendant from trespassing or encroaching on, constructing, disposing and/or in any other manner dealing or interfering with the Land Parcels Reference Numbers Ndumberi/Ndumberi/1956 and Ndumberi/Ndumberi/1957 (hereinafter referred to as "the suit properties"), pending the hearing and determination of the application and the suit herein.

The Plaintiff claimed to be the beneficial and lawful owner of the suit properties by virtue of being the administrator and beneficiary of the Estate of the late Njoroge Wanjage Karoki, the registered owner of the same, and that the Defendant had unlawfully and without any colour of right encroached and trespassed on the suit properties and intended to dispose of them.

The Defendant thereupon filed a Notice of Preliminary objection dated 4th July 2014 on the grounds that the suit herein is *res judicata* and is barred by section 7 of the Civil Procedure Act, as there has been a previous suit between the same parties being **ELC 1606 of 2007**, which has been determined. Further, that the suit is also *res judicata* as it was the subject of **Succession Court CMCC 122 of 2010- In the matter of the Estate of the Late Njoroge Wanjagi Karoki (Deceased)** which has been determined.

The Defendant also stated that the suit has been filed out of time and is barred by section 7 of the Limitation of Actions Act, as the Plaintiff's cause of action arose in the year 2005 as pleaded by the Plaintiff in ELC 1606 of 2007. Lastly, that this suit is thus an abuse of the court process which should be struck out with costs.

The Plaintiff's Advocates filed Grounds of Opposition dated 10th July 2014, and contended that the Plaintiff was not a party to **ELC No. 1606 of 2007** and that this matter was filed well within the limitation period. Further, that **Succession Cause No. CMCC 122 of 2010** was limited to administration of the deceased's estate and not for determination of the dispute currently before this court, and that the Plaintiff obtained letters of administration to the deceased's estate in the year 2011 and could not have brought this case earlier than that.

The Submissions

The court directed parties to file written submissions on the preliminary objection. The Plaintiff's Advocate at the hearing of the Preliminary Objection stated that he had no instructions from his client and did not file any submissions. The Defendant's Advocates in submissions dated 28th November 2014 stated that this suit is barred by section 7 of the Civil Procedure Act in two respects. Firstly, that there was a previous suit between the parties namely **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** which has been determined after having been dismissed on 9th December 2011 for want of prosecution. Further, that the suit involved the suit property known as Ndumberi/Ndumberi 1956 which is also a subject matter of the present suit, and that the Plaintiff in the present suit is the son and administrator of the Plaintiff in the previous suit. The Defendant's counsel cited the decision in **E.T. vs Attorney General & Another (2012) e KLR** in this regard.

Secondly, that this suit is also *res judicata* as it was the subject of **Succession Cause CMCC 122 of 2010- In the matter of the Estate of the Late Njoroge Wanjagi Karoki** wherein a Certificate of Confirmation of Grant was issued that shows that the estate of the Deceased consists only of Ndumberi/Ndumberi 1957, and that the property known as Ndumberi/Ndumberi 1956 does not form part of the estate.

Lastly, the Defendant's counsel submitted that this suit is time barred under section 7 of the Limitation of Actions Act as the Amended Plaint dated 1st February 2007 filed in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** stated that the fraudulent transactions involving the property known as Ndumberi/Ndumberi 1956 took place in 2005, and that in the present suit the Plaintiff is alleging trespass yet the Defendant has been registered proprietor of the said property since 1994, and has been in possession since then.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the Defendant's preliminary objection raises a pure point of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“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 assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The objection raised of *res judicata* is a pure point of law as it has the effect of determining this suit, and since the fact of the ruling by this Court dismissing the suit in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** is not disputed. The doctrine of *res judicata* is provided for under section 7 of the Civil Procedure Act which states 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 requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties.
- b. The issue before the court must have been finally determined in that previous suit.
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the

doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

The requirements for a successful plea of *res judicata* therefore are that the two actions have to be between the same parties and their successors in title, concerning the same subject and founded on the same cause of action. Further, the judgment giving rise to the plea of *res judicata* has to be a final judgment. The Court notes in this regard that the parties in this suit and in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** are the same, as the Plaintiff in this suit is in privity with the Plaintiff in the previous suit, having succeeded to the said Plaintiff's interest in his capacity as the administrator of his estate.

However, the court also notes that there is an additional property included in the present suit, namely Ndumberi/Ndumberi 1957 that was not a subject matter in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006**. In addition for the doctrine of *res judicata* to apply the judgment in the previous suit must be shown to be final and decisive of an issue or on the merits of the case, and not merely a determination of a technical or interlocutory matter. A dismissal of an action for want of prosecution as was the case in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** cannot consequently be regarded as a final judgment to sustain a plea of *res judicata*.

As regards the other grounds raised by the Defendant with regard to the property known as Ndumberi/Ndumberi 1956 not being included in the Certificate of Confirmation of Grant issued in **Succession Cause CMCC 122 of 2010- In the matter of the Estate of the Late Njoroge Wanjagi Karoki**, and the causes of action herein and in **Njoroge Wanjagi Karoki vs John Githii Muthua, ELC 1606 of 2006** being time barred, these are allegations that will require certain facts to be verified and therefore do not raise pure questions of law.

Arising from the foregoing reasons, I find the Defendant's Preliminary Objection dated 4th July 2014 does not have merit, and it accordingly fails. However, since there are some elements of abuse of the process of court by the Plaintiff that have been shown particularly in filing a suit over property that has been the subject of previous decisions by this Court, the costs of the said Preliminary Objection shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 23rd day of February , 2015.

P. NYAMWEYA

JUDGE