



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 148 OF 2013

SAMUEL KIPTUI

NGEIYWA:.....:PLAINTIFF

VERSUS

PATRICK KWALIA MOIKUT & 2 OTHERS:.....:DEFENDANTS

RULING

1. The applicant herein Samuel Kiptui Ngeywa filed suit against the three respondents on 31/10/2013. He contemporaneously filed an application in which he sought injunction orders against the three respondents from evicting him from Plot No. 5 Kitalale Settlement Scheme Phase 1 or erecting any structures on the said plot pending the hearing and determination of the application. He obtained temporary orders of injunction on the same day pending the hearing of the application inter-partes.
2. The second and third respondents filed grounds of opposition and replying affidavit in which they inter alia objected to the application and the entire suit on the ground that the same was res judicata. The first respondent on the other hand filed a replying affidavit in which he supported the applicant's application. The parties agreed to have the application disposed of by way of written submissions. The first respondent stated through his lawyer that he did not wish to file any submissions and that he relied on the replying affidavit which he filed. The applicant and the second and third respondents filed their submissions.
3. The Counsel for the applicant and the second and third respondents addressed themselves on the following issues for the determination of the court:-
 - (a) *Whether the suit herein is res judicata.*
 - (b) *Whether the decision of the court in Kitale HCCC No. 96 of 1999 was as a result of a technicality.*
 - (c) *Whether the second and third respondent have legal nexus with the plaintiff or whether there is any privity of contract between them.*

(d) Whether the applicant has established a prima facie case to warrant grant of an injunction.

4. The genesis of the present suit as well as the application herein is a suit in Kitale HCCC NO 96 of 1999. The plaintiff in that case was Matayo Ndila Cheprot who is the third respondent in this suit. The defendant was Philip Lochok who is the second defendant herein. The third party was Samuel Kiptui Ngeywa who is the plaintiff/applicant herein. The plaintiff in that suit filed an application in which he sought Judgement on admission and striking out of the third party's defence. The third party now the plaintiff in this case filed his response. After the application was fully heard, the third party's defence was struck out and judgement on admission entered in favour of the plaintiff against the defendant. The third party was ordered out of the suit land. The third party then filed an appeal against the ruling and later came and filed this suit in which he seeks the orders stated hereinabove.
5. The applicant's Counsel submitted that the suit herein is not res judicata as the parties in Kitale HCCC No. 96 of 1999 were not the same as the parties in this case and that in any case the decision in the former suit was as a result of a technicality in that, it was based on admission. On the other hand, the counsel for the second and third respondents argued that the application as well as the suit are res judicata because the issues which are being raised herein were substantially the same as those which were raised in the former case which were finally decided.
6. I will start addressing the issue of res judicata because if it is found that this case is res judicata, it will be superfluous to address the other issues. The principle of res-judicata is premised on section 7 of the Civil Procedure Act which 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 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 issues has been heard and finally decided by such court.”

7. All the parties in the present suit were the same except the first defendant/respondent who was not a party. The subject matter of the former suit as in the present suit was the same. The defendant in the former suit Philip Lochok had admitted the plaintiff's claim. The plaintiff in the former suit is the third defendant. The third party in the former suit is plaintiff in this present suit. The defence the third party had filed was struck out after the same was considered and his replying affidavit considered. The documents which were in issue are the same ones relied on the present suit. The third party in the former suit was contending that he had bought the suit land from Patrick Moikut. The defendant in the former suit admitted that he had intended to sell the suit land to Patrick Moikut but that the sale did not go through prompting him to sell the property to Matayo Ndila Cheprot. That is why he admitted the plaintiff's suit in the former case.
8. It is therefore clear that all the issues which are raised in the present suit were raised in the former suit and were finally determined. This present case is therefore res judicata. In the **case of Lotta - Vs- Tanaki & Others [2003] 2EA 556 (CAT)** the court of Appeal Tanzania had this to say regarding res judicata.

“Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit..”

Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.”

9. Explanation number 4 under section 7 of the Civil Procedure Act provides as follows;-

“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.”

It is therefore clear based on the Tanzanian court of Appeal decision and explanation **No. (4) under section 7 of the Civil Procedure Act** that it was not necessary to enjoin Patrick Moikut in the former suit. Patrick already featured in the defence of the third party in the former suit. The mere fact that he has now been made a defendant in this case does not help the case not being res judicata. The present plaintiff and the first defendant had a common interest in the former suit as well as in the present suit. This is why the first defendant is supporting the plaintiff's application in this case.

11. In ***Omondi -Vs- National Bank of Kenya Ltd & Others [2001] EA 177*** the court held that ***“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”***

The only difference between the former suit and the present suit is that the first defendant has formally been added as a party. Otherwise he featured in the defence of the third party who is the current plaintiff. I find that this suit is res judicata. This is enough to dispose of this case. To go on to address the other issues will be like engaging myself in an academic exercise. I therefore dismiss the applicant's application as well as the entire suit with costs to the defendants.

It is so ordered.

Dated, signed and delivered at Kitale on this 9th day of February, 2015.

E. OBAGA

JUDGE

COURT: Ruling delivered at 9.35 a.m. in the absence of all parties who were aware of today's date. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

9/2/2015