REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 62 OF 2013

MICHAEL CHEBII TOROITICH.....PLAINTIFF

VS

PETER MOGIN YATICH CHEBII.....DEFENDANT

RULING

This ruling is in respect of a preliminary objection raised by the defendant. It is the contention of the defendant that this matter is res judicata in terms of Sections 6 and 7 of the Civil Procedure Act, CAP 21, as the issues herein were substantially the same as those raised in Iten RMCC No. 9 of 1994 between the same parties over the same land in issue herein. It is also stated that another suit, Iten RMCC No. 15 of 2010 was filed and dismissed. The defendant has also alleged that the plaintiff has not paid the costs of the dismissed suits.

The plaintiff has opposed the preliminary objection but before I go to the gist of the opposition, I think it is prudent that I provide a little background to this suit.

This suit was commenced by way of Originating Summons filed pursuant to the provisions of Order 38 of the Civil Procedure Rules, the Limitation of Actions Act, CAP 22, Laws of Kenya, and Section 28 (h) of the Land Registration Act, Act No. 3 of 2012. It is a suit for orders that the plaintiff has obtained title to one half of the land parcel Marakwet/Kapsowar/1805 (now designated to be Elgeyo Marakwet/Kapsowar/ 2453 and 2454). The plaintiff lays claim to the parcel which is soon to be registered as Elgeyo Marakwet/Kapsowar/2453. The plaintiff has averred that the suit land Elgeyo Marakwet/Kapsowar/1805, in total being 7.5 hectares, was initially owned by their father, one Chebii Mogin. The defendant is brother to the plaintiff. He has stated that prior to his death, their father had sub-divided the land equally between the defendant and himself, with each getting 3.75 hectares, in the year 1972. In the year 1977, the land was registered in the name of the defendant who is elder brother to the plaintiff. Prior to that, the plaintiff had built his house on the land in the year 1972. The plaintiff has also averred that he got married in 1979 and settled his family on the suit land. He has stated that in the year 1997, he proceeded to the land control board to have title released to him, but the defendant refused to sign the consent of the land control board.

He has further averred that in the year 2002, a proposal to sub-divide the land parcel No. 1805 into the parcels No. 2453 and 2454 was made and a mutation drawn. He has stated that the portion he occupies is now parcel No. 2453. He has contended that the defendant has never interrupted his possession of the land and that therefore the title of the defendant has been extinguished by time. He has further averred that the dispute was heard by the Land Disputes Tribunal who held that the plaintiff is entitled to half share of the suit land. He has also added that his sons have married on the suit land and even built their houses.

The plaintiff therefore wants to be declared to have acquired by way of adverse possession the half portion of the land parcel No. 1805, now designated as parcel No. 2453.

The defendant filed a Replying Affidavit to the Originating Summons and he has refuted all the claims of the plaintiff. He has however acknowledged that the plaintiff is his biological brother. He has stated that when their father died in the year 1962, he shared his properties, with the defendant getting the suit land, and the plaintiff getting a land parcel described as Elgeyo Marakwet/ Kapsowar/1825. The defendant has averred that he got registered as owner of the suit land in 1979 and got title deed in the year 1993. The defendant has denied that the plaintiff is in occupation of the suit land and has denied that the sons of the plaintiff have built structures or cultivate the land. He has however stated that one of the sons of the plaintiff forcefully put up a structure on the land. He has rejected the award of the Land Disputes Tribunal as having been made without jurisdiction. He has contended that the plaintiff's possession has never been peaceful as there have been a lot of cases between them. He has asked that the suit be dismissed.

To support the preliminary objection, the defendant annexed copies of the plaint and judgement in Iten RMCC No. 9 of 1994. He also annexed the decree in Iten Land Disputes Case No. 15 of 2010 which was the decree that adopted the award of the land disputes tribunal. There is also a ruling in the same suit which held that the suit was res judicata.

Mr. Chebii for the defendant urged me to allow the preliminary objection. He referred me to the judgment of Ochenja R.M, in the suit Iten RMCC No. 9 of 1994. Mr. Chebii averred that the plaintiff claimed his half share in the said suit which suit was dismissed. He also pointed out that the plaintiff in the year 2010 filed a similar suit in the land disputes tribunal, which held in his favour, but the court declined to endorse the award in light of the earlier decision in Iten RMCC No. 9 of 1994. Mr. Chebii therefore contended that this suit is res judicata as the issues raised are similar to those raised in the previous suits which have been decided.

Miss. S.W. Karuga for the plaintiff opposed the preliminary objection. She pointed out that the suit herein is a suit based on adverse possession. She argued that the suit Iten RMCC No. 9 of 1994 never concerned a claim of adverse possession but was an ordinary suit. She averred that the sub-ordinate court could not hear a suit on adverse possession. She asserted that the plaintiff needs to be heard on whether or not he has acquired title to the suit land by way of adverse possession, a matter that was never in issue in the previous suits. It was therefore her view that this suit is not res judicata.

I have considered the pleadings, the material in support of the preliminary objection, and the submissions in opposition thereto. It is trite law that a court is not supposed to proceed with a matter that has previously been decided. That is the doctrine of res judicata which in our laws is embodied in Section 7 of the Civil Procedure Act, which provides as follows :-
S. 7. 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.

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made 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.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

It will be seen that no court is to try a matter which was directly and substantially in issue in a former suit. Explanations 3 and 4 above may be relevant to this suit. Explanation 3 elaborates that the matter in the previous suit must have been alleged by one party and denied or admitted by the other. In explanation 4, any matter which could have been a ground of defence or attack in the former suit, cannot found a new claim.

The question herein is whether the matters raised by the plaintiff in this suit were directly and substantially in issue in the former suits and whether the issues herein could have been a ground of attack or defence in the former suits.

I have seen the plaint and judgment in Iten RMCC No. 9 of 1994. That suit was instituted by the plaintiff herein, and the defendant in this matter, was also the defendant in that suit. In the plaint in that suit, the plaintiff pleaded that the defendant holds one half of the land parcel Elgeyo Marakwet/Kapsowar/1805 on his behalf. Just as he has pleaded in this suit, he claimed that the land was originally owned by his father, and that the defendant registered the land in his name when the plaintiff was in school. He claimed to be entitled to one half of the land. I decipher that claim to be one based on a trust, probably a customary trust. That suit did not succeed.

I have read the decision of Ochenja R.M (as he then was) which was delivered on 2 December 2004. He dismissed the plaintiff's suit inter alia on the basis that the title of the defendant was a first registration that was not defeasible. There is no record of any appeal having been filed. Matters seem to have gone quiet until the plaintiff instituted a suit at the land disputes tribunal. The tribunal held in favour of the plaintiff and made an award sub-dividing the suit land into two equal portions of 3.75 hectares for each of the two brothers. That decision was filed in the Magistrates Court at Iten, as required, and adopted as a judgement and decree of the court on 6 October 2010. However, on 29 October 2010, counsel for the defendant filed an application to stay execution of that decree on the basis that the matter had already been decided earlier by the Magistrate's Court, in apparent reference to the decision of Ochenja R.M. It was argued that the decree was res judicata in light of the previous judgement. In a ruling delivered on 24 November 2010, the learned Magistrate in Iten, B.N. Mosiria, found the defendant's application to be merited and she allowed it. I think that it is then, frustrated by the inability to execute that decree, that the plaintiff filed this suit seeking orders of adverse possession.

The matters in issue in Iten RMCC No. 9 of 1994 and in the land disputes tribunal, in my view, were whether the defendant holds a half share of the land in trust for the plaintiff. The question whether the plaintiff is entitled to the suit land by way of adverse possession never arose in those proceedings. Indeed, they could not have arisen, as the Magistrate's court does not have jurisdiction to entertain a claim of adverse possession. Neither could adverse possession have been made a ground of attack or defence in those two proceedings. The issue of adverse possession could not have been raised and was never raised in those proceedings.

I am therefore of the view that the cause of action of the plaintiff, being a cause of action based on a claim of entitlement to land by way of adverse possession, is not an issue that has ever been tried before. I am in agreement with Miss Karuga, counsel for the plaintiff, that the new cause of action is not barred by the res judicata rule. This suit is therefore not res judicata for the reason that the cause of action herein has never been tried before and neither could it be a ground of attack or defence in the previous proceedings.

This preliminary objection must fail and it is hereby dismissed with costs. The matter is to proceed to determine whether the plaintiff has acquired title to what he claims by way of adverse possession.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Miss S.W. Karuga for plaintiff

Mr. G. Tarus for defendant.