REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 421 OF 2013

SAULO KANDIE.....PLAINTIFF

VERSUS

JAMES KWAMBAI CHERUIYOT.....DEFENDANT

RULING

Robert Kipchumba Cheruiyot ***(Sued as the administrator in the Estate of the late James K. Cheruiyot)*** filed an application in this matter on the 30.10.2017 dated 24.10.2017 praying that the suit herein be struck out with costs on the basis that it discloses no reasonable cause of action against the defendant and that it is scandalous, frivolous or vexatious and is otherwise an abuse of the court process. The application is based on grounds that the defendant participated in Eldoret Chief Magistrate's Case No. 329 of 1998 in which judgment was read and delivered on 13.8.2001. The matter was between ***Kipchumba Cheruiyot (Suing as the administrator in the Estate of the late James K. Cheruiyot Vs Saulo Kandie***.

The plaintiff preferred an appeal against the entire judgment being Eldoret High Court Civil Appeal No. 3 of 2002 which appeal was dismissed in 2002. Prior to the filing of the suit herein, the issues herein had been heard and determined in Eldoret CMCC No. 329 of 1998. According to the applicant, litigation must come to an end and that the plaintiff's suit is an abuse of court process. In the supporting affidavit, the defendant reiterates the grounds of the application.

In response, the plaintiff has filed a replying affidavit stating that the suit is not an abuse of court process and is neither scandalous, frivolous nor vexatious and that the suit discloses reasonable cause of action against the defendant.

The respondent in response states that he is entitled to seek a declaration whether the decision of the Lower Court in Eldoret CMCC No. 329 of 1998 could be enforced 12 years after it was issued. The decision of the Lower Court was issued on 13.8.2001. The respondent claims that the suit challenges enforceability of the decision of the court.

The appeal in the High Court was against the decision declining to set aside the default judgment. The parties have not been afforded a hearing in the subordinate court. The High Court declined to set aside the default judgment after the respondent failed to annex a cause list. He states that the issue before the Magistrate's Court was default judgment and is now being pursued in the Court of Appeal.

I have considered the application, supporting affidavit and the replying affidavit and do find that the plaintiff prays for a declaration that the decision in Eldoret Principal Magistrate's Court Civil Case No. 329 of 1998 is unenforceable by dint of the Limitation of Actions Act. The plaintiff further seeks a declaration that the magistrates court lacked jurisdiction to entertain a dispute revolving on trespass to land.

This court observes that the said decision is being challenged before the Court of Appeal in Civil Appeal No. 139 of 2012 and that the appeal is not yet determined. Parties can raise the issue of Limitation of Actions Act before the Court of Appeal in the said

appeal. I do find that the suit herein is founded on a decision of the court which has a mechanism of being challenged by way of an appeal to the High Court and appeal to the Court of Appeal and therefore, the suit is strange in law as is not based on any cause of action.

I do agree with the defendant that the plaintiff has no reasonable cause of action. Moreover, I do agree with the defendant that the suit is an abuse of the court process as the declaration sought is actually a technical point of law that should have been raised in the Magistrates Court, High Court and Court of Appeal.

The suit is moreover res judicata. What is *res judicata* and when does it apply" The Latin of it is simply *"a thing adjudicated"*. In **Black's Law Dictionary, Ninth edition,** as:

"(i)An issue that has been definitively settled by judicial decision;

(ii)An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been –but was not- raised in the first suit.

In the case of **Ukay Estate Ltd & another vs Shah Hirji Manek Ltd & 2 others [2006] eKLR**, Waki JA stated as follows:

"The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause."

The principle is captured in **Section 7** of the **Civil Procedure Act** as follows:

"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 court."

We may add ***Explanation 4*** which states:

"Any matter which might and ought to have been made ground of defence or attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

And on that basis, I do also find the suit to be frivolous as it raises no serious relief based either on tort, contract or claim on land.

The upshot of the above is that application dated 24.10.2017 is allowed and the suit is hereby struck out with costs. Parties to pursue the dispute in the Court of Appeal. The application dated 9.11.2017 to stay proceedings is disallowed as the proceedings to be stayed are an abuse of process of court as the matter is already pending in the Court of Appeal.

Dated and delivered at Eldoret this 24th day of October, 2018.

A.OMBWAYO

JUDGE