



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 1181 OF 1992**

**SOUTHDOWN DEVELOPERS LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA NATIONAL CAPITAL CORPORATION LIMITED.....DEFENDANT**

**AND**

**ABDI RAHIMAITHAR HAJI.....1<sup>ST</sup> APPLICANT/AGGRIEVED PARTY**

**HAITHAR HAJI ABDI.....2<sup>ND</sup> APPLICANT/AGGRIEVED PARTY**

**OCEANIA INVESTMENT LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**AVIC INTERNATIONAL PROJECT (K) LIMITED....2<sup>ND</sup> INTERESTED PARTY**

**CONSOLIDATED WITH**

**CIVIL SUIT NO. 6054 OF 1991**

**HAITHAR HAJI ABDI.....1<sup>ST</sup> PLAINTIFF**

**ABDI RAHIMAITHAR HAJI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**KENYA NATIONAL CAPITAL CORPORATION LIMITED.....DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> applicants herein have brought the Notice of Motion dated 17<sup>th</sup> January, 2020 supported by the grounds set out on the body thereof and the affidavit of the 1<sup>st</sup> applicant.

The applicants sought for the following orders:

*i. A declaration that the plaint filed in the case and the entire suit was a nullity in law and a fraud practiced on the court and on the applicants as the owners of the suit property.*

*ii. A declaration that all the proceedings in the case by the purported plaintiff were a nullity in law and a fraud practiced on the court and the applicants as the owners of the suit property.*

*iii. The judgment entered in the case and dated 15<sup>th</sup> October, 2003 be recalled, re-opened, re-examined and declared a nullity.*

*iv. All subsequent cases commenced and proceedings taken and/or orders made pursuant to the said judgment be re-opened, re-examined and declared a nullity.*

*v. A declaration that all dealings by the purported plaintiff in the suit property or relating to the suit property are null and void.*

*vi. The costs of the application be provided for.*

2. The defendant put in the replying affidavit sworn by **Morris Tiema** on 20<sup>th</sup> November, 2019 to oppose the Motion and further filed Grounds of Opposition dated 8<sup>th</sup> June, 2020 putting forward the grounds hereunder:

*a) THAT the application is time barred.*

*b) THAT the application is res judicata.*

*c) THAT the applicants lack locus standi to bring the present application as they are not aggrieved parties.*

*d) THAT there is no new evidence to support the application for review.*

*e) THAT the application is an abuse of the court process.*

*f) THAT the cases or judgments cited in the applicants' submissions are distinguishable and do not support the application.*

3. The record shows that plaintiff and the interested parties herein did not file any documents or participate at the hearing of the Motion. The record also shows that Civil Suit No. 6054 OF 1991 which was consolidated with the present suit was withdrawn by the applicants vide a consent filed in court on 6<sup>th</sup> March, 1992 and adopted by the court on 11<sup>th</sup> March, 1992.

4. The Motion was canvassed by way of written submissions. In their submissions dated 16<sup>th</sup> July, 2020 the applicants have argued that the suit, proceedings and judgment in the present suit are nullities since the suit was founded on an illegality.

5. The applicants have cited the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** where the court held that:

*“In Mistry Amar Singh vs Serwano Wofunira Kulubya UCA No. 74 of 1960 the Court inter-alia had this to say: "Ex Turpi Causa Non Oritio Actio. This old and well known legal maxim is founded in good sense and expresses clear and well organized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him.”*

6. The applicants further cited the case of **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR** in which the Court of Appeal held inter alia that any act which is incurably bad is automatically null and void, and that every proceeding which is premised on such act is also incurably bad.

7. It is the submission of the applicants that the parties herein were engaged in various cases before the High Court and the Court of Appeal in respect to the judgment delivered in the present suit and under the belief that the plaintiff had purchased the property known as I.R. No. 257149 (L.R. No. 13154) (“the suit property”); but it has now emerged that the plaintiff neither participated in the auction of the suit property nor purchased the suit property.

8. It is also the submission of the applicants that deriving from the above circumstances, the plaintiff had no cause of action against the defendant *ab initio* and consequently, it was not entitled to the reliefs sought in the plaint and awarded in the impugned judgment.

9. According to the applicants, the proceedings; the impugned judgment and the resulting transactions in respect to the suit property are therefore incurably bad, thereby making them null and void.

10. The applicants are of the view that they are the rightful owners of the suit property which they were deprived of as a direct result of the illegalities and/or fraudulent actions of the plaintiff, and hence the need for a review and annulment of the impugned judgment.

11. The defendant retorted with the submission that the application is time barred since it was brought 17 years following delivery of the judgment and yet the provisions of **Section 4(4) of the Limitation of Actions Act** which stipulates that:

*“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”*

12. The defendant further submits that the application is *res judicata* since it is seeking for a granting of orders similar to orders previously sought in another case between some of the parties herein; namely Environment and Land Court (“ELC”) Case No. 1389 of 2004 on the same or substantially the same subject matter which in this case is the suit property and the *locus standi* of the plaintiff. The defendant added that the ELC held that the applicants’ application in that case is an abuse of the court process and moved to dismiss it with costs.

13. The defendant urged this court to consider the following determination made by the court in the case of **E.T. v Attorney General & another [2012] eKLR**:

***“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court...”***

14. It is the contention of the defendant that the applicants have not shown any cognizable rights on their part to the suit property since at the time the defendant exercised its statutory power of sale, the applicants had lost any rights to the suit property. The defendant made reference *inter alia*, to the judicial authority of **Captain Patrick Kanyagia & another v Damaris Wangechi & 2 others [1995] eKLR** where the Court of Appeal determined that where a transfer is effected pursuant to the statutory power of sale of a mortgagee, the rights of a purchaser shall not be extinguished merely on the ground that the power was irregularly exercised.

15. The defendant submits that no new evidence has been presented to support the assertions made by the applicants, including the lack of evidence to show that Paul Omondi Mbago was not a director of the plaintiff at the time of the public auction in 1991 or at the time of filing the suit.

16. The defendant further submits that the application is purely an abuse of the court process for various reasons, including the fact that they did not disclose to this court the existence of a similar application which they filed in ELC Case No. 1389 of 2004.

17. In rejoinder, the applicants argue that the present application does not constitute a fresh action for it to be deemed time barred and that it is an application for a review and annulment of the impugned judgment, brought under the proviso of **Section 80** of the **Civil Procedure Act**.

18. The applicants also argue that in any case, the discovery of the fraud against the plaintiff was discovered in the year 2019 and going by the provisions of **Section 26** of the **Limitation of Actions Act**, the time of limitations does not begin to run in instances of fraud until the fraud has been discovered.

19. The applicants deny that their application is *res judicata* by arguing that the issues now raised have never been previously determined in any related case.

20. It is the contention of the applicants that they are rightful parties to the application since they are owners to the suit property, which property was never auctioned or sold to the plaintiff herein.

21. It is further the contention of the applicants that their application is not an abuse of the court process and that it raises new evidence and/or facts that were not previously known to the court, thereby making it valid.

22. I have considered the grounds set out on the face of the Motion and the facts deponed in the supporting affidavit, the replying affidavit in opposition thereto; the Grounds of Opposition and the rival written submissions.

23. A brief background of the matter is that at the onset, the applicants charged the suit property to the defendant as security for the advancement of a loan. According to the defendant, the applicants defaulted on repayment of the loan, causing it to advertise the suit property for sale by way of a public auction on 14<sup>th</sup> November, 1991, at around which time the applicants had sought injunctive orders from the court to stop the said sale, vide Civil Suit No. 6054 of 1991 which was subsequently withdrawn.

24. The defendant sold the suit property to the plaintiff on the aforementioned date but re-advertised the suit property for sale on 4<sup>th</sup> March, 1992 thereby causing the plaintiff to file the present suit in which it sought for *inter alia*, an order for specific performance of the auction sale agreement of 14<sup>th</sup> November, 1991 and execution of all consequential documents for completion of the transfer of the suit property to the plaintiff.

25. Upon hearing the parties on the present case, the court vide the judgment delivered on 15<sup>th</sup> October, 2003 granted the reliefs sought in the plaint.

26. The record shows that since then, there have been numerous suits and applications filed before various courts in respect to the suit property, some of which have been determined.

27. Before I consider the merits of the instant Motion, I wish to first determine some preliminary issues raised by the defendant in its Grounds of Opposition.

28. The **first** issue has to do with whether the Motion is time barred. Upon considering the rival positions taken by the applicants on the one hand and the defendants on the other hand, as set out hereinabove, I find that the Motion does not constitute an action in the real sense of the word since it was brought under an existing claim and hence I am not convinced that the Motion is time barred pursuant to **Section 4(4)** of the **Limitation of Actions Act**.

29. Under the second issue, I am required to determine whether the Motion is *res judicata*. I took into account the contending positions taken by the applicants and the defendant on this issue.

30. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** offered the following interpretation on the legal term ‘res judicata’ in the manner hereunder:

**“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;**

**“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 the 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.”**

**Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;**

**(a) The suit or issue was directly and substantially in issue in the former suit.**

**(b) That former suit was between the same parties or parties under whom they or any of them claim.**

**(c) Those parties were litigating under the same title.**

**(d) The issue was heard and finally determined in the former suit.**

**(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

31. Upon perusing of ELC Case No. 1389 of 2004 which was filed by the defendant, specifically the ruling delivered by the ELC on 20<sup>th</sup> June, 2014 in the case of **Southdowns Developers Limited v Haithar Haji Abdi & another [2014] eKLR** I note therefrom that the suit involved the plaintiff and the applicants herein. I similarly note that the ruling was in respect to an application filed by the applicants following the delivery of judgment in favour of the plaintiff, where the ELC granted the plaintiff an eviction order against the applicants and an order for payment of the sum of Kshs.6,300,000/ as general damages for trespass.

32. In their application, the applicants had sought for *inter alia*, injunctive orders; a review and/or setting aside of the judgment and decree and the consequential orders; and the annulment of that suit and other related suits where the plaintiff appears as a plaintiff.

33. In the Grounds to their application, the applicants argued *inter alia*, that the plaintiff was never registered as a company prior to commencement of the suit and it could therefore not have filed the suit or entered into any contracts of bids in relation to any auction, and that Paul Omondi Mbago who purported to be the Managing Director of the plaintiff did not bring any evidence of registration or incorporation of the plaintiff. The application was opposed by the plaintiff.

34. Upon hearing the parties, the ELC found that no new evidence had been presented by the applicants and also found that the plaintiff was a registered company. Consequently, the ELC dismissed the application for being an abuse of the court process and for lacking in merit.

35. Upon comparing the application filed before the ELC and the instant Motion, I note that the orders sought in both instances are substantially similar; the grounds/facts raised therein are almost identical and it is apparent that the issues raised before the ELC were determined. It is also noted that the parties before the ELC are also parties in the present suit and that the suit property forms the crux of both cases. In my view, any changes that have been made in the instant Motion are purely cosmetic.

36. From the foregoing, I am therefore convinced that the instant Motion is not only *res judicata* but is amounts to also an abuse of the court process. In the case of **E.T. v Attorney General & another [2012] eKLR** the court held *inter alia* as follows:

**“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and 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.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....”**

37. The third preliminary issue is whether the applicants have *locus standi* to bring the instant Motion.

38. Having considered the material placed before the court, it is not in dispute that the applicants had charged the suit property to the defendant. It is also not in dispute that the defendant later sold the suit property to the plaintiff by way of a public auction and that

subsequently, the plaintiff was declared the rightful owner of the suit property. In the absence of anything to indicate annulment of the plaintiff's and/or subsequent person(s)' entitlement to the suit property by way of a court order, I am of the opinion that the applicants have lost any legal rights to the suit property and cannot claim otherwise.

39. In the end, I find the Motion dated 17<sup>th</sup> January, 2020 to be lacking in merit and to be an abuse of the court process.

The same is hereby dismissed with costs to the defendant.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13<sup>th</sup> day of November, 2020.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants

..... for the 1<sup>st</sup> Interested Party

..... for the 2<sup>nd</sup> Interested Party