



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KENYA**

**ELC NO 193 OF 2013**

**AYABEI A CHERUIYOT .....PLAINTIFF**

**VERSUS**

**SOLOMON KIGURU NJUGUGA.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR LAIKIPIA DISTRICT .....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application to have suit dismissed for being res judicata and for being frivolous and vexatious; there having been a previously decided suit over the same subject matter; plaintiff also filing two other suits prior to this suit; case herein clearly being res judicata; limitation of actions; subject matter being a sale agreement of 1983; as late as 1995, plaintiff being aware of the 1st defendant's registration; suit filed in 2013 clearly outside the limitation period of 12 years for recovery of land; suit has no merit and is dismissed with costs).***

1. The application before me is that dated 16<sup>th</sup> June 2014 filed by the 1st defendant. It is an application seeking to have this suit dismissed for the reason inter alia that the same is res judicata. The application is supported by the affidavit of the 1st defendant who has averred that the matters in this suit were fully considered in Nyahururu Magistrate's Court Case No. 71 of 1990 and also consisted of the subject matter in two other suits filed in the High Court at Nakuru. No response was filed by the plaintiff to respond to the application and the material that I have is therefore only that supplied by the applicant and the same is uncontroverted.

2. Since it is alleged that this case is res judicata the suit Nyahururu Magistrates' Court Case No. 71 of 1990, and was also the subject of two other suits, I need to make an assessment of whether the subject matter of this case has been decided before in the previous named suits.

3. This suit was commenced by way of plaint filed on 18<sup>th</sup> February 2013 as against the applicant, being 1st defendant, and the Land Registrar, Laikipia District, as 2nd defendant. The plaintiff pleaded that he was allotted by the Settlement Fund Trustees (SFT), in the year 1968, the parcel of land identified as Plot No. 281 Marmanet Scheme previously Plot No. 220 Marmanet, measuring about 23 hectares. It is pleaded that on 16 March 1983, the plaintiff and the 1st defendant entered into a land sale agreement whereby the plaintiff sold to the 1st defendant 21.5 acres out of the said Plot No. 281, at a consideration of Kshs. 146,000/=. It is said that a deposit of Kshs. 111,000/= was paid and that the balance of the purchase price was to be paid after obtaining the consent of the Land Control Board. It is pleaded that the plaintiff religiously paid the SFT loan until he cleared it in the year 2000. In the year 2001, while processing his

registration of the land, he discovered that the 1st defendant had become registered as proprietor, sometimes on 11 November 1988. It is alleged that this was done either through corruption or misrepresentation. The plaintiff has further pleaded that at a later date, he applied for a certified copy of the title deed and he identified several anomalies, namely, first that the area of 23 hectares was cancelled and 11.2 hectares indicated but that their agreement was for 21.5 acres, and secondly, that the title was closed on subdivision, but the number of subsequent subdivisions except the No. 2765, are not indicated. He has pleaded that there has never been any subdivision on the ground and that he has requested to no avail from the 2nd defendant for the reference numbers of the subdivision of the title number 281.

4. In this suit, the plaintiff has asked for the following prayers :-

- (a) *An order that the 1st defendant submit the title deed to the 2nd defendant for cancellation.*
- (b) *An order compelling the 2nd defendant to register the suit land in the plaintiff's name.*
- (c) *Alternatively, the Deputy Registrar to sign the necessary documents to effect transfer of the subject suit (sic) into the plaintiff (sic) name.*
- (d) *General Damages.*
- (e) *Costs of this suit.*

5. The 1st defendant entered appearance and filed defence. In the defence, he stated that the matters pleaded in this suit by the plaintiff, had been decided in Nyahururu PMCC No. 71 of 1990. He also pleaded that the plaintiff attempted to bring the same matters in Nakuru HCCC No. 285 of 1995 which was dismissed because it was res judicata Nyahururu PMCC No. 71 of 1990. The 1st defendant pleaded that the plaintiff still filed another case in respect of the same matter, being Nakuru HCCC No. 252 of 2009 (OS) which upon contestation, was abandoned by the plaintiff. He has stated that he purchased the Plot No. 281 for valuable consideration which was paid to the plaintiff and all formalities undertaken. He has averred that even if the plaintiff's contentions were true, the suit is time barred following the law on limitation.

6. In his supporting affidavit to this application, the applicant has annexed a copy of the sale agreement between himself and the plaintiff, copy of consent of the Land Control Board and a Certificate of Outright Purchase issued by the SFT. He has deposed that after about 4 years, the plaintiff sought to rescind the sale agreement which forced the applicant to sue the plaintiff in Nyahururu PMCC No. 71 of 1990. A copy of the plaint and decree are annexed by the 1st defendant. The applicant has deposed that the plaintiff tried to set aside the decree but was unable to do so and that the judgment therefore binds the plaintiff to date. It is therefore the applicant's view that this suit is res judicata. The applicant has gone further to annex the plaint in Nakuru HCCC No. 285 of 1995 which he states was withdrawn with costs. He has also annexed the Originating Summons and Replying Affidavit in Nakuru HCCC No. 252 of 2009 (OS). He has averred that the same was dismissed. He has stated that the plaintiff has not pleaded any particulars of corruption or misrepresentation and has further averred that if he learnt of the same in the year 2001, there is no explanation why this suit has been filed in 2013, which he states is a period of 13 years. He has pointed out that the plaintiff seeks to rescind a sale transaction entered into in the year 1983 which is outside the period permitted by the Limitation of Actions Act. It is his view that disputes must come to an end.

7. I have considered the matter. As I stated earlier, the plaintiff did not file anything to oppose this motion. It is of course the applicant's contention that this suit is res judicata the suit Nyahururu PMCC No. 71 of 1990 which suit was filed by the 1st defendant/applicant. It is not in doubt that the said suit was decided and a decree issued. I have looked at the decree annexed by the applicant and I can see that the following was decreed :-

- (i) *That the land parcel L.R No. Laikipia/Marmanet/281 belongs to the plaintiff absolutely the same having been validly and legally bought by the plaintiff from the defendant.*

*(ii) That the defendant has no legal right to the said plot.*

*(iii) That the defendant be and is hereby ordered to vacate the plot unconditionally failing which he should be evicted.*

*(iv) That the defendant do pay the costs of the suit to the plaintiff.*

8. The decree is dated 18<sup>th</sup> October 1990.

9. I have no evidence that the above decree was ever set aside and the only assumption I can make is that it was not. I have also seen that in the suit Nakuru HCCC No. 285 of 1995, the plaintiff filed suit seeking orders that he be declared the owner of the land parcel Laikipia/Marmanet/281. He further sought orders to have the applicant (as defendant in the said suit) transfer the title documents to him. The applicant states that the said suit was withdrawn but I do not have any evidence of this. But it doesn't matter, for whether it was withdrawn or whether it still persists, it means that it is a suit filed prior to this matter. It will be observed that the prayers sought in the said suit are more or less similar to the prayers sought in this matter. The bone of contention still remained the sale agreement between the plaintiff and the 1st defendant.

10. I have also seen the Originating Summons in Nakuru HCCC No. 252 of 2009 (OS). It appears to me as if it was claim for adverse possession. I do not know what happened to the suit for I have no final order.

11. Having looked at the above suits, I do not think it can be in doubt that the matters pleaded in this case have either been the subject of previous suits or the same have been decided. Sections 6 and 7 of the Civil Procedure Act, CAP 21, Laws of Kenya bars the filing of a suit where the matter is also the subject of a previously filed suit which is still subsisting, or the subject matter in the suit has been decided before.

12. I have no doubt in my mind that the matters herein were decided in Nyahururu PMCC No. 71 of 1990 or consisted of the subject matter of the suit Nakuru HCCC No. 285 of 1995. It is clear that this suit is res judicata. Being res judicata, I have no option but to dismiss it with costs.

13. Even if the matters were not res judicata, I would still have dismissed the suit for having been filed out of time. It is trite law, and it is set out in Section 7 of the Limitation of Actions Act, CAP 22, that suits for the recovery of land must be filed within 12 years of the cause of action. The bone of contention seems to be a sale agreement of 1983. The plaintiff has pleaded in his plaint that the plaintiff became registered as owner of the suit property in the year 1988. He was clearly aware of the applicant's registration of the suit property as late as 1995, when he filed the suit Nakuru HCCC No. 285 of 1995. Even if we take the year 1995, as the year in which the cause of action accrued, this suit was filed about 18 years later. It is clearly out of time.

14. The plaintiff may still bear a sentiment that the sale agreement of 1983 was not executed in accordance with the terms thereof. But he has had his chances in court, and unfortunately, he has lost. Litigation must come to an end. At times it does not end with the result that a litigant wants, but one has to bear the consequences of a judgment and move on with life. I advise the plaintiff to do so and not stress his mind thinking that he was shortchanged over the agreement of 1983.

15. It is clear that this suit has no merit and it is hereby dismissed with costs.

16. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> Day of January 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of -:**

Ms. Kipruto for plaintiff/respondent

N/A on part of M/s D. K Kaburu & Company for 1st defendant /applicant

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**