



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 572 OF 2015

REUBEN GACHAU MWIHAKI.....PLAINTIFF

-VERSUS-

JAMES KIGUL.....1ST DEFENDANT

GUESTCARE IDEAL HOMES LIMITED.....2ND DEFENDANT

IRENE WANJIKU GIKANGA.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Subject matter herein came up for hearing on the **25th November 2021**, on which date the matter proceeded and the Plaintiff's case was heard and closed.
2. Upon the close of the Plaintiff's case, the matter was taken out on account of time and the parties agreed that the Defense herein shall be commenced and/or heard on the **25th January 2022**.
3. Come the **25th January 2022**, the matter was called out during the call over and with a view to confirming readiness of the parties. For clarity, the Advocates for the Parties, were present.
4. Be that as it may, when the matter was called out, counsel for the Plaintiff drew to the courts attention to the fact that the 2nd Defendant to the Counter claim, namely, the Chief Land Registrar, had filed a Statement of Defense and various Documents and that same had been served on himself on the eve of scheduled of the Defense hearing.
5. Owing to the foregoing, Counsel for the Plaintiff sought directions of the court as to the legality and/or propriety of the said Statement of Defense and Documents, which had been filed by and/or on behalf of the 2nd Defendant to the counter-claim.
6. Nevertheless, the court indicated and/or directed that the matter was scheduled for defense hearing and that any interlocutory issues seeking for directions and/or guidance by the court, shall be dealt with on the floor, during the schedule hearing. Consequently, the court proceeded to and allocated time for the defense hearing.
7. Later at **12:00 noon**, the matter was called out in open court and counsel for the Plaintiff brought up the issue of the Statement of Defense and the documents, which had been filed by and/or on behalf of the 2nd Defendant to the counter-claim.
8. Owing to the foregoing, the court gave indications that the parties either agree to address the issue of the Documents that were filed by the honourable Attorney General and leave the matter to the court to render a Ruling, in which case, the scheduled hearing shall abort and/ or be shelved.
9. On the other hand, the court also suggested to the parties and in particular the Plaintiff's counsel who had closed his case, that the document could be allowed on to remain on record, with the liberty to the Plaintiff to re-open his case and tender further evidence, if it was deemed necessary.
10. Pursuant to the suggestion by the court, the Plaintiff's counsel, who had raised the issue pertaining the new set of documents and who was bound to be prejudiced, informed the court that same would not be averse to the Documents being admitted and forming part of the record.

11. On the other hand, the Plaintiff's counsel also informed the court that having reviewed the documents, same was neither inclined to re-open the Plaintiffs case nor to recall the Plaintiff for further examination in chief.

12. Following the address by the Plaintiffs counsel, the advocate for the 1st, 2nd & 3rd Defendants, remained mute and/or silent and did not object to the usage and/or reliance on the Documents that were filed by and/or on behalf of the 2nd Defendant to the Counter-claim.

13. Nonetheless, the Counsel for the 2nd Defendant to the Counter-claim implored the court to rely on and utilize the Documents, lateness in filing and service notwithstanding.

14. It is worthy to note, that based on the foregoing, the court proceeded to and made a short order as hereunder;

I. The documents that were filed by and/or on behalf of the 2nd Defendant to the counter-claim be and are hereby allowed to remain on record and the same shall therefore be relied upon by the respective parties.

II. To the extent that the Plaintiffs counsel is not seeking to recall the Plaintiff on the face of the new documents, the matter be and is hereby ordered to proceed for hearing as scheduled.

15. Upon the rendition of that order, counsel for the 1st & 2nd Defendants indicated to the court that same was still ready to proceed.

16. Premised on the address by counsel for the 1st & 2nd Defendants that same was ready to proceed, the court made a further order as hereunder;

a. Hearing to proceed as was ordered and/or directed.

17. Subsequent to the foregoing, the counsel for the 1st & 2nd Defendants summoned his witness to the witness box and same was duly sworn and the hearing commenced. For clarity, the witness for the 1st & 2nd Defendants testified, was cross examined by the Plaintiff and counsel for the 2nd Defendant to the counter-claim.

18. At the conclusion of the testimony by the witness for the 1st & 2nd Defendants, counsel for the 1st & 2nd Defendants indicated to the court that same was closing the 1st & 2nd Defendants case.

19. Pursuant to the address, it is imperative to recall that the court proceeded to and closed the case for the 1st & 2nd Defendants and thereafter set a further date for Defense hearing on the **8th March 2022**.

20. Despite the foregoing chronology, counsel for the 1st & 2nd Defendants then rose up and contended that he was now seeking to have the Documents filed by the 2nd Defendant to the counter-claim to be struck out and/or expunged.

SUBMISSIONS BY THE PARTIES:

1ST & 2ND Defendants submissions:

21. It was the 1st & 2nd Defendants submissions that the Statement of Defense and the impugned documents had been filed too late in the day and that same shall prejudice the 1st & 2nd Defendants case.

22. It was further submitted that the subject matter had proceeded for pretrial conference before the Deputy Registrar and that at the time of the final pretrial conference, the 2nd Defendant to the Counter-claim, had not filed any Defense and/or Documents.

23. In any event, it was submitted that the Counsel for the 2nd Defendant to the Counter-claim had indicated that same shall only be relying on the decision passed by the chief Land Registrar, vide letter dated **11th May 2010**, and no other.

24. It was further submitted that the 2nd Defendant to the Counter-claim cannot be allowed to sneak in Documents and thereby subject the other Parties to prejudice.

3RD DEFENDANTS SUBMISSIONS:

25. The 3rd Defendant herein supported the contention by the 1st & 2nd Defendants and similarly sought to have the documents filed by the 2nd Defendant to the counter-claim to be expunged.

26. According to counsel for the 3rd Defendant, the issue of filing pleadings and documents had been addressed and dealt with before the Deputy Registrar and during the entire session, the 2nd Defendant to the counter-claim did not signal any indication that same shall be filing any Documents.

27. In the premises, counsel for the 3rd Defendant, reiterated the request that the Documents be expunged.

PLAINTIFF'S SUBMISSIONS:

28. The Plaintiffs counsel contended that the issue of filing of the Statement of Defense and the documents by the 2nd Defendant to the Counter-claim, was only raised by the Plaintiff and no other counsel.

29. Secondly, the Plaintiff's counsel further submitted that it was only the Plaintiff, who was bound to be prejudiced by the late filing of Defense and the Documents, given that the Plaintiff had already closed his case.

30. Nevertheless, the Plaintiff contended that having reviewed the totality of the documents filed and taking into account the nature of dispute, it was not appropriate and/or expedient to lock out the evidence from the Chief Land Registrar, who is the custodian of the Records pertaining to land within the City County of Nairobi.

31. At any rate, counsel for the Plaintiff further pointed out that the issue before the court was ownership of **L.R No. 7785/824 (I.R No. 70478)** and hence a determination on merits would require that the court looks at all the evidence available.

32. Finally, the Plaintiffs' counsel submitted that the issue of the filing of the new documents and whether same could be relied on, had been pronounced upon by the court before the commencement of the days hearing.

33. In fact, counsel for the Plaintiff added that after the pronouncement by the court, counsel for the 2nd Defendant to the counter-claim was allowed to cross examine and indeed, cross examined the the witness by the 1st & 2nd Defendants, based on the impugned documents.

34. In a nutshell, counsel for the Plaintiff contended that the import and tenor of the documents filed by the 2nd Defendant to the counter-claim had been imported into the proceedings and therefore cannot be dis-entangled, in line with the request by the 1st, 2nd and 3rd Defendants.

SUBMISSIONS BY THE 2ND DEFENDANT TO THE COUNTER-CLAIM:

35. According to the 2nd Defendant to the counter-claim, the Application by the 1st, 2nd & 3rd Defendants, seeking to expunge the pleadings and documents filed, was overtaken by events.

36. It was counsel's submissions that the legality and/or propriety of the said documents had been addressed by the court and a decision was made thereon before the commencement of proceedings.

37. Similarly, counsel for the 2nd Defendant to the counter-claim also submitted that following the pronouncement by the court on the basis on the impugned documents, same were used to cross examine **DW1** and hence the impugned documents have since impacted on the proceedings.

38. On the other hand, Counsel for the 2nd Defendant to the counter-claim made two further submissions and stated that the issue of the expunction of the documents, having been addressed vide the order of the court, same was therefore **res-judicata**.

39. Finally, counsel for the 2nd Defendant to the counter-claim submitted that even assuming that the documents had not been pronounced on, the court still has a discretion, to allow reliance on the said documents so as to ensure that the subject dispute is determined on merit as opposed to technicality.

40. In sum, the counsel for the 2nd Defendant to the counter-claim relied on the decision in the case of **Nicholas Kiptoo Arap Salat v IEBC & Others (2014) eKLR**, where the Supreme Court considered the factors to be addressed whilst extending time, for the performance of an act and/or an event.

ISSUES FOR DETERMINATION:

41. Having listened to the submissions by the advocates on record and taking into account the proceedings of the day, which were taken in the presence of and with concurrence of the parties, the following issues are germane for determination;

I. *Whether the court has jurisdiction to re-agitate the issue of the expunction of the impugned documents or whether such an action would amount to seating on appeal.*

II. *Whether the issue of the expunction of the impugned documents is Res-judicata.*

III. *Whether the impugned Documents, which have since been relied upon during Cross examination and the proceedings of the day can be divorced from the proceedings.*

IV. *Whether the admission of the impugned documents would prejudice the 1st, 2nd & 3rd Defendants.*

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the court has jurisdiction to re-agitate the issue of the expunction of the impugned documents or whether such an action would amount to seating on appeal on own Decision:

42. Prior to and/or before the commencement of the proceedings on the 25th January 2022, the Plaintiffs counsel, brought to the attention of the court the fact that the 2nd Defendant to the counter claim had filed a statement of Defense and Documents, long after the close of the Plaintiff's case.
43. Owing to the foregoing, the Plaintiff's counsel sought for directions by the court as to the import and tenor of the impugned documents.
44. Nevertheless, on a second thought counsel for the Plaintiff retracted his objection and informed the court that the impugned documents can be allowed to remain on record and be utilized during the course of the proceedings.
45. Other than the submissions by the counsel for the Plaintiff, which were made on the floor of the court, the counsel for the 1st, 2nd & 3rd Defendant, did not comment on the said documents. For clarity, the said advocate remained silent and mute.
46. Based on the foregoing position and more particularly the stand taken by the counsel for the Plaintiff, who was bound to suffer prejudice, the court proceeded to and made orders, details of which have been captured herein before.
47. On the other hand, the court thereafter directed that the impugned documents be used and/or utilized by the parties in the proceedings.
48. With the foregoing position, it is evident that the court pronounced itself on the status and position of the impugned documents and same were ordered to be used in the proceedings.
49. Having made the foregoing orders, can the court be now asked to have a second bite on the same subject and/ or be requested to proceed and determine, whether the Documents ought to be expunged.
50. In my humble view, the invitation by the counsel by the 1st, 2nd & 3rd Defendant touching on the expunged documents, amounts to asking the court to sit on appeal in respect of own decision.
51. I am afraid that having consciously and deliberately dealt with the issue in dispute, with the concurrence of the advocates on record, I cannot re-agitate the same issue.
52. In the premises, I find and hold that the court is not seized of jurisdiction to revisit the said subject matter. For clarity, an attempt to do so, would occasion a travesty to justice.

ISSUE NUMBER 2:

Whether the issue of the expunction of the impugned documents is res-judicata

53. It is common ground that the issue relating to the impugned documents, was raised and ventilated by the Parties and more particularly, counsel for the Plaintiff on the floor of the Court.
54. It is also evident that upon the ventilation of the issues, the Court proceeded to and made a decision and thereafter counsel for the 1st & 2nd Defendants, signaled that he was still ready to proceed.
55. To the extent that the subject matter, was raised and dealt with on its merits, the resultant decision is therefore a decision that is binding on the parties.
56. In any event, the court having pronounced itself on the issues, same cannot now be revisited, in the manner proposed by the 1st, 2nd & 3rd Defendants. Simply put, the issue herein is **Res – judicata**
57. As pertains to the scope, relevance and application of the **doctrine of res-judicata**, it is imperative to take note of the provisions of **Section 7 of the Civil Procedure Act**, which provides as hereunder;

7. **Res judicata:**

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.

58. On the other hand, it is also worthy to take cognizance of the decision in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, where the court of appeal held as hereunder;

“See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases.

Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions”.

59. Having dealt with the issues of impugned documents and having made a conscious ruling thereof, the issue of the impugned documents is now *res-judicata*.

ISSUE NUMBER 3:

Whether the impugned Documents, which have since been relied upon during cross examination and the proceedings of the day can be divorced from the proceedings or whether the Doctrine of Waiver is applicable herein:

60. In the course of the rendition of the decision pertaining to and/or concerning the issue of the impugned documents the court ordered as hereunder;

I. The Documents that were filed by and/or on behalf of the 2nd Defendant to the counter-claim be and are hereby allowed to remain on record and the same shall therefore be relied upon by the respective parties.

61. Pursuant to the foregoing order, all the parties to the subject matter, were at liberty to rely on and/or cross examine on the basis of the said documents.

62. In fact, the witness for the 1st & 2nd Defendants, testified whilst alive to and/or knowledgeable of the said documents, which had admittedly been served on the respective advocates.

63. Other than the foregoing, the counsel for the 2nd Defendant to the Counter-claim used and/or relied on the pleadings and/or the impugned documents, to mount cross examination and the answers arising from cross examination, were endorsed on the court records.

64. The question that now arises, is whether the impugned documents, part of whose contents already forms part of the court record can now be divorced from the proceedings and the manuscript of the court.

65. In my humble view, the scenario before hand is analogous to insisting on extricating the cooking flour from water, long after the cooking flour has been stirred and porridge or ugali has arisen therefrom.

66. Simply put, that the 1st, 2nd & 3rd Defendants are now asking the court to do an impossibility and thus the invitation amounts to action in vanity. In my view, Courts of Law do not act in Vain.

67. Nevertheless, it must be observed that the counsel for the 1st, 2nd & 3rd Defendants were present in court and did not appropriate their mandate and/or responsibility. In this regard, whatever right that same had is deemed to have been Waived.

68. In support of the foregoing position, I wish to invoke and rely in the decision in the case of **748 Air Services Limited v Theuri Munyi [2017] eKLR**, where the court held as hereunder;

“Closer home in the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited vs Development Finance Company of Kenya Limited, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?.”

69. Certainly, if the counsel for the 1st, 2nd & 3rd Defendants, were keen to take any objection, same ought to be have been taken at the onset and Ex post facto.

70. Nevertheless, out of their own volition they failed, neglected and/or refused to act and such failure, has its consequences, both in Law and in Equity.

71. Suffice it to underscore, that one such consequences is waiver of rights. At any rate, Equity aids the Vigilant and the Indolent.

72. In short, the Objection which was being taken long after the Documents had been admitted for purposes of being relied on in the course of the proceedings, was tantamount to placing the Cart before the Horse.

ISSUE NUMBER 4

Whether the admission of the impugned documents would prejudice the 1st, 2nd & 3rd Defendants.

73. The dispute before the court, touches on ownership of the suit property which is being claimed by three separate and distinct persons, with each contending to be the bona-fide owner thereof.

74. The Chief Land Registrar is by law the custodian of the records pertaining to all landed property in the Republic of Kenya and in particular, within the City County of Nairobi.

75. Consequently, in a dispute of this nature the Chief Land Registrar plays a critical, *albeit* crucial role in helping the court to resolve the ownership dispute.

76. At any rate, even where the Chief Land Registrar is not sued, the court has the liberty and latitude to summon the Chief Land Registrar, to appear before the court and to bring forth the documents under his or her custody.

77. However, in this case the Chief Land Registrar has filed the documents, *albeit* late and out of time and hence the application that same be expunged.

78. If the documents by the Chief Land Registrar are expunged, the question is what evidence shall the court rely on to determine ownership to the disputed property, where each of the three disputants have some semblance of titles.

79. In my humble view, neither of the parties herein, shall suffer any prejudice, if the documents by and/or on behalf of the Chief Land Registrar are admitted, utilized and/or processed, for purposes of arriving at the Right answer, as propagated by **Professor Ronald Myles Dwokin, the Famous Legal Scholar, who posited that for every case, there must be a Right Answer.**

80. Perhaps, the side question would be, why are the 1st, 2nd & 3rd Defendants apprehensive of the documents by the Chief Land Registrar and the evidence that would come therefrom? Is it that there is something that the court must not know.

81. Notwithstanding the contention by the 1st, 2nd & 3rd Defendants, the court has inherent jurisdiction to ensure that justice is not only be done, but seem to have been done. See Article 159 (2) of the Constitution, 2010.

82. If there was a case that befits the invocation and application of the ***doctrine of inherent jurisdiction***, the subject case is a perfect candidate.

83. It is also imperative to note that upon of the promulgation of the **Constitution of Kenya 2010**, same underlines that justice shall not be fettered by undue regard to procedural technicalities. For clarity, the provisions of **Article 159 (2) (d)**, provides as hereunder;

(d) justice shall be administered without undue regard to procedural technicalities;

84. Notwithstanding the foregoing, it is also important to take cognizance of the decision in the case of **Chase International Investment Corporation and Another vs. Laxman Keshra and Others**, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

85. In regard to the subject matter, the delay by the 2nd Defendant to the counter-claim to file the pleadings and the impugned documents in time is something that must be abhorred, but same can be regularized and the court is seized of discretion, to facilitate the validation of such documents.

86. At any rate, the documents herein were already admitted and utilized in the course of the proceedings and therefore no prejudice shall arise.

87. In a nutshell, I would have been obliged to exercise my discretion towards retention of the impugned pleadings and documents. However, based on the orders that were made in course of the proceedings the point herein is moot.

FINAL DISPOSITION:

88. Having dealt with and addressed the issues that were set out for determination, I am now disposed to render a decision.

89. Consequently, the informal Application by the 1st, 2nd & 3rd Defendants, touching on and/ or concerning the expunction and/or striking out of the impugned pleadings and documents, be and is hereby Dismissed.

90. Costs shall abide the cause.

91. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27th DAY OF JANUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE.

In the Presence of;

June Nafula Court Assistant

Mr. Asford Muguku for the Plaintiff.

Mr. Allan Kamau for the 2ND Defendant to the Counter Claim.

Mrs Karanu for the 3RD Defendant.

N/A for the 1ST and 2ND Defendants.