REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL CASE NO. 11 OF 2015

ARTHUR AMOS AJWA BONDE ..... PLAINTIFF/APPLICANT

Versus

KENYA NATIONAL ASSURANCE

COMPANY (2001) LIMITED …..... DEFENDANT/RESPONDENT

RULING

1. The defendant, Kenya National Assurance Company (2001) Limited, was sued by Arthur Amos Ajwa Bonde, the plaintiff in this case whereby the plaintiff pleaded that he had been a tenant for over 10 years of the defendant at a residential property namely **Nanyuki Housing Scheme** on **L.R. NO. Nanyuki/Municipality/Block VIII/898.** That the defendant had failed to give the plaintiff first priority to purchase that property but had instead advertised for bids from interest parties. The plaintiff's prayer is for an order to stop the defendant from seeking bids for sale of that property and for the plaintiff to be allowed to pay 90% of the purchase price within 90 days. The plaintiff also prayed in his plaint for an injunction to restrain the defendant from disposing of the property.

2. The plaintiff when filing the plaint simultaneously filed a Notice of Motion application dated 11th October 2011 which sought interlocutory injunction to restrain the defendant from selling the property. That application was heard by **Justice Sergon**. In the Judge's ruling of 17th October 2011 there was a finding that the plaintiff was represented, in the representative suit namely **HCCC Nyeri No. 21 of 2008**. In that case the plaintiff alongside 91 other plaintiffs sued this same defendant seeking similar orders as the plaintiff seeks in this case. In that case No. 21 of 2008 the plaintiff alongside 91 other plaintiffs also sought interlocutory injunction to restrain defendant from selling the property. By a Ruling delivered on 23rd September 2011 the court dismissed the interlocutory injunction application in case No. 21 of 2008.

3. Justice Sergon in this case by his Ruling of 17th October 2011 on the interlocutory injunction application filed by the plaintiff found as following:-

> ***"HCCC No. 21 of 2008, the plaintiffs filed the motion dated 10th March 2011 in which they sought for near similar orders as those sought in the motion the subject matter of this ruling. This court considered the motion and came to the conclusion that the same has no merit and proceeded to dismiss the same in its ruling delivered on 23rd September 2011. The plaintiffs in Nyeri HCCC No. 21 of 2008 had wanted the defendant to be restrained from selling houses pending a comprehensive valuation of the houses. The plaintiff in this suit is seeking for an order of injunction to restrain the defendant pending the hearing of this suit. In the substantive***

suit, the plaintiff is basically praying for more time to complete transaction. In my view, I think the current motions should be determined on the basis of the preliminary issue. The question of whether a matter is *res-subjudice* ***or*** *resjudicata* ***cannot be categorized as technical. It is a legal point which goes to the root of the suit. A critical consideration of Order 1 rule 8 (3) of the Civil Procedure Rules will reveal that the plaintiff herein having been part of those parties who authorized the institution of Nyeri HCCC No. 21 of 2008, was not allowed to file a separate suit but to instead seek for leave to made a party to the suit. What the plaintiff has done herein is to ignore the previous suit and instate a fresh suit. It is obvious the plaintiff has raised new grounds in support of the application for injunction. In my view that will not assist the plaintiff because the law requires a party to bring out the issue of his case in one suit and not to litigate in piecemeal. The issue raised in the motion dated 11th October 2011 were supposed to have been raised in the motion dated 10th March 2011 but the plaintiff decided to circumvent the principal of*** *resjudicata* ***by avoiding Nyeri HCCC No. 21 of 2008 and by purporting to file this suit. I do not intend to consider the merits of the motion lest I prejudice the available remedies the plaintiff may seek herein after. I dismiss the motion on the ground that the same is*** *resjudicata* ***with costs to the defendant."***

4. On the court deliver the ruling on 17th October 2011, the excerpts of which are reproduced above, the plaintiff virtually went to sleep as far as this case is concerned. This inactivity prompted the defendant to file a Notice of Motion dated 17th March 2015 for orders that this suit be dismissed for want of prosecution and in the alternative that this suit be dismissed for being an abuse of court and for being res judicata.

5. The plaintiff was not represented when that Notice of Motion was heard because counsel who had been requested to hold brief by the firm Gori & Ombongi advocates, who act for the plaintiff, had walked out of the court when the application was heard. The application was therefore unopposed and indeed the plaintiff had failed to file a replying affidavit to the application.

6. What is very telling is that there is a pending application filed by the firm Gori & Ombongi advocates whereby that firm is seeking leave of this court to cease to act for the plaintiff herein. In the affidavit in support of that application the learned counsel George Gori deponed that he is the advocate having the conduct of this case. He deponed therein:-

"That I am not able to proceed with this suit because the plaintiff has failed to attend briefing and preparation and also failed to provide sufficient instructions and materials in support and preparation of the case."

ANALYSIS AND DETERMINATION

7. There are two prayers that are sought by the defendant. In the first prayer the defendant seeks dismissal of the suit for want of prosecution. In the second and alternative prayer the defendant seeks a finding that this suit is *resjudicata.*

8. In respect of the first prayer the same is anchored on **Order 17 Rule 2(1)(2)** and **(3)** of the **Civil Procedure Rules** which provides:-

"2.(1) In any suit in which no application has been made or step by either party for one year, the court may give notice in writing parties to show cause why the suit should not be dismissed, and …… is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

9. The plaintiff from the date the court dismissed his application for injunction, that is on 17th October 2011, has taken no step in this matter. At most, on the plaintiff side, there is only application made by his advocate who seeks leave of court to cease to act for him for failure to obtain instructions. That inactivity by the plaintiff in breach of the overriding objective of this court set out in **section 1A** and **1B** of the **Civil Procedure Act, Cap 21**. Section 1B requires the court to aim to attain efficient disposal of the business of court and timely disposal of proceedings. The parties advocate in any civil action are under a duty to assist the court attain those goals. Similarly **Article 159 (2) (b)** of the **Constitution of Kenya** requires that justice be not delayed.

10. In the case of **ET MONKS & CO. LIMITED –V- EVANS (1985) KLR 584** the court held:

> ***"Whether an application for dismissal of suit for want of prosecution should be allowed or not is a matter for the discretion of the Judge who must exercise its judicially. The court shall among other things, consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexecusable. However, each case will turn on its own fact and circumstances."***

In the case of **MOSES MURIIRA MAINGI & 2 OTHERS – VS- MAINGI KAMURU & ANOTHER – NYERI CIVIL APPEAL NO. 151 OF 2010**. The Court of Appeal said:-

> ***"The power of the court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially."***

11. Bearing in mind what is stated above in this ruling, there is no doubt that the plaintiff has failed to take any action or step since October 2011 and it can therefore be surmised that he plaintiff has indeed lost interest in this case and it should therefore be dismissed for want of prosecution.

12. Having reached that conclusion there need not be a determination on the alternative prayer. I will however proceed to determine it because the defendant has provided material in its support.

13. As stated before the plaintiff herein was also one of the plaintiffs in case No. 21 of 2008. That case, No. 21 of 2008, was concluded and a decree was extracted. That decree was to the effect that the property, which is the same property in this suit, would be subdivided and surveyed by the Government Valuer; the value set by the Government Valuer would form the purchase price; the sitting tenants, such as the plaintiff herein, would be given first priority to purchase within 45 days from the date in the letter of offer; and if the sitting tenant failed to pay the purchase price within the 45 days the defendant was to be at liberty to evict those tenants upon expiry of 90 days. The plaintiff, as was stated by Justice Sergon in his ruling, failed to meet that timeline and in order to circumvent the effects of such failure filed this case and sought to restrain the defendant from selling the property he occupies.

14. Section 7 of Cap 21 provides:-

> ***"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 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."***

15. In the concluded case No. 21 of 2008 the issues that were there are exactly the same as the issues raised by the plaint in this case. In case No. 21 of 2008 a decree was issued which clearly signifies that the case was heard and determined. It follows for the plaintiff to file this case after case No. 21 of 2008 was concluded was against the doctrine of res judicata. Justice Ombwayo in the case of **CHARLES MWANGI RINGURU –V- NANCY WANGARI MATHENGE (2014) eKLR** had this to say which is pertinent to this case:-

> ***"In the case of EDWIN THUO V ATTORNEY GENERAL AND ANOR PETITION NO. 212 OF***

2012 it was stated that the court must be vigilant and guard against evading the doctrine of *res judicata* ***by introducing new causes of action. It was stated 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 is 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."

I do make a finding that this case is res judicata.

16. In the end I order:-

(a) This suit be dismissed for want of prosecution and for it being res judicata.

(b) The plaintiff shall pay the costs of the suit and the costs of the Notice of motion dated 17th March 2015.

DATED THIS 31st DAY OF MAY 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant:……

Applicant: ……..

Respondent: ……..….

For Applicant: …….

For Respondent: …….

COURT

Ruling read in open court.

MARY KASANGO

JUDGE