



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KISUMU.

HIGH COURT CIVIL CASE NO. 120 OF 2010.

ERI LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

EQUITORIAL COMMERCIAL BANK (FORMERLY

SORTHERN CREDIT BAKING CORPORTATION LTD.....1ST DEFENDANT

ZAINUL GALIB VELJI.....2ND DEFENDANT/APPLICANT

R U L I N G.

1. The is a composite ruling on two applications: One dated 22/9/2013 while the other is dated 24/10/2013. Both applications are generally similar, hence the need and ease of handling them together. The application of 23/9/2013 was brought by the 2nd defendant – **ZAINUL GALIB VELJI**. He sought to have the suit herein struck out on the ground that it is **RES JUDICATA**. The other application was brought by the 1st defendant – **EQUITORIAL COMMERCIAL BANK**. It, too, alleges that the suit is **RES JUDICATA**. The suit is also said to be time-barred.

2. The plaintiff is **ERI LIMITED** and a reading of the two applications reveal that this is not the first legal tussle it has had with the defendants. Some background is necessary: the plaintiff was offered some overdraft facility by the 1st defendant amounting first to 18,000,000/= but enhanced later to 20,000,000/=. For this financial accommodation, the plaintiff offered two properties as securities: KISUMU MUNICIPALITY/BLOCK 12/165 and KISUMU MUNICIPALITY/BLOCK 3/92. Repayment by the plaintiff was to be in accordance with pre-agreed terms and conditions. The plaintiff appears to have defaulted or fallen behind in repayment.

3. The 1st defendant then set in motion the process of selling the plaintiffs properties. The plaintiff did not face this prospect lying down. He filed a case - NO.594/2001- at High court, Milimani, seeking, inter alia, some restraining orders. In that case the plaintiff lost an application for temporary restraining orders meant to stop the sale. He then filed an appeal – CIVIL APPEAL NO. NAIROBI 196 of 2001 (UR 101/2002 – seeking to get the same orders. The appeal too was dismissed. Later on, suit No. 594 of 2002 was dismissed for want of prosecution.

4. The 1st defendant appears to have proceeded with the sale of the plaintiffs properties. The two properties were sold to the 1st defendant at the same time and on the same date; and in similar circumstances too. It is a sale that the plaintiff want treated as illegal and/or as null and void for failing

to comply with the law.

5. But there were crucial subsequent events. The plaintiff appears to have voluntarily handed over property No. 12/265 to the 2nd defendant. The 2nd defendant demanded to have the other property 3/92- as well. The plaintiff refused to vacate the property and this gave rise to civil suit NO. HCC. 143/04, KISUMU, seeking, inter alia, to wrest possession of the other property from the plaintiff herein. The plaintiff herein was the defendant and he filed a defence and a counter claim in the case. In the counter-claim, the plaintiff appears to have added the 1st defendant herein as a party.

6. It appears clear that in the counter-claim, the plaintiff herein challenged the legality of sale of property No. 3/92 to the 2nd defendant. According to the plaintiff, the 1st defendant did not have a statutory power of sale over property 3/92. To the plaintiff, the sale was illegal, null and void and so also was the subsequent transfer of the property to the 2nd defendant. The plaintiff was actually seeking declaratory orders to that effect.

7. The cumulative thrust of the two applications is that the suit herein is **RES JUDICATA** in two ways: first, the issues were dealt with in past related cases and – which is second – if some issues were not raised in those cases, they ought to have been raised.

8. The plaintiff's response shows him attacking the applications on several fronts. According to the plaintiff, the applications are brought belatedly, in fact when the matter was ripe for hearing, with the plaintiff himself being very ready to proceed. The plaintiff reads bad faith in all this and believes that the defendants are up to some mischief.

9. The plaintiff then went on to cite discrepancies in the dates appearing on 2nd defendant's application, with the application appearing to be dated 24/9/2013.

10. But the 2nd defendant's alleged mischief seems to have started earlier according to the plaintiff. He cited instances where the documents filed by the 2nd defendant show contradicting positions. For instance, the plaintiff averred it was doubtful whether the 2nd defendant allegedly bought the properties through auction. Doubts were also expressed as to when the plaintiff bought the properties: Was it on 5/7/2002 when she says her offer was accepted or 3/7/2002 when she says she bought the properties and signed the sale agreement?

11. On the crucial issue of **RES JUDICATA**, the plaintiff averred that the issues in case NO. 594/2002 are different from the facts that gave rise to this case. According to the plaintiff, the issue in this case is whether the purported sale of the suit property to the 2nd defendant was null and void owing to manifest fraud and/or illegality. It was pointed out that in suit No.594/02, no sale had accrued. In this suit, there is already an alleged sale. The prayers in the two suits are said also to be different.

12. Concerning suit No. 143/04 in which the plaintiffs counter-claim was dismissed, the plaintiff pointed out that the applications leading to that dismissal were brought in bad faith, having been filed about two months after this case itself had been filed. The bank – 1st defendant - was also said not to have been a party in that suit. In sum, the applications herein are said to be malicious and only meant to deprive the plaintiff of a course of action before a full trial.

13. The applications were argued in court on various dates starting from 26/1/2015 and ending on 25/6/2015. The arguments advanced consisted in re-stating, expounding, and expostulating on what had already been availed in writing. The applicants for instance emphasized that the matter is res judicata, its issues having been covered in the previous suits or, in the alternative, being issues that should have been raised in those suits. Additionally, the statute of limitations - **The Limitation of Actions Act (cap 22)** - is said to have caught up with the matter by dint of the provisions of section 4 thereof, which bars contractual actions from being brought after six years from the time they arose.

14. The issue of the suit being statute - barred had not come out particularly strongly in the two

applications. It had only received brief mention in the supporting affidavits. During hearing however, both sides came out strongly either for or against it. The defendants expressed their position that the suit as filed is premised on contract. And according to the applicable law, the time for bringing actions arising from contract is six years. The cause of action herein is said to have arisen sometimes in the year 2002. This suit was originally filed here on 31/8/2010. The defendants position is that six years had long passed.

15. But the plaintiffs position is radically different. The suit is for recovery of land and the period applicable under section 7 of Limitation of Actions Act (cap 22) is 12 years. That being the case, the plaintiff was perfectly within time to bring this suit. The plaintiff argued further that the subject matter of this suit is sale of the suit property. That same issue has been the subject of other suits filed earlier and still pending in court. The issue, according to plaintiff, cannot therefore be said to be affected by the statute of Limitation.

16. But these are not the only arguments advanced by the plaintiff on the issue of Limitation of time. According to the plaintiff, no sale took place on the date – 3/7/2002 – it is said to have occurred. The issue of Limitation therefore does not arise. Additionally, the suit is founded on fraud. The plaintiff allegedly discovered that fraud much later and could not possibly have discovered it earlier. The view was expressed that time starts running for a case based on fraud when that fraud is discovered.

17. The hearing of the two applications also saw the plaintiff pointing out various discrepancies in the date of filing the 2nd defendants application and a further argument that some annexures may not have been paid for. The 2nd defendant countered this by saying that such discrepancies should not lead to dismissal of the application. It was pointed out that section 96 of the Civil Procedure Act (cap 21) would allow for such payment to be made later. A further argument was that if there is such problem, it is the court, not the 2nd defendant that is to blame.

18. The plaintiff raised arguments attacking the sale said to have taken place. The aim seems to be a desire to show that the sale was irregular and unlawful and therefore that it amounted to no sale. The argument saw the defendants retorting that the sale was indeed proper and lawful. The second defendant made a further argument: That even if the sale happened to turn out to be defective or unlawful, the plaintiffs only recourse is to the 1st defendant for a claim in damages.

19. Both sides availed a number of authorities to back-up or buttress their arguments. Some of the authorities availed by the defendants are:

- a) Geoffrey Mundia Kabethi vs Peter Wanjohi Njogu & another (2013) eKLR
- b) Gichuki vs Gichuki (1982) eKLR
- c) Jamleck Muriithi Kithce vs Samson Mbui Obadioh (2010) eKLR.
- d) Michael Gichira Njeru vs Samwel Magu Mugo & 2 others (2014)eKLR.
- e) Mwambeja Ranching Company Limited & another vs Kenya National Capital Corporation Limited (KENYA) & 6 OTHERS (2015) eKLR.
- f) Pop –In (Kenya) Ltd & 3 others vs Habib Bank AG Zurich: ca no. 80 OF 1998, NAIROBI.

20. The facts emerging from the defendants authorities cited are diverse and in many instances vastly at variance with those of the case herein. But the propositions of law emerging from the authorities are generally helpful and illuminating. For instance the case of Geoffrey Mundia Kabethi (listed as ‘a’ herein) illustrates well that issues determined in a previous case cannot be raised again for determination in a later case. This same position emerges in **JAMLECK MURIITHI KITHECE’S** case (listed as ‘c’ herein). And for the proposition that issues that ought to have been raised in a decided matter

cannot form the basis of litigation in a latter case, the PoP-In case (listed as ‘f’ herein) is a good example.

21. The plaintiff also availed quite a number of rulings and judgments. Some of them are:

- i. MARCO MUNUVE KIETI VS Official Receiver and Interim Liquidator Rural Urban Credit Finance & Another: CA NO. 164/2002, NAIROBI.
- ii. R vs Administrative Review Board & 2 others: J.R. NO. 382 of 2013, NAIROBI.
- iii. Ngige V Chomba & 3 others: (2004) KLR 597.
- iv. LOISE MUMBI GACHINGA & Another VS STEPHEN KIIRU MUGO & Another: ELC NO. 411/2013, NAIROBI.
- v. ZEPHANIA GICHURE NDUNGU VS RWAIKAMBA TWATHIS TRADING CO. LTD & Another: ELC NO. 78 OF 2009, NAIROBI, MILIMANI.
- vi. THE Delphis Bank Limited VS Cane land Limited C.A. NO. 282/02, NAIROBI.
- vii. DT Dobie & company (Kenya) Ltd VS Muchina [1982] KLR 5.
- viii. UNTA EXPORTS LTD VS CUSTOMS; [1970] EA 648.
- ix. R VS PUBLIC PROCUREMENT BOARD & 2 others: HCC. NO. J.R. 382/2013, NAIROBI.
- x. NELIWA BUILDERS & CIVIL ENGINEERS VS KENYATTA NATIONAL HOSPITAL: HCC NO. 1675/02, NAIROBI.
- xi. SAVANA SAW MILLS LTD VS GEORGE MWALE MUDOMO: HCCA. NO. 23/04, ELDORET.
- xii. R V FUNYULA LAND DISPUTES TRIBUNAL & Another: HCC. J.R. NO. 23/2012, BUSIA (K).

22. The facts obtaining in the authorities availed are different from those of the case at hand. In fact, none of the case is on all fours with this one. But the propositions of law are largely relevant to the issues under consideration. And I understand the defendant to be saying, inter alia, that no document is properly filed if the fee due is not paid (see UNTA case listed as VIII in the list herein) and that a case where such state of affairs obtain can easily be struck out (see Funyula Land Disputes Tribunal case (listed as xii in the same list).

23. The plaintiff is also saying that the power to strike out a suit should exercised sparingly and cautiously (see DT. Dobie’s case: listed as No. viii in the list). And on RES –JUDICATA, Zephania Gichure’s case (No. V in the list) was availed to illustrate, inter alia, that the principle does not apply where the issues raised in a case have not been heard and decided on merit in a previous case. This same position emerges in Ngige’s case (No. iii in the list herein).

24. I need to point out that both sides availed more authorities than I have mentioned in this ruling. I have not mentioned them because the points of law canvassed are mainly similar to those of the authorities already mentioned. In some however, no value to the case at hand is readily discernible. During hearing, the counsels on record passed over those authorities in silence. It would have been useful if the suitability of the authorities was demonstrated.

25. So much for what each side presented: It is now necessary to embark on the process of making decision. The plaintiffs case is contained in the amended plaint filed here on 31/8/2010. It is clear that

the plaintiff is disputing the validity of the statutory notice of sale issued before his properties were sold. He disputes the subsequent sale and subsequent transfer of the properties to 2nd defendant. His position is that the activities surrounding and leading to all this were illegal, fraudulent, and therefore null and void.

26. And the plaintiff seems to reply to averments made in the defendants defence in the amended plaint itself. In the defence, the defendants referred to past cases filed by the plaintiff. The plaintiff decided to insert a paragraph (Paragraph 17) saying that the cases related to a different property, not the property in this case. The proper procedure is to make such averment in a reply to defence. It is not clear why the plaintiff deemed it fit to raise the issue in the plaint.

27. It is true that there were past cases between the plaintiff and the defendants herein. In fact that is why the issue of RESJUDICATA was raised. Among the prayers sought by the plaintiffs are two declarations viz: That there was no valid sale or at all of land parcel NO. KISUMU MUNICIPALITY/BLOCK 12/265 by the 1st defendant to 2nd defendant and that the transfer and registration of the same parcel of land to 2nd defendant was fraudulently and illegally done, which made it null and void.

28. Past litigation by the plaintiff against the defendants related to land parcel NO. KISUMU MUNICIPALITY/BLOCK 3/92. It seems clear that the plaintiff started with civil case NO.594/02. At that time, he was opposing an imminent sale. It appears clear that there was an application in the case to obtain interlocutory restraining orders before determination of the case. The court heard the application and dismissed it. The plaintiffs appealed vide Civil Appeal No. 196/02. The appeal too was dismissed. Later on, the entire case itself was dismissed for want of prosecution.

29. This turn of events seems to have emboldened the 2nd defendant to file a case here in Kisumu seeking, inter alia, vacant possession of property NO.3/92. The case was HCCC. NO. 143 of 2004. The plaintiff filed a defence and counter-claimed. It seems clear that the counter-claim targeted not only the 2nd defendant but 1st defendant as well.

30. In the counter-claim the plaintiff alleged illegal transfer of property NO. 3/92 to 2nd defendant. He challenged too the power of sale exercised by the 1st defendant. It was the plaintiffs contention that the 1st defendant could not pass title of the property to 2nd defendant as there was no power of sale and that the transfer of property NO. 3/92 was illegal, null and void.

31. Both defendants herein applied to have the plaintiffs counter-claim struck out or dismissed. In two rulings delivered by two different judges (*Warsame J, and Nabuye J as they then were*) the plaintiffs counter-claim and defence were dismissed. It appears clear that the plaintiff went to the Court of Appeal vide Civil Application No. 209/2011 (U.R 135/2011) seeking stay. A three judge bench dismissed the plaintiff's application.

32. The plaintiff in the meantime turned his attention to the suit property in this case. This case was then filed. It is the plaintiff's position that this case is different and deals with different issues. The decision to be rendered in this matter requires that I address the issue of discrepancy in dates alleged to be manifest in the application. It requires attention also to the related issue of alleged non-payment of fee by 2nd defendant. The other issues are **RES JUDICATA** and Limitation of time. Indeed, these two are the core issues.

33. I begin with the issue of discrepancy in dates and alleged non- payment of fees. It seemed to be the plaintiff's position that the 1st defendant was up to some mischief. The discrepancies were attributed to 1st defendant. The 1st defendant does not stamp court documents. The court does it. A mistake can be made. Why is it a mischief and not a mistake? What benefit would the 1st defendant achieve from confusion regarding dates? And what prejudice or harm has come to the plaintiff as a result of the alleged discrepancies? The plaintiff needed to answer all these. He did not.

34. A part from the alleged confusion in dates, the application is otherwise very clear. The plaintiff could read it, respond to it, argue it and appreciate its every other aspect. Why then should it be rejected because of simple confusion regarding dates? The time when simple technical issues would form the basis of draconian action by the courts is long gone. I have read the authorities availed by the plaintiff on the issue of dates and non-payment of court fees. Some of them, like the Uncata case, are obviously old law, out of sync with our times. The others comprised of circumstances where tampering with dates would give rise to dire consequences. They gave rise to undue advantages to one side while denying the other side an obvious legal advantage that would accrue to them if the true dates had been indicated. I think I need to explain more: the authorities concerned situations where mandatory timelines had to be adhered to. The parties that tried to play mischief wanted the dates to appear to be within the stipulated timelines. But the sides adversely affected were quick to notice this stratagem. They raised the issue with courts and the courts agreed with them. No such things obtain in this case. There is no real benefit that the 1st defendants side is said to be looking for.

35. As regards non-payment of fees, the same authorities availed dealt with it. But it is clear it was dealt with in the context of determining the disputed dates of filing. The 1st defendants counsel in this case said that section 96 of the Civil Procedure Act (cap 21) provides for the way handle it. Section 96 simply provides that the court may use its discretion to direct that such fee be paid. It is clear it is a simple issue.

36. It is also important to ponder over the effect of expunging the application from record as asked. The court is not dealing with one application here. It is dealing with two applications that are generally similar. Even if one is expunged or rejected, the other remains. And the one that remains will have to be handled. The results would generally have the same impact in favour or against the parties much in the same way they would if the two applications are handled together. What tangible benefit then would arise by expunging one application from the record while the other is left intact? Not much in my view.

37. For all these reasons the plaintiff's arguments are hereby rejected. The 1st defendant's application remains on record.

38. The other issue is one of RES JUDICATA. As already pointed out earlier, the issue was raised in two contexts: One, that the issues raised have been dealt with in previous cases and, two, that if not raised in the previous cases, they should have been raised. In this second context, the defendants are saying that the suit should have been part of the earlier litigation.

39. Most of the times, RES JUDICATA is raised as a defence. It bars the same parties from litigating a second suit on the same claim. It also bars parties from bringing a claim arising from a transaction that was the basis of a previous suit which could have been brought – but was not – in that previous suit. The first context has the effect of foreclosing re-litigation of matters that have been litigated and decided in the past. The second context has the effect of foreclosing litigation of matters that were never raised but should have been raised in a previous suit.

40. The statutory basis of RESJUDICATA is to be found in section 7 of civil Procedure Act (cap 21). That section requires that the previous litigation must have been handled by a court of competent jurisdiction. The decision of the court must have spoken directly upon an issue in question in a subsequent suit. And the previous suit and subsequent one must involve the same parties or their representatives. The aim of the law is simple: a person shall not be heard to say the same thing twice over in successive litigations. It also serves a crucial public interest. And the interest is that there should be an end to litigation.

41. In this matter, the plaintiff charged his two properties together. When the alleged default in payment arose, the two properties were put up for sale together. Then 2nd defendant bid for the two properties together. When the disputed sale was conducted, she purchased the two properties together. And it seems to be the case that the transfers of the properties to 2nd defendant also went on in tandem.

42. Then the plaintiff voluntarily surrendered the property in this case to the 2nd defendant. He refused to surrender the other. That prompted the 1st defendant to file civil suit No. 143 of 2004 seeking, inter alia, to be granted vacant possession. The plaintiff counter-claimed, besides filing a defence. In the counter-claim, the plaintiff was attacking the legality of the sale and subsequent transfer of the property NO. 3/92 to the 2nd defendant.

43. What is the plaintiff doing in this suit? He is attacking the legality of sale and subsequent transfer of property NO. 12/265 to the 2nd defendant. In the other suit, plaintiff took issue with the legality of the statutory Notice of sale. He is doing so in this suit. Elsewhere in this ruling (see para 30) I tried to set out the crucial aspects of the plaintiff's counter-claim in the other suit. The aim was to draw attention to clear parallels and similarities between that counter-claim and this suit.

44. It is important to note that two rulings by different judges were issued dismissing the plaintiffs counter-claim mainly on the ground that the issues raised in it had impliedly been dealt with in other previous cases.

45. The positions of the two defendants in this case are clear: The claim herein, or the issues in it, should have been litigated in the other past cases in court. I agree entirely with the defendants. The plaintiff is being too clever by half. He sugar-coats his claim with cosmetic amendments meant to hoodwink the court that it is an entirely different suit. The fact of the matter is that the suit herein is, in a manner of speaking, an identical twin-brother or sister to the plaintiff's counter-claim in suit NO. 143/04.

46. To throw the court off-track, the plaintiff purports to show that he has discovered new fraud in this matter. He also thinks that this case is fundamentally different because it relates to different property. The plaintiff is wrong. I have already pointed out that the two properties were dealt with together at every stage. The plaintiff voluntarily handed one – NO. 12/265 – to the 2nd defendant. He declined to do so concerning the other – NO. 3/92. He tried litigation concerning property NO. 3/92. He lost. Now he has turned to property NO. 12/265 raising the same issues but disguising everything to look like he is raising new things. The court cannot allow this. The principle of RES JUDICATA as raised applies.

47. The plaintiff should have joined this claim to his counter-claim in suit NO. 143/04. By trying to bring it separately, he is subjecting the defendants to piecemeal – Litigation or, if you like, Litigation by installments. He is abusing the court process.

48. Some rulings have been availed related to the past litigation. At least some of the rulings (like Warsame's J. ruling) are clear that the issue of sale cannot be revisited as it was settled in other past litigation. That is the same sale that the plaintiff in this case wants the court to declare illegal. He would like the court to revisit the issue of the statutory notice of sale, the sale itself and the transfer that took place. The fact of the matter is that this court cannot revisit issues which have been the subject of findings by fellow judges of equal or concurrent jurisdiction. It would be improper to contradict or alter their findings.

49. In a word therefore, what I am saying is that the principle of RES -JUDICATA applies in the two senses stated by the defendants. And as an additional reason, I am also saying that I cannot be called upon to make findings on issues that fellow judges have had occasion to make findings on.

50. The other issue raised is that of LIMITATION. In simple terms, the defendants are saying that the plaintiff's claim is time barred. I have already pointed out the arguments of both sides on this issue. The suit property was sold in year 2002. The contentious issue is whether the suit is founded on contract or fraud. To the plaintiff, the suit is founded on fraud. To the defendants, it is founded on contract, with sale as a central issue.

51. This suit was filed in the year 2010. If the tort of fraud was raised as a stand-alone issue, the legal position would be as pointed out by the counsel for plaintiff viz: that time starts running when the fraud

is discovered. And according to him, the plaintiff discovered the fraud much later.

52. But I think the plaintiff's counsel is wrong. The fraud alleged by the plaintiff is inseparably and intricately intertwined with the sale and transfer said to have taken place. In fact, one cannot establish the alleged fraud without interrogating the sale and/or transfer that took place. The proper position to take is that the matter is founded on contract as alleged by the defendants counsel. The plaintiff is simply saying that the sale and the transfers that took place were tainted with fraud.

53. The plaintiff's counsel seemed to realize this position and that seems to be the reason why he offered another argument namely: that the sale that took place in respect of this property, cannot be affected by the statute of limitation because it is the same sale that has been in court in previous litigation. But the counsel unwittingly courts a contradiction here. On the one hand, he wants the court to see the matter is one based on fraud. On the other hand, he seems to forget that his position earlier on is that this matter is different from the others. He now seems to admit that the same sale raised herein was the same sale that has been the subject of earlier litigation. In my view, the arguments of the plaintiff's counsel are self-defeating. They do not overshadow the fact that the matter is based on contract.

54. My finding is that the suit is founded on contract. According to section 4 of Limitation of Actions Act (cap 22 actions based on contract cannot be brought after the end of six years since the cause of action accrued. The cause of action herein accrued in year 2002 when the property herein was sold to 2nd defendant. This suit was filed in the year 2010. Quite clearly six (6) years had expired. It is true therefore that the suit is time-barred. I realize too well that striking out a suit should be done with extreme caution. But in my view, this is one suit that should not be allowed to stand. The defendants applications are therefore allowed with costs of both the applications and the suit to the defendants.

A.K. KANIARU,

JUDGE.

DATED AND DELIVERED ON 28TH DAY OF SEPTEMBER 2016.

IN THE PRESENCE OF;

PLAINTIFF.....

1ST DEFENDANT.....

2ND DEFENDANT.....

J U D G E.