



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E 028 OF 2020

GIDEON KIILU NDOLO.....PLAINTIFF/APPLICANT

VERSUS

PETER KYULE.....1ST DEFENDANT/RESPONDENT

JASON MWANZIA.....2ND DEFENDANT/RESPONDENT

ANNA MWIKALI MWEU.....3RD DEFENDANT/RESPONDENT

R U L I N G

What is before Court for determination is the Plaintiff/Applicant's Originating Summons dated the 27th November, 2020 brought pursuant to Section 7 of the Limitation of Actions Act; Order 37 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks the following orders:

- a) That this Honourable Court be pleased to grant leave to the Plaintiff/Applicant herein to file suit out of time against the Defendants.
- b) That cost of this suit be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of GIDEON KIILU NDOLO the Applicant, where he deposes that the claim herein is founded on recovery of land. He explains that the documents that were supposed to be used in the dispute herein are hidden by 1st Defendant. Further, he has been ailing which condition has made him not prosecute this claim in due time. He avers that the delay in filing the suit against the Intended Defendant is not inordinate. Further, no prejudice will be occasioned to any of the parties by the orders sought.

The 1st Defendant/ Respondent opposed the application by filing a replying affidavit sworn by PETER KYULE where he deposes that he acquired the suit land Ndalani/ Mavoloni Block 1/620 in 1988 after executing a Sale Agreement with the Applicant and paying the whole purchase price. He claims the Applicant gave him ownership documents and he was issued with a title deed. He confirms that he sold the suit land to the 2nd and 3rd Respondents in 1997 and transferred the same to them. He explains that the Applicant filed a suit against him and the other Respondents on 20th January, 2014 being Machakos ELC No. 2 of 2014, after 28 years but this suit was dismissed for want of prosecution on 13th April, 2018 with the Applicant herein filing an application for reinstatement of the matter which application was dismissed on 5th July, 2019. He insists the Plaintiff did not file an appeal against the said Ruling and preferred to file the instant application which amounts to an abuse of the court process. He contends that there is no medical record to show that the Applicant was suffering from chronic illness. He reiterates that the Applicant has not come to court with clean hands as he failed to disclose that Machakos ELC No. 2 of 2014 was dismissed for want of prosecution.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Originating Summons dated the 27th November, 2020 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Applicant should be granted leave to institute this suit out of time.

The Applicant in his submissions reiterated his averments and states that he has established a prima facie arguable case as the Plaint dated the 27th November, 2020 raises triable issues. He contends that this suit is not res judicata as the earlier one being Machakos ELC Case No. 2 of 2014 was dismissed for want of prosecution but not determined on merits. He explained that the period of limitation commenced in 2011 when he discovered fraud, and in view of section 26 of the Limitation of Actions Act, he is entitled to extension of time. To buttress his

averments, he has relied on the following decisions: **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** ([2003] eKLR; **Kenyariri Vs Salama Beach** [2017] eKLR; **The Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017** [2017] eKLR; **Uhuru Highway Development Ltd V Central Bank of Kenya** [1999] eKLR; and **Tana and Athi Rivers Development Authority V Joseph Mbindyo & 3 Others NYR CA Civil Appeal No. 253 of 2011** [2013] eKLR.

The Respondents in their submissions reiterated their averments as per the 1st Respondent's replying affidavit and insist the Applicant should not be granted leave to file the suit out of time against them. They contend that the instant application is an abuse of the court process and an afterthought as the Applicant's earlier suit Machakos ELC No. 2 of 2014 was dismissed for want of prosecution. They explain that the dismissal of the Machakos ELC No. 2 of 2014 for want of prosecution pursuant to Order 17 Rule 2 of the Civil Procedure Rules constitutes res judicata in the intended suit. They insist in the previous suit and the current suit; the issues are similar and parties litigating under the same title. To support their arguments, they have relied on the **definition of Judgement as per Mulla's Indian Civil Procedure Code, 13th Ed Vol p 798 as well as the decision of Cooperative Bank of Kenya Limited V Cosmas Mrombo Moka & Legal Auctioneering Services (2019) eKLR.**

In this instance, the Applicant has sought to file a fresh suit and has not denied that Machakos ELC No. 2 of 2014 which is a related suit was dismissed for want of prosecution. The Respondents contend that in line with this, the intended suit is res judicata.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to 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.'

In the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** the Court of Appeal stated that: -

'in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'

Further in case of **the Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR**, that: **'or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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.'**

While in **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR**, the Court of Appeal held that:

'As, stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1st respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st respondent could do was to invoke the appellate process and not filling a fresh suit.'

Further, in the case of **Michael Bett Siror v Jackson Koech [2019] eKLR**, the Court of Appeal held that:

'We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the Civil Procedure Act, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout. Thus, we reject the appellant's contention and find that the application of the doctrine of res judicata was very contentious and required full investigation at the trial, more so in a longstanding land dispute involving a big parcel of land and several other people.'

On perusal of the two Court of Appeal decisions of **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR** and **Michael Bett Siror v Jackson Koech [2019] eKLR**, I note they hold different positions in respect to whether a suit dismissed for want of prosecution can be deemed res judicata if it is filed again. Insofar as Machakos ELC 2 of 2014 and the intended suit deal with the same issue and same parties who were litigating under same title, however, the said suit was not determined on merit as it was dismissed for want of prosecution. It is my considered view that in the interest of justice while relying on Article 50 of the Constitution, noting that the Applicant has raised triable issues in the Plaintiff, I wish to rely on the case of **Michael Bett Siror v Jackson Koech [2019] eKLR** and hold that the instant case cannot be deemed as res judicata.

On the issue of whether the Plaintiff is entitled to leave to file this suit out of time, I will make reference to the relevant legal provisions within the Limitation of Actions Act. Section 7 of the Limitation of Actions Act provides that:

‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

While section 26 of the Limitation of Actions Act provides an extension of time to bring an action to recover land on certain circumstances, and stipulates thus:

‘Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.’

I note the Applicant at paragraph 21 of the Plaintiff has raised particulars of fraud as against the Respondents. Further, he alleges he discovered fraud in 2011. The 1st Respondent insisted that he purchased the suit land, got registered as its owner and proceeded to transfer the same to the 2nd and 3rd Respondents. He admits it is the Applicant who sold him the suit land.

In the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

While in the case of **UCB Vs Mukoome Agencies [1982] HCB22** it was held as follows:

‘that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit’.

Based on the facts as presented while associating myself with the two decisions cited above, I find that the allegations of fraud are triable issues and cannot be proved unless viva voce evidence is adduced. I note section 7 as read together with section 26 of the Limitations of Actions Act provides a reprieve to the Applicant. In the circumstance, I will grant the Applicant leave of 21 days to file and serve the Plaintiff.

It is against the foregoing that, I find the Plaintiff’s Originating Summons dated the 27th November, 2020 merited and will allow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE