REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 963 OF 2014

SHELF CO. LTD.....1ST PLAINTIFF

CHESS PROPERTIES LTD.....2ND PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

INTERNATIONAL PROPERTIES LIMITED.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

R U L I N G

The Plaintiff in the present matter by way of a plaint dated 22nd July 2014 seeks judgment against the 2nd Defendant by way of a declaration that the 2nd Defendant never at anytime acquired lawful title to land parcel **L.R. NO. 209/1781** and **L.R.NO. 209/1782/2** Limuru Road which purportedly were succeeded by title numbers **L.R. NO. 209/20054** and **L.R.NO.20055** Limuru road and that no title ever passed to the 2nd Defendant in regard to these properties. The plaintiffs seek an order of injunction restraining the 2nd Defendant from entering, trespassing, remaining upon, occupying, leasing or in any manner dealing with the said Land Parcels **L.R.NO.209/1781** and **L.R.NO. 209/20054** and **L.R.NO.209/20055** Limuru Road. As against the 1st and 3rd Defendants the plaintiffs seek a mandatory order compelling the 1st and 3rd Defendants to delete the 2nd Defendant from proprietorship of **L.R. NOS. 209/1781** and **209/1782/2** and/or the succeeding title Numbers **L.R.209/20054** and **L.R. NO.209/20055 Limuru Road** in its place to restore the respective plaintiff's proprietorship thereof.

Simultaneously with the plaint the plaintiffs filed a Notice of Motion under a certificate of urgency seeking an order of temporary injunction directed against the 2nd Defendant restraining the 2nd Defendant from entering, trespassing, occupying or in any manner dealing with the property the subject of the suit. The court on 5th August 2014 granted the order of injunction exparte in favour of the plaintiffs on the basis that the 2nd Defendant had not responded to the plaintiffs application and thus the same was unopposed.

The 2nd Defendant vide a Notice of Motion dated 2nd October 2014 and filed in court on the same date

seeks the following orders:

1. That this suit against the 2nd Defendant be struck out/dismissed.

2. That the exparte orders granted herein on 5th August 2014 be discharged and/or varied.

3. That pending inter parte hearing of this application the exparte orders granted on the 5th august 2014 be discharged and/or varied.

4. That cost of the entire suit and this application be borne by the plaintiffs.

The 2nd Defendant's application is supported on the grounds that appear on the body of the application and on the affidavit sworn on 2nd October 2014 in support thereof by **Rose Muthoni Kariuki.** Inter alia the grounds in support of the application are as follows:-

1. That the suit is resjudicata as the issues raised herein were all raised and/or ought to have been raised in Judicial Review Misc. application NO. 173 of 2012 between the same parties and was heard and determined on its merits.

2. That the grounds raised and documents relied upon in Judicial Review Misc. Application NO. 173 of 2012 by the Exparte Applicants therein are the same grounds and documents relied upon by the same party (Plaintiff herein) and which grounds were determined in the previous suit by the Honourable **Justice Odunga** in his judgment dated 6th June 2014.

3. That the exparte orders granted herein on the 5th August, 2014 were obtained by the plaintiff through perjury and non disclosure of material facts and is an abuse of the Honourable court's process.

4. That the 2nd Defendant was never served with the pleadings herein and has only just learnt of the proceedings.

Through the supporting affidavit sworn by **Rose Muthoni Kariuki** on behalf of the 2nd Defendant, the 2nd Defendant depones that the suit properties **L.R.NO.209/20054** and **L.R. NO.209/20055** are registered in favour of the 2nd Defendant and avers that the titles are indefeasible and constitutionally protected. The 2nd Defendant deny having been served with any of the proceedings herein either personally or through advertisement. The 2nd Defendant states that the plaintiffs were well aware that the firm of **M/S Sagana, Biriq & Company Advocates** were actively representing the 2nd Defendant in Judicial Review Misc. application **NO. 173 of 2012** and the plaintiffs would therefore have easily served and/or notified the 2nd Defendant's of the present suit. The 2nd Defendant deny ever receiving any pleadings respecting the instant suit through the post. The 2nd Defendant states that it learnt of this suit on the 29th September 2014 at the Lands office through a court order that the plaintiffs registered against the titles whereafter the deponent states she applied for copies of the pleadings from the court file.

The 2nd Defendant contends that the present suit is res judicata and an abuse of the court process on the basis that the Judicial Review **Misc. NO**. **173 of 2012** brought by the plaintiffs against the same Defendants herein raised the same issues which the court determined. The 2nd Defendant has annexed copies of the pleadings in the Judicial Review marked "**RMK1**". The 2nd Defendant avers that the Honourable **Justice Odunga** on the 6th June 2014 rendered a Judgment in the Judicial Review annexed and marked "**RMK2**" which aptly dealt with and determined the issues which the plaintiffs are once more raising in the present suit. The 2nd Defendant further states that the plaintiffs have appealed against the judgment in the Judicial Review and the instant suit is brought on the same facts and the plaintiffs rely on the same documents they relied upon in the Judicial Review application and that the present suit is on the same cause of action as in the previous suit and it is apparent the plaintiffs wish to relitigate the same

matter which the court has heard and determined.

The 2nd Defendant further avers that the plaintiffs deliberately failed to disclose that they had unsuccessfully applied for orders of stay of the judgment by **Odunga, J** and for an order of status quo and that the said application was pending before the said court for hearing on the 5th November 2014. Copy of application is annexed and marked **"RMK3**". The plaintiffs failed to disclose that they had appealed to the Court of Appeal against the Judgment by **Odunga, J** rendered on 6th June 2014 in the said JR Misc. 173 of 2012. Annexed is a copy of the Notice of Appeal marked "**RMK4**". The 2nd Defendant further avers that **George Machecho Mungai** the plaintiff's deponent perjured himself when at paragraph 58 of his affidavit he depones that the plaintiffs remain in possession yet the 2nd Defendant took over possession of the suit property in July, 2014, demolished the dilapidated structures thereon and put up and iron sheet perimeter fence having been licenced by the Nairobi County Council. The 2nd Defendant states that the 2nd Defendant remains in possession and occupation of its properties. It is the 2nd Defendant's averment that the plaintiffs reason for non disclosure is so as to hoodwink the court to obtain underserved orders of injunction.

George Macheho Mungai filed a replying affidavit sworn on 5th November 2014 on behalf of the plaintiffs in opposition to the 2nd Defendant's application. The plaintiffs aver that the 2nd Defendant's application is incompetent, an abuse of the court process, has no merit and is bad in law. The plaintiffs reiterate the 2nd Defendant was served with court process via registered post and there has never been any return of that postage upto the date the replying affidavit was sworn. The plaintiffs assert that they had no knowledge that the 2nd Defendant's Advocates on record herein were acting for the 2nd Defendant and could not therefore effect service of process on the said Advocates. The plaintiffs deny there was any material non disclosure of the existence of **J.R. MISC NO. 173 of 2012** as the plaintiffs made disclosure and even annexed the copy of the judgment thereof as exhibit "**GMM8**". The plaintiffs thus deny the claim that **George Macheho Mungai** perjured himself in the affidavit he swore in support of the plaintiffs application in these proceedings. The plaintiffs depone that the 2nd Defendant acquired the suit property fraudulently and cannot thereof be entitled to have the title to the suit property protected under the law.

The plaintiffs further deny that their instant suit is resjudicata by virtue of the determination of **JR NO. 173 of 2012** and contends that the present suit raises a distinct cause of action founded on fraud which could not have been pleaded, ventilated or adjudicated upon in the Judicial review proceedings as claimed. The plaintiffs state that the 2nd Defendant in collusion with the 1st Defendant fraudulently acquired the suit properties. The plaintiffs aver that they hold the original grants and Deed plans which they have never surrendered to enable a new title (grant) to be processed. The plaintiffs further state they have been and continue in possession of the suit properties which they have leased to tenants from whom they collect rent and hence aver that the 2nd Defendant has never been in possession of the suit properties.

Serah Mwenda, the Chief Land Registrar filed a replying affidavit sworn on 28th October 2014 on behalf of the 3rd Defendant confirming that **L.R.NO.209/20054** and **L.R. NO. 20055** are registered in the name of **International properties Ltd** as per the copies of search records annexed and marked "**SM1**". The 3rd Defendant deponed that the court had heard a similar matter involving the same parties and the same subject matter and had dismissed the same with costs and that the instant suit is but an attempt to revive a matter that had been determined by a competent court. The 3rd Defendant further deponed that from all the available records at the Lands office the lease and indenture of the plaintiffs had expired and the same had not been renewed in favour of the plaintiffs. The 3rd Defendant contended that the plaintiffs never made any application for renewal of their leases and did not in their records have any application for renewal of lease by the plaintiffs.

The plaintiffs in respond to the 3rd Defendant's replying affidavit in the replying affidavit sworn by **George Macheho Mungai**. The plaintiffs aver that the 3rd Defendant acted in collusion with the 2nd Defendant to defraud the plaintiffs as neither the 2nd Defendant or the 3rd Defendant and/or the 1st

Defendant made any information available as to the status of the 2 parcels of land. In particular the plaintiffs were never informed that the parcel registers for the 2 land parcels had been closed and new ones opened resulting in the change of parcel numbers. The plaintiffs assert that as the registered owners of the suit property they should have been afforded the first opportunity when it came to renewing the leases for the two plots. The plaintiffs contend that the 1st and 3rd Defendants acted in bad faith in appropriating the two suit properties to the 2nd Defendant as though the said plots were vacant and unoccupied. The plaintiffs in the premises aver that the predecessor of the 1st Defendant, the Commissioner of Lands, acted unlawfully in sanctioning the issuing of the new titles **L.R. 209/20054** and **L.R.209/20055** to the 2nd Defendant to obscure the plaintiffs Land parcels L.R.NO.209/1781 and L.R.209/1782/2. The Plaintiffs state this was fraudulent and the said titles ought not to be sustained in favour of the 2nd Defendant.

The parties filed written submission as directed by the court to ventilate their respective positions. The 2nd Defendants written submissions dated 14th November 2014 were filed on the same date. The 3rd Defendant filed her submissions dated 17th November 2014 on 20th November 2014 which were in support of the 2nd Defendant's application. The plaintiff's written submissions dated 19th December 2014 were filed in court on 20th January 2015.

The submissions by the 2nd Defendant applicant reiterated the facts and the back ground of the case. The broad facts of the case are not in dispute. The suit properties are leasehold and the 1st plaintiff claims to have purchased **L.R.NO.209/1782/2** Limuru Road vide an agreement dated 3rd October 2001 from the Registered Trustees of **Bochana Sancwnashi Shree Akshapurushottam (Siraminarayan) Sanstha** while the 2nd plaintiff was vide the indenture dated 6th July 1999 registered as owner of **L.R.209/1781** for the unexpired residue of the lease of 74 years from 1st June 1931.

Both leases in respect of the two properties **L.R. NO. 209/1781** and **L.R.NO.209/1782/2** which the plaintiffs claim expired on 31st May 2015. The only intimation that the plaintiffs and/or their agents ever applied for renewal of the leases is vide a letter dated 23rd December 2006 authored by **Stephen Mungai** and addressed to the Commissioner of Lands. The said letter annexed to the plaintiffs supporting affidavit and marked "**GMM5**" is reproduced hereunder for ease of reference.

Re: Extension of Lease

<u>Plot NO. 209/1781 and 209/1782/2</u>

Dear Sir,

Mr. Bhangwanji told me he had applied extension of lease by the time he was selling the above plots to my family's company Shelfco Ltd P.O. Box 22173, Nairobi but in case you have not responded his letter I hereby apply for extension of the above plots lease.

Your Co-operation will be highly appreciated.

Yours Faithfully

S. Mungai

For: SHELFCO LTD

Of note is that the purchase took place in 1999 and at the time this letter is being written the lease had expired 1 ½ years earlier. No letter is exhibited to show the previous owner had applied for extension of the leases and between the period 1999 and 23rd December 2006 when the letter was written there is nothing to show there was any follow up respecting the extension of the lease by the plaintiffs.

In the Judicial review application that the plaintiffs brought against the Defendant's being **JR.MISC.Application NO. 173 OF 2012 Hon. Odunga J,** made findings of fact that the Applicant, the plaintiffs herein had not furnished any information and or material to prove that the leases in respect of the suit properties had been extended in favour of the plaintiff. The Judge at paragraphs 29 and 30 in his judgment stated thus:-

> **29. In this case, according to the indenture dated 6th July 1999 made between Bhagwaji & Co. Ltd and Chess properties Limited in respect of L.R. NO. 209/1781 (original 170/12) the period of demise of the said land was 74 years from 1st June 1931. Accordingly the said demise was due to come to an end at the end of May, 2005. The only letter on record seeking extension of the demise was a letter dated 23rd December 2006 which referred to an earlier application for extension, which earlier application is not itself exhibited. That letter though it referred to plot NOS. 209/1781 and 209/1782/2 was signed by S. Mungai for Shelfco Ltd rather than for Chess Properties Ltd. By the time of the letter dated 23rd December 2006, it is clear the demise in respect of this particular land had lapsed.**
>
> **30. With respect to land parcel NO. LR.209/1782/2, it is true that the only document exhibited is an agreement for sale thereof to Shelfco Limited. However from the said agreement it is likewise clear that the period of the leasehold in question was 74 years from 1st June 1931. Similarly the only document on record which alluded to extension was the same letter dated 23rd December, 2006.**

The Defendants have submitted that the issues that fell to be determined in the Judicial review application are the same issues that the plaintiffs now want to be determined in the instant suit. The Defendants argue that the same documents that the plaintiffs relied upon in the Judicial review application are the same documents that the plaintiffs have placed reliance upon in this suit. The 2nd Defendant has set out the facts relied upon by the plaintiffs in the Judicial review application against the facts relied upon by the plaintiffs in this suit and contends that the facts and the documents relied upon in both matters are the same in all material circumstances.

The Defendants further submit that the reliefs sought in the Judicial review application was to quash the decision of the Commissioner of Lands allocating the suit premises to the 2nd Defendants herein on the basis that the allocation was unlawful which would have resulted in the cancellation and/or revocation of the titles issued in the 2nd Defendant's name. In the present suit the plaintiff seek a declaration that the 2nd Defendant's allocation of and issue of title in respect of the suit premises was unlawful abinitio and that no title ever passed to the 2nd Defendant. The plaintiffs further seek an order annulling and/or cancelling the title issued in favour of the Defendant and restoring the same to the plaintiffs proprietorship respectively.

The Defendants contend the same issues raised in this matter were raised in the Judicial review application and determined and therefore the present suit is res judicata and the same ought not to be sustained. In the Judicial review application the applicants (the plaintiffs herein) principal assertions and upon which the Judicial review was founded was that, they having been the registered proprietors of the suit properties and having applied for extension of the leases, the Commissioner of Lands acted illegally, unfairly and unjustly in granting title to the 2nd Defendant without affording an opportunity to the plaintiffs of being heard before cancelling the proprietorship by the plaintiffs which was in breach of the rules of natural Justice and the constitution. I have perused the judgment by **Odunga J**, in the Judicial review and I am persuaded he belaboured the issue of whether or not the plaintiffs had in fact made an application for extension of lease.

Odunga, J considered the question whether or not the plaintiffs had infact applied for the extension of the lease and at paragraph 31 of the Judgment stated thus:-

> **31. Accordingly without clear evidence that an extension was sought and (possibly) obtained, there would be no legal interest therein by the applicant which can be the basis of the application for Judicial review. Whereas the court cannot state with certainty there was no such application made by a Mr. Bhagwanji, what is clear is that there is no sufficient information availed to the court on the basis of which the court can determine that application was infact made before the expiry of the lease assuming without deciding that such construed as an extension of the lease for the purposes of Judicial review proceedings.**

While I am alive to the fact that Judicial review proceedings are usually not concerned with the merits and/or demerits of the decision the subject of the challenge but rather whether the decision was procedurally and fairly arrived at having regard to the rules of natural justice that require that any party likely to be affected by the decision be given an opportunity of being heard I am clear in my mind that in the present matter and in the judicial review matter the primary issue on which the matter turns is whether or not the plaintiffs had applied for the extension of the leases before they expired.

Odunga, J in the judicial review clearly held that there was no sufficient evidence that the plaintiffs indeed had applied for the extension before the expiry of the leases. Although the plaintiffs in a manner of speaking in the present suit are seeking to have a second bite of the cherry, they have tendered the very same evidence (inform of documents) as was tendered before **Hon. Justice Odunga** and on which he expressed himself. As observed by **Odunga J** other than the letter of 23rd December 2006 which intimates an application for extension had been made by the previous owner before the plaintiffs bought the property there is absolutely no other evidence that indeed any application for extension had been made. The properties having been sold to the plaintiffs in 1999 and 2001 respectively with leases expiring on 31st May 2005, it is rather intriguing that the plaintiffs only came to realization that the leases had not been extended in December 2006 long after the expiry date. There is no evidence that the earlier alleged letter seeking extension of the leases was ever made and/or received by the Lands Office. Equally too the letter of 23rd December 2006 has no acknowledgement by the Commissioner of Lands and it is thus a matter of conjecture whether or not it was received by the Lands Office.

The Plaintiffs in the present suit have pleaded fraud by the Defendants the particulars of which are that the 1st Defendant acted unlawfully and fraudulently in processing titles in favour of the 2nd Defendant without having regard of the plaintiffs interest in the suit properties and in particular in causing the suit properties to be converted from **L.R.NO. 209/1781** and **L.R.NO,209/1782/2** to **L.R.NO.209/20054** and **L.R.NO. 209/20055** and allowing the 2nd Defendant to illegally acquire the said properties fraudulently.

On the basis of the material placed before the court, I like Odunga, J hold the view that there is no evidence that the plaintiffs indeed applied for the extension of their leases and it is my finding that they did not. Having not applied for any lease extension and such extension not having been granted any interest the plaintiffs may have had on the suit property expired on 31st May 2005 and the interest in the properties reverted to the state. The 1st Defendant, the Commissioner of land, was in my view entitled to deal with the properties in any manner including allocating the same to the 2nd Defendant. It is common knowledge that upon expiry of leases, the interest in the property reverts to the Government. There is no requirement for surrender of the previously held title documents. They would be of no use as the interest conferred under them will have absolutely ceased upon expiry. A surrender of the previous titles would be required only if the extension of lease was effected before the expiry of the lease.

Having further considered the issues that were canvassed in the Judicial review application and having reviewed the judgment rendered by Odunga, J in the matter I am satisfied the same issues that arose in the Judicial review application are indeed the same issues that are being raised in the present suit. Those issues were considered by **Odunga, J** and a decision made on the same. The issues of fraud being raised by the plaintiffs in the present suit are a camouflage to skirt the principle of res judicata. The plaintiffs no doubt are raising issues of fraud in an endeavour to avoid and evade being caught up by the provision of

section 7 of the Civil Procedure Act, which embodies the rule on resjudicata.

Section 7 of the Civil Procedure Act 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 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, on has been heard and finally decided by such court.**

Explanation notes 1-6 set out under the said section 7 explain the application of the res judicata rule. The res judicata rule applies as was stated by **Wingram V-C,** in the case of **Henderson –vs- Henderson (1843) 67 ER 313** as follows:-

> **"----------where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which property belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".**

In the present case the grounds upon which the plaintiffs allege fraud in my view are the very grounds they were relying upon to impugn the allocation and issue of title to the 2nd Defendant in the Judicial review application. The plaintiffs having chosen the forum of Judicial review to canvass and ventilate their case and having been unsuccessful cannot in my considered opinion now seek to open a fresh litigation by way of the present suit as they have done. Their recourse was to appeal the decision by **Odunga, J** which option they have exercised having filed a notice of appeal and having sought a stay pending the determination of the appeal which stay was rejected by **Odunga J** vide his ruling delivered on 11th November 2014.

It appears to me the plaintiffs having hit a culdesac in the judicial review application opted to open a fresh front of attack in the expectation that the court may overlook critically evaluating the previous suit and in the process fail to discern that indeed this suit is res judicata and thereby give the plaintiffs a second bite of the cherry. The courts in the words of **Majaja, J** in the case of **E.T. –VS- Attorney General & Another (2012) Eklr** should be "**hawk eyed**" to avoid suits that are otherwise res judicata from being instituted by employing devious means. **Majaja, J** in the said case stated thus:-

> **"The courts must always be vigilant to guard 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 in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi –vs- National Bank of Kenya Ltd and others (2001) EA 177 the court held that, "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba, J in the case of Njanga –vs- Wambugu and another Nairobi HCCC NO.2340 of 1991 (unreported) where he stated, "if parties were allowed to go on litigating for ever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judica-----"**

That passage, with which I am in agreement sums up the scenario in this case where the plaintiffs having lost in the judicial review application have **"Panel beaten**" the facts to take a new shape for purposes of

instituting this suit on basically the same facts and issues as determined by **Odunga J**. The court refuses to be hoodwinked that this indeed is a different facts and cause of action.

The court holds that this suit is res judicata J**.R. Misc. Application NO. 173 of 2012** and that to sustain the same would be an abuse of the process of the court. I order that the same be struck out with costs to the Defendants.

As I have come to the conclusion that the present suit is resjudicata and therefore brought in abuse of the court I need not consider the second limb of the application which seeks to discharge and/or vary the exparte orders granted on 5th August 2014 as the same automatically falls by the way side once the suit is struck out.

In the result and for the reasons I have advanced in this ruling I order the plaintiffs suit filed on 23rd July 2014 struck out with costs to the Defendants. The costs of the application are equally awarded to the Defendants.

Ruling dated, signed and delivered this……**15th**……day of……**May**…….2015.

J. M. MUTUNGI

JUDGE

In the presence of:

……. For the Plaintiffs

…….. For the 1st and 3rd Defendants

…… For the 2nd Defendant