REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 58 OF 2009 & CIVIL SUIT NO.79 OF 2011

PAUL KIPSIGEI RONO............................PLAINTIFF/RESPONDENT

VERSUS

JOHANA KIPKEMOI RONO......................DEFENDANT/APPLICANT

RULING

1. The application by way of **Notice of Motion** dated **25th September, 2009** under **Order L Rule 1** of the old **Civil Procedure Rules** and **Sections 3A and 7 of the Civil Procedure Act**, was filed by the defendant in **Kericho HCCC No.58 of 2009** seeking that the plaintiff's suit be dismissed as being directly and substantially similar to **Kericho HCCC No 60 of 2004,** which was heard and determined.

2. When **Kericho HCCC No. 60 of 2004** was dismissed, the plaintiff filed **Kericho HCCC No. 58 of 2009** and later filed **Kericho HCCC No. 79 of 2011**. I have taken the liberty to ascertain the parties and other particulars in the three files, I have noted the following:

a. **The plaintiff is Paul Kipsigei Rono.**
b. **The Defendant is Johana Kipkemoi Rono.**
c. **The subject is L R No.8939/31.**

3. The instant application is anchored on a supporting affidavit deponed by the defendant, **Johana Kipkemoi Rono** filed on **30th September, 2009** but is undated. He depones that the matter in **Kericho HCCC No. 60 of 2004** was dismissed for want of prosecution on **27th May, 2009**, and therefore **Kericho HCCC No. 58 of 2009** is resjudicata.

4. The application is opposed. The plaintiff filed a replying affidavit sworn on **4th November, 2009** in which he deponed that **Kericho HCCC No. 60 of 2004** was dismissed by the court on its own motion, despite there being no Notice to Show Cause. It was his contention that the current suit was not res judicata and raised triable issues which should be heard on merit.

5. On **28th January, 2014** a mention date was taken seeking directions about **Kericho HCCC No.79 of 2011, Kericho HCCC No.58 of 2009** and **Kericho HCCC No.60 of 2004** which had been dismissed for want of prosecution. After reading the 3 files, I gave directions on **27th March, 2014** that the pending application in **Kericho HCCC No.58 of 2009** be argued by way of written submissions to determine the fate of the two pending matters. In their submissions counsels for the respective parties were directed to address three possibilities namely:

i. **consolidation of the suits,**
ii. **stay and**
iii. **dismissal.**

6. Both counsels filed their written submissions. Counsel for the defendant/applicant filed their written submissions on **17th June, 2014** while counsel for the plaintiff/respondent filed theirs on **31st July, 2014**. Counsel for the applicant submitted that the suit was not only res judicata but was also time barred, as the transaction occurred on **26th August, 1989** when the plaintiff and defendant signed a sale agreement to buy **L.R. NO 8939/31.**

7. Counsel for the defendant relied on the case of **Simeon Waitim Kimani & 3 others v Equity Building Society (2010)** where the court held that although suits may be reinstated, they cannot be done so if there was unreasonable delay. Counsel also relied on the case of **Peter Bekyibei Langat v Recho Chepkurui Mosonik & Another (Kericho No 115 of 2005)** where **Waithaka J,** quoted the case of **Peter Kinyari Kihumba v Gladys Wanjiru Migwi & Another (CA Civil Application No 121 of 2005).**

8. Counsel for the plaintiff submitted that **Kericho HCCC No.58 of 2009** was not res judicata and the same should be considered on its own merit; that when **Kericho HCCC No.60 of 2004** was dismissed it was not heard and determined but merely dismissed for want of prosecution. He relied on the case of **Philip Kimutai Langat p/a Kiplangat Maina v Job Kibet Maina [2007] eKLR.** Counsel urged the court to consolidate the two files in the interest of justice so that the case could be heard and determined on merit. He further submitted that a suit could only be stayed if the party seeking stay orders was able to prove to the court with reason why an order of stay should be granted.

9. On the issue of dismissal, Counsel relied on **Order 12** of the **Civil Procedure Rules,** and the cases of **Philip Kimutai Langat p/a Kiplangat Maina v Job Kibet Maina [2007] eKLR** and **Lee Waigwa Waruingi v Housing Finance Company of Kenya Limited [2005] eKLR**, stating that a suit should only be dismissed if it was incurably defective.

10. I have carefully considered the pleadings in the three files, submissions by counsels and the authorities relied on and I find the following questions for determination:

i) is this suit res judicata?

ii) is this suit time barred? If not

iii) should the two suits be consolidated or one stayed?

iv) should Kericho HCCC 79 of 2011 be dismissed?

v) Costs.

11. The starting point is whether this suit is res judicata. Res judicata is addressed in **Section 7 of the Civil Procedure Act, 2010** which 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, and has been heard and finally decided by such court."**

12. It is common ground that a similar suit **Kericho High Court Civil Suit No.60 of 2004** was earlier filed and dismissed under **Order 16** of the **old Civil Procedure Rules**. The suit was not heard and finally decided. **Order 12 Rule 6** of the **Civil Procedure Rules 2010** appears to throw a life line to suits dismissed in this fashion provided they are not limited by time. It states:

“(1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.”

13. **Kericho HCCC No.60 of 2004**, having been dismissed by the court for non attendance on **27th May, 2009** falls in the category contemplated by **Order 12**, **Rule 6**. **Kericho HCCC No.58 of 2009** cannot therefore be deemed to be res judicata as the suit was not heard and decided on its merits. The plaintiff’s remedy lay in instituting a fresh suit, which is what I believe the filing of **Kericho HCCC No.58 of 2009** addressed. It is however not clear why the same plaintiff decided to file another suit **Kericho HCCC No.79 of 2011**.

14. The second question for determination is whether the cause of action was time barred at the time the plaintiff filed **Kericho HCCC No.58 of 2009**.

Section 7 of the Limitation of Actions Act provides:

“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.”

The transaction between the parties occurred in 1989. By the time the plaintiff filed **Kericho HCCC No 58 of 2009** and **Kericho HCCC 79 of 2011** 12 years had passed since the sale agreement was signed. The plaintiff did not avail himself under the exceptions provided for in **Section 27** of the same **Act.** I therefore find that this suit is time barred.

15. This is one case after a lot of thought and consideration that I wish could be determined on its merit. But can I invoke the discretion of the court and treat Limitation under **Section 7** of the **Limitations of Actions Act** as a procedural technicality?

In the case of **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR,** the Court of Appeal when referring to **Section 4(1)** of the **Limitation of Actions Act** in relation to contracts expressed itself thus:

“to us, the meaning of the wording of section 4(1) ……is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action……A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that ‘‘the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked.”

16. For the above reasons, I find that my hands are tied and I have no choice but to dismiss **HCCC No 58 of 2009 and HCCC No.79 of 2011** as both are time barred.

Each party to bear their own costs.

Dated, signed and delivered at Kericho this 24th day of September, 2014

L.N. WAITHAKA

JUDGE

In the presence of:

- Mr Koko for Plaintiff
- Mr Mutai holding brief for Mr. Orina for the Defendants
- Court Assistant: Richard Korir