



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 5 OF 2009

JAMES NDETO MWALIMU.....1ST PLAINTIFF

VERSUS

1. KENYA COMMERCIAL BANK.....1ST DEFENDANT

2. PETER MATHIGU GICHAMBA.....2ND DEFENDANT

RULING

1. On 6th January, 2009, the Plaintiff, as Administrator of the estate of Peter Mwalimu Miwa filed the suit herein. He states that his late father had charged Mombasa/Block IX/270 (“the Suit Property”) with the 1ST Defendant, who then sold it when the loan secured by the Suit Property was not paid. In the plaint, the Plaintiff’s prayers are, *inter alia*:

“(a) A Declaration that the purported sale of the property known as MSA/BLOCK IX/270 is null, void and of no legal consequence.

“(b) An injunction to restrain the Defendants, their servants and or agents from interfering, dealing, entering or in any other manner dealing with the property known as MSA/BLOCK IX/270.”

2. By a Notice of Preliminary Objection dated 9th March, 2011, the 1ST Defendant objects to, and seeks the striking out of, the suit in its entirety. The grounds of objection are:

“1. That the suit herein offends the provisions of Section 6 of the Civil Procedure Act.

2. That there is another suit being HCCC Number 437 of 2000, filed by the Plaintiff against the Defendants herein over the very same subject matter.

3. That this suit is thus *res subjudice*, consequently the same is bad in law. Frivolous and an abuse of the court process.”

3. During a mention on 12th March, 2012 the 1ST Defendant sought that file HCC 437/2000 Mombasa, be

tied together with this file for purposes of the hearing of the Preliminary Objection. On 2nd May, 2012 the hearing of the Preliminary Objection was scheduled in the presence of counsel holding brief for each of the parties.

4. At the hearing, Mr. Omondi appeared for the 1st Defendant. There was no representation for the Plaintiff. The Court therefore heard the matter in the absence of the Plaintiff. Mr. Omondi stated that the Preliminary Objection was raised on the grounds of *Res subjudice* pursuant to Section 6 and 8 of the Civil Procedure Act. These Sections provide as follows:

“6.No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same of any other court having jurisdiction in Kenya to grant the relief claimed.

7.

8. where plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

5. Counsel referred to HCC 437/2000, the earlier filed suit, and pointed out the following similarities with the present suit, which are, *inter alia* as follows:

- In Paragraph 1 of the Plaint, the Plaintiff is Peter Mwalimu Miwa, the father of the Plaintiff in the present suit. Counsel pointed out that there are provisions in the Civil Procedure Act for substitution of a party when one has died. This is compared with paragraph 1 of the present suit.
- In Paragraph 5 of the Plaint, the Suit Property is MSA/BLOCK IX/270. This is the same suit property in the present case.
- In Paragraph 15 the Plaintiff’s claim is for a declaration and injunction, and in the present suit a declaration is sought at Paragraph 12 of the Plaint.
- Prayer (a) in HCCC 437/2000 is for a declaration that the 1st Defendant improperly exercise its statutory powers of sale. Prayer (a) in the present suit seeks a declaration with similar effect.

Prayer (b) in HCC 437/2000 seeks an injunction in respect of transactions on the suit property, just as prayer (b) does in the present suit.

6. Counsel further pointed out that the Plaintiff in the present suit had perjured himself in swearing a verifying affidavit and in the Plaint by stating that no similar suit had been filed previously.

Counsel supported his objection by citing the case of **Patrick Kirono Mwaura vs KCB and Onesmus Macharia Waitthaka T/A Walts Enterprises** [2006] e KLR.

7. I have carefully considered the objections and the pleadings in this matter and in HCCC 437/2000. I have no doubt whatsoever that the present case is a replication of the previous case under the guise of the new Plaintiff, namely the son of deceased owner of the Suit Property. This goes against the provisions of Section 6.7 and 8 of the Civil Procedure Rules. The first suit has not been heard and determined and the second suit cannot be used to dispose of the issues in the first suit.

8. For a matter to be considered as *res subjudice* or *res judicata* four conditions must exist: See **Abuk James Odera Vs John Patrick Machira** Civil Application Nairobi 49 of 2001. The four conditions are:

- (a) ***a previous suit must exist in which the specific matter was in issue.***

(b) *the parties were the same or litigating under the same title.*

(c) *a competent court heard and determined the matter in issue. [in the case of res judicata]*

(d) *the issue has been raised once again in a fresh suit in the same case. It was held that res judicata applied to applications just as it applies to suits because there must be an end to litigation.*

9.A good description of *res judicata* is contained in Black’s Law Dictionary as follows:

“ [for res judicata] to be applicable, requires identity in[the] thing sued for as well as identity in cause of action, of persons and parties to action, and of quality in persons for or against whom the claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.”

10.I find that it was open to the Plaintiff, instead of filing a new suit, to apply to substitute his name as Administrator of the estate of his late father, in place of that of the deceased in HCC 437/2000.

11.In view of the foregoing, I hereby uphold the Preliminary Objection. However, with a view to the need for expedition in proceedings and to avoid wasting the Court’s time pursuant to Section 1A and 1B of the Civil Procedure Rules, I shall not strike out the later suit. Instead I shall order the Plaintiff herein, as I hereby do, to elect which suit he shall proceed with. Such election shall be effected within thirty days of the date hereof. Upon such election, the unelected suit shall stand terminated.

Costs of this application shall be born by Respondents.

Orders accordingly.

Dated, Signed and delivered this 30th Day of...May, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)