



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 430 OF 2010

BERNARD MBUGUA KINYANJUI
.....PLAINTIFF

VERS

RAPHAEL KARIUKI NJOROGE.....
.....1ST DEFENDANT

MWAURA WAIHIGA.....
.....2ND DEFENDANT

ANNA

MWAURA T/A MWAURA

WAIHIGA & CO.

The Plaintiff filed an application dated 27th September 2010 wherein he is seeking orders that the 1st Defendant, his agents and servants be restrained by an order of temporary injunction from damaging or removing the applicant's house and other structures erected and standing on the suit land known as DAGORETTI/KINOO/1069, and from interfering with the Plaintiff's peaceful occupation of the said suit land until the hearing and final determination of this suit. The grounds for the application are that the Plaintiff is living and has always lived on the suit land with other family members for over 30 years, and the 1st Defendant with members of a gang entered into the compound and threatened to evict the Plaintiff and his family. Further, that the 2nd and 3rd Defendants acted without instructions from the Plaintiff to vest the suit land to the 1st Defendant irregularly or unlawfully, and this suit is crucial in determining whether or not the 1st Defendant is entitled to the ownership of the suit land. These grounds are restated in the Plaintiff's supporting affidavit sworn on 27th September 2010.

This Court on 26th October 2011 directed that the 1st Defendant's Notice of Preliminary Objection dated 6th October 2011 and the 2nd and 3rd Defendants Notice of Preliminary Objection dated 7th July 2011 be heard together. The 1st Defendant's Notice of Preliminary Objection objects to the application on the grounds that it is a gross abuse of the court process as the same is *res judicata* as the suit property is the subject matter in previous suits already heard and determined by courts of competent jurisdiction, the said suits being Nairobi SPMCC No. 6750 of 1993, Nairobi HCCA 292 of 1997, Nairobi HCC ELC 299 of 2008 and Court of Appeal Civil Appeal No. NAI 12 of 2008 all of which were decided in the 1st Defendant's favour. Further, that the Plaintiff has filed a Notice of Appeal against the decision of this Court in HCC ELC 299 of 2008, which appeal is still pending and therefore this suit ought to be stayed pending the hearing and determination of the said appeal.

The 1st Defendants Advocate at the hearing of the Preliminary Objection on 14th February 2012 referred the Court to the copies of the judgments, rulings, orders and decrees issued in the above cited suits and which are attached to the 1st Defendant's Replying Affidavit sworn on 7th October 2010. He also submitted that section 7 of the Civil Procedure Act bars this Court from entertaining any suit relating to a subject matter decided in previous suits, and asked that it be found to be *res judicata* and be struck out. The Advocate was also in support of the 2nd and 3rd Defendants' preliminary objection.

The 2nd and 3rd Defendants object to the application on the ground that the Application dated 27th September 2010 and the Plaint are time barred. The 2nd and 3rd Defendants' Advocate submitted that the cause of action against the 2nd and 3rd Defendants as laid out in the Plaint raises the tort of negligence which has a time limit of 6 years under the Limitation of Actions Act section 4(2), and the suit was filed 18 years after the alleged delivery of the amount due by the 2nd and 3rd Defendants in 1992. Further, that the Plaintiff had not sought extension of time, and the Advocate relying on the decision in **Cyperr Enterprises Ltd vs Metipso Services Ltd and 2 Others (2011) eKLR**, prayed that the suit filed herein be struck out for being time barred

I will consider the 2nd and 3rd Defendants' preliminary objection first, as its outcome will have a bearing on the preliminary objection raised by the 1st Defendant. The preliminary objection raises the issue of the competence of the Plaintiff's application and suit *vis-à-vis* the provisions of the Limitation of Actions Act. The gist of the Plaintiff's case against the 2nd and 3rd Defendants is in paragraphs 10 to 12 of the Plaint filed herein and dated 2nd September 2010. The Plaintiff in the said paragraphs claims that he rescinded a sale agreement entered into with the 1st Defendant, and withdrew instructions from the 2nd and 3rd Defendants. Further, that on a date unknown to the Plaintiff, the 1st Defendant thereafter

forwarded the amount due under the sale agreement of Kshs 75,000/= to the 2nd and 3rd Defendants, who without authority or instruction from the Plaintiff forwarded the same in 1992 to Business Finance Ltd, in whose favour the suit property was charged. The Plaintiff has also annexed to his supporting affidavit copies of his letters addressed to Business Finance Ltd dated 4th February 1991 and 12th February 1991 in which he indicates that the 2nd and 3rd Defendants are no longer acting for him.

It is therefore clear from the Plaintiff and by the Plaintiff's own averments that the cause of action against the 2nd and 3rd Defendants arose in 1992, which is when time began to run for purposes of limitation. The Plaintiff in the Plaintiff is seeking a declaration that that the 2nd and 3rd Defendants continued to unlawfully act for the Plaintiff when instructions had been withdrawn, and also prays for general damages against the said Defendants. The Plaintiff is alleging professional misconduct, and the claim and remedy sought can only arise under tort, which has a limitation period of 6 years. The Plaintiff's claim as against the 2nd and 3rd Defendants is therefore caught up with limitation as it was filed on long after the statutory limitation period. This finding also applies to the application filed herein as it is anchored on a suit which is time-barred. I therefore uphold the 2nd and 3rd Defendants' Preliminary Objection dated 7th July 2011, and strike out the Plaintiff's suit as against the 2nd and 3rd Defendants.

As regards the outstanding suit as against the 1st Defendant, the main issue is whether the same is *res judicata*. The Plaintiff claims the 1st Defendant breached the sale agreement entered into with the Plaintiff on 30th April 1990 by failing to pay the balance due of the purchase price, as a result of which the Plaintiff rescinded the said agreement. That the 1st Defendant thereafter paid the balance due, and instituted proceedings to have the suit property transferred to him, which orders were granted by this Court. The Plaintiff also avers that other than PMCCC No 6750 of 1993 and HCCA 292 of 1997 which have been finalized, there is no other suit pending. He prays for a declaration that the transfer of the suit property was unlawful, and a retransfer of the same to him.

After perusal of the judgments in PMCCC No 6750 of 1993 and HCCA 292 of 1997, I find that the issue of the said transfer was substantially what was in issue between the Plaintiff and 1st Defendant, and the issue has been heard and determined by this Court. The lower court in PMCCC No 6750 of 1993 in a judgment delivered on 31st October 1996 ordered that the suit property be transferred to the 1st Defendant herein, who was the Plaintiff in the said suit. This Court dismissed the Plaintiff's appeal in a judgment delivered by Nambuye J. (as she then was) 21st September 2007. The Plaintiff ought to have canvassed all the issues arising in the said suits, and this Court is therefore bound by section 7 of the Civil Procedure Act, and cannot entertain the Plaintiff's suit and application as against the 1st Defendant.

In addition, the Plaintiff has failed to disclose the existence of HCC ELC 299 of 2008 wherein this Court gave a ruling on 23rd August, 2010 that the Plaintiff herein vacates the suit property within 30 days from the date of the said ruling, and in default an eviction order to issue. Further, the Plaintiff has also failed to disclose that he has already instituted an appeal against the order of the court delivered in HCC ELC 299 of 2008, and has filed an application dated 23rd September 2008 for stay of execution of the said order which application is still pending before this court. He has not come to this Court with clean hands.

For the above reasons the suit against the 1st Defendant is also dismissed.

The Plaintiff shall meet the costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE