



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 389 of 2011

ROSIELLO BRUNO.....1ST PLAINTIFF
ALLFIX SERVICES LIMITED.....2ND PLAINTIFF
PETER KABI GITAU.....3RD PLAINTIFF
VERSUS
FLORENCE WAIRIMU MBUGUA1ST DEFENDANT
GRACE WANJIKU MBUGUA.....2ND DEFENDANT
PETER CHEGE KIARIE.....3RD DEFENDANT
SYLVIA MURUGI MBUGUA.....4TH DEFENDANT

RULING

There are three applications for determination in this Ruling. The first is a Notice of Motion dated 4th August 2011 brought by the Plaintiffs, seeking a temporary injunction against the Defendants. The other two applications are brought by the 1st and 4th Defendants, the first being a Notice of Motion dated 2nd February 2012, seeking to set aside or vacate the ex parte order for injunction issued by this Court on 4th August 2011. The second application is a Notice of Motion dated 6th October 2011 seeking to dismiss the suit herein on the ground that it is an abuse of the court process, and that it is scandalous, frivolous and vexatious.

I will commence with a consideration of the 1st and 4th Defendants' application of 6th October 2011, for the reason that if successful, it will have the effect of disposing of the other applications. The said application which is for dismissal of the suit herein is brought under the provisions of sections 1A, 1B, 3A and 7 of the Civil Procedure Act, and Order 2 Rule 15 (1) of the Civil Procedure Rules.

The grounds for the application are that the Plaintiffs suit is res judicata within the meaning of section 7 of the Civil Procedure Act because all the issues that they have raised in this suit have been fully and finally determined in Rosiello Bruno -vs- Joseph Kiarie Mbugua and Florence Wairimu Mbugua, Nairobi HCCC No. 1047 of 1994 (hereinafter referred to as "HCCC 1047 of 1994"). Further, that a decree was issued by this Court in the said suit on the 27th April, 1998, and the 1st Plaintiff's applications dated 28th July, 2010 and 15th June, 2011 seeking to set aside the said decree and for stay pending appeal respectively, were dismissed by rulings delivered by the Honourable Mr. Justice Mbogholi Msagha on

30th May 2011 and on 26th July, 2011.

The 1st and 4th Defendants allege that all the issues that the Plaintiffs seek to agitate in this suit have already been heard and determined in HCCC No. 1047 of 1994, and that the 1st Plaintiff has now enjoined the 2nd and the 3rd Plaintiffs and the 2nd, 3rd and 4th Defendants as new parties in an attempt to reopen and re-agitate the issues that have been determined against him. The 1st and 4th Defendants aver that this is a flagrant abuse of court process and the Plaintiffs' suit ought to be dismissed with costs.

The Plaintiffs opposed the application in a Replying Affidavit sworn by the 1st Plaintiff on 24th November 2011, wherein he states that this suit is not *res judicata* for reasons that the parties herein and the parties in H.C.C.C No. 1047 of 1994 are distinct from each other, and as such do not fall under section 7 of the Civil Procedure Act. Further, that the issues or matters raised in the suit herein have not been substantially dealt with or at all. In particular the Plaintiffs claim that they are protected under the principle of proprietary estoppel arising from the Defendants' representations that they would transfer the suit property to the 1st Plaintiff, and that as a result of these representations he entered into agreements with tenants who have erected structures on the suit property.

These arguments were reiterated at the hearing of the applications on 26th July 2012. I have read and carefully considered the pleadings, evidence and submissions made by the respective parties. The main issue in the application dated 6th October 2011 is whether the suit filed herein is *res judicata*. The law on *res judicata* is stated in section 7 of the Civil Procedure Act, which provides that 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.

The first question that I must therefore answer is whether the parties herein are the same or are claiming or litigating under the same title as those in HCCC 1047 of 1994. The Plaintiff in HCCC 1047 of 1994 was Rosiello Bruno, who is the 1st Plaintiff herein, and the two Defendants in that case were firstly, Joseph Kiarie Mbugua since deceased, and secondly, Florence Wairimu Mbugua the 1st Defendant herein. The Plaintiffs in the present suit are the 1st Plaintiff and his two tenants, who are the 2nd and 3rd Plaintiffs. The 2nd and 3rd Plaintiffs have based their claim on the veracity of the 1st Plaintiff's title, arising from the sale agreement the 1st Plaintiff entered into with the deceased Joseph Kiarie Mbugua, and on representations they claim were made by the Defendants on the completion of the sale agreement.

With regards to the Plaintiffs in the two suits, I am guided by Explanation 6 to section 7 of the Civil Procedure Act which states as follows:

"Explanation. (6)—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The 2nd and 3rd Plaintiffs are parties whose claim arises from the 1st Plaintiff's right to the suit property, and as their interests are dependent upon and the same as those of the 1st Plaintiff, they are therefore deemed to be claiming under the 1st Plaintiff herein, who was also the Plaintiff in HCCC 1047 of 1994.

The Plaintiffs have sued the 1st to 4th Defendants herein in their personal capacity and as co-administrators of the estate of Joseph Kiarie Mbugua, which deceased was the 1st Defendant in HCCC 1047 of 1994. In addition the 1st Defendant herein was also the 2nd Defendant in HCCC 1047 of 1994. The Defendants herein are also being sued because of a sale agreement entered into by the Plaintiff and the 1st Defendant in HCCC 1047 of 1994. The 1st to 4th Defendants herein are therefore basically being sued in the same capacity and title as the Defendants in HCCC 1047 of 1998. It is therefore my finding that the parties in the suit herein are essentially the same parties and/or are litigating under the same title

as those in HCCC 1047 of 1994.

The second question that I need to address is whether the matter directly and substantially in issue herein is the same as in HCCC 1047 of 1994, and if so, whether it was heard and finally decided by the court in that case. I have perused the Plaintiff in HCCC 1047 of 1994 which was annexed to the replying affidavit by the 1st Defendant herein sworn on 17th August 2011. I note that the claim arose from the sale agreement dated 2nd March 1991 entered into between the 1st Plaintiff herein and the Defendants in that suit, with respect to Land Reference No. 29/1, which is also the subject of the suit filed herein. The Plaintiff sought orders of specific performance of the said sale agreement and execution of a conveyance in respect of the suit property among other remedies. The parties subsequently entered into a consent by a letter dated 19th February 1998 which was adopted as orders of this Court on the same date, and which orders are in the decree issued on 27th April 1998. The effect of the said orders was that judgment was entered in HCCC 1047 of 1994 in favour of the Plaintiff for the sum of Kshs 2,400,000/=, and the Plaintiff was to remain in possession of the suit property for a period of five years from 18th February 1998.

In the present suit the Plaintiffs are seeking orders arising from their entitlement to the suit property as a result of the same sale agreement of 21st March 1991 and representations made by the 1st – 4th Defendants after the consent judgment was entered. It is clear that the main issue herein is the effect of the sale agreement dated 21st March 1991, which issue was finally determined by the parties by way of the judgment by consent they entered into on 19th February 1998. I also in this regard refer to Explanations 3 to 5 to section 7 of the Civil Procedure Act, which state as follows:

“Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.”

It therefore follows that the issues being brought in the suit herein with respect to the sale agreement dated 21st March 1991 ought to have been brought in HCCC 1047 of 1994, otherwise there would never be an end to litigation. In addition by the parties having consented to certain reliefs in the said case, then all the remaining prayers sought in the Plaintiff in HCCC 1047 of 1994 are deemed to have been denied, including specific performance of the said sale agreement, or any orders consequent thereof as are sought in the suit herein.

Any subsequent agreement entered into by the parties after a judgment can only have effect on that judgment by way of an additional consent recorded and adopted by the court, or upon a review of the judgment can only be upon application. Such a subsequent agreement on the matters that were in issue in a judgment cannot give rise to any type of estoppel, since the issues are deemed to have been finally determined. In addition, an application was made by the 1st Plaintiff herein to set aside the consent judgment entered into in HCCC 1047 of 1994 on 28th July 2010 and denied by this Court. It is my finding that the Plaintiffs’ suit herein is now seeking to achieve the same result by way of a fresh claim, and is therefore not only *res judicata*, but are also clearly an abuse of the process of court. The legal options available to the Plaintiffs in the circumstances is to proceed with execution of the consent judgment or enter into a new consent in HCCC 1047 of 1994, or to appeal against the said consent judgment to the Court of Appeal.

I therefore allow the 1st and 4th Defendants’ application of 6th October 2011 for the reasons stated in the foregoing, and accordingly dismiss the Plaintiff suit herein brought by way of the Plaintiff dated and filed on 4th August 2011. The Plaintiff’s application dated 4th August 2011 seeking a temporary injunction

against the Defendants consequently also fails. The 1st and 4th Defendants' application dated 2nd February 2012 succeeds to the extent that it is accordingly also ordered that the interim orders granted herein pursuant to the Plaintiff's application dated 4th August 2011 be and are hereby vacated. The Plaintiffs shall meet the costs of the applications herein and of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE