NO. 2751

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 197 OF 1999

JAPHET ANGILA.....PLAINTIFF

-VERSUS-

ISAYA ARNOLD OWALA.....1ST DEFENDANT
M/S KENYA INDUSTRIAL ESTATE.....2ND DEFENDANT

RULING

On 17th November, 2010, **Mr. Oguttu, Otieno** and **Ogweno** learned counsels appearing for the plaintiff, 1st and 2nd defendants respectively entered a consent before me in these terms:-

-Chamber summons application dated 28th April, 2010 together with preliminary objection dated 16th November, 2010 be consolidated and canvassed simultaneously.

-The two to be canvassed by way of written submissions

-The preliminary Objection should however be addressed first in the ruling.

The application dated 28th April, 2010 was lodged by the 1st defendant. It seeks the following prayers:-

"1. Pursuant to Order VI rule 13(a) Civil Procedure rules this suit be struck out and dismissed on the ground that it discloses no reasonable cause of action against the applicant herein.

2. Even if, which is not admitted, the declaration certificate dated 12th November, 1971 was valid, this suit having been filed on 15th October, 1999, it is barred by the Statute of Limitations.

3. Further and or in the alternative pursuant to Order VI rule 13(b), (c) and (d) this suit be struck out and all or any orders made be discharged on the grounds that;

(i) It is scandalous or vexatious or

(ii) It may prejudice, embarrass or delay the fair trial of the action or

(iii) It is otherwise an abuse of the process of court.

4. The costs of this application be provided……..".

It would appear from the face of the application that the sole ground urged in support of the application is that the instant suit was ***res judicata.***

In support of the application, **Connie Francis C. Owala**, the son of **Isaya Arnold Owala,** the original 1st defendant now deceased, swore an affidavit. He deponed where pertinent that he was the administrator of the estate of the 1st defendant. His late father was a partner together with the plaintiff and one, **John Mark Obaga** in a business trading under the name and style of Saga stores. The three were allocated as such, plot No. **L.R. 1432/177** Homa Bay under the **Registration of Titles Act** and the title thereof issued in their joint names, hereinafter **"the suit premises"** In a suit filed by the first defendant against Saga stores being **Nairobi HCCC.NO. 75 of 1990, Mwera J** decreed on 29th January, 1993 :

"1. That the respondent partnership was dissolved vide Declaration Certificate dated 12th November, 1972 and by that they divided everything the firm had even with the capital base.

2. That the three partners had declared they were dividing the assets/liabilities of the respondent according to the state of affairs as at 31st December, 1971.

3. That there are no partnership accounts to be taken.

4. That the originating summons be and is hereby dismissed.

5. That the applicant do pay costs of the suit to the respondent to be taxed and certified by the taxing officer of this court……"

According to the 1st defendant, the suit premises aforesaid was dealt with in the decree aforesaid. On 18th October, 1999, 1st November, 2000 and 29th August, 2002 respectively, the plaintiff filed these suits, **HCCC.(KISII) Misc. App. No, 301 of 1997** (OS) and **HCCC (KISII) 251 of 2002** raising issues pertaining to the declaration certificate as well as ownership of the suit premises aforesaid. By a judgment of this court in **HCCC.No. 251 of 2002** delivered by **Musinga J** on 10th December, 2009 he held that the alleged certificate of declaration of 12th November, 1972 was not genuine and **Mwera J** had accordingly

been misled in **HCCC.75 of 1990**. He further deponed that and even if the certificate was valid by suing on it on 18th October, 1999, the suit was barred by Statute of Limitation . Finally, he deponed that by the plaintiff filing a multiplicity of suits over the same issues he was basically abusing court process.

When served with the application, the 2nd defendant immediately filed Notice of Preliminary Objection dated 16th November, 2010. It is this Preliminary Objection that is the subject of this ruling as well, in terms of the consent order stated at the commencement of this ruling. In essence, the 2nd defendant took the position that the suit as against it was non-existent having abated on 30th October, 2003. With the death of the 1st defendant, the suit being in ***persona*** and not in ***rem*** cannot be transferred and finally, that in the absence of a valid suit against it then there was no ***nexus*** or ***privity*** between the plaintiff and it. Thus the suit against cannot subsist in ***vacuo***.

On 22nd October, 2010, the plaintiff filed a statement of grounds of opposition in which he maintained that the application was mischievous, misconceived and bad in law; offended section 1A (3) of the **Civil Procedure Act,** was ***res judicata*** and ***subjudice***, was merely calculated to delay, obstruct and or defeat the expeditious disposal and or determination of the suit in which only defence hearing is left, lastly, that the application constituted and amounted to the abuse of the due court process. Neither the defendants nor plaintiff followed up their initial actions aforesaid with replying affidavits.

In support of their respective positions on the application, parties filed and exchanged respective written submissions which I have carefully read and considered alongside cited authorities.

From what I can gather from the record, the history of this disputes appear to be this, on or about 18th October, 1999 the plaintiff mounted this suit against the defendants jointly and severally for a declaration that Plot no. **L.R. 1432/177** HomaBay municipality belonged to him and that the same be registered in his name, an order directing the 2nd defendant to discharge and deliver the title documents to the plaintiff and finally costs.
In their defences, the defendants denied the plaintiff's claims. They denied their execution of a declaration of dissolution of their partnership referred to in the decree of **Mwera J** in **HCCC.NO. 75 of 1990,** and the giving to the plaintiff the said plot. They also denied the allegations of fraud attributed to them by the plaintiff with regard to the plot and maintained that in any event, the suit was statute barred. With regard to **HCCC.NO. 75 of 1990**, the defendants contented that the judgment therein did not fall within the perview of section 47A of the **Evidence Act**.

Before this suit could be heard and determined the original 1st defendant **Isaya Francis Owala** passed away on 30th October 2002. Subsequently, the current 1st defendant petitioned this court and was issued with a grant of letters of Administration intestate for the estate of his deceased father on or about 17th may, 2005. He subsequently applied and was substituted in the suit in the place of his deceased father.

Before this suit could be set down for hearing, the 1st defendant filed a Notice of Preliminary Objection dated 7th July, 2006 claiming that the suit was ***res judicata***. That Preliminary Objection was heard and determined vide ruling delivered by **Bauni J.** The judge found no merit in the Preliminary objection and dismissed the same with costs.

Following the ruling, the hearing of the suit formally commenced before **Gacheche J** on 12th June, 2007. The plaintiff testified and closed his case. Subsequently the suit was listed for defence hearing on the 10th December, 2007. However it never took off. As of now therefore, the suit is still pending hearing the defence case.

From this outline of the history of the suit, I find the application and the Preliminary Objection wholly unmerited. However and in terms of the consent order, let me first deal with the Preliminary Objection. That Preliminary Objection raises three issues, whether the suit has abated, whether the suit is in ***persona*** and not in ***rem*** and finally the ***nexus*** or ***privity*** between the plaintiff and 2nd defendant.

Dealing with the 1st issue, it is common ground that the current 1st defendant sought and obtained a grant of letters of administration intestate with regard to the estate of his deceased's father who was the initial 1st defendant in the suit. It is also common ground that the instant 1st defendant was subsequently substituted in the suit in place of his deceased father on 8th September, 2004. It is also common ground that, that substitution was by consent of all the parties. However, it is instructive that initially the 2nd defendant had intended to oppose the application for substitution. Indeed it had filed grounds of opposition dated 22nd June, 2004 in which the issue of abatement of the suit against the 1st defendant featured prominently. However, when the application for substitution came up for interparties hearing, a consent order in terms aforesaid was recorded. Besides , the substitution application had a prayer to the effect that upon such substitution, the case do to proceed to hearing. When the applications for substitution was compromised as aforesaid, the 2nd defendant waived its right to raise the issue of abatement much as it was an issue of law. In terms of explanation 4 of **res judicata** under section 7 of the **Civil Procedure Act**, the issue of abatement of the suit as against the 1st defendant was a matter which ought to have been made a ground of defence or attack against the application. It was an issue which was directly and substantially in issue in the application. See also **Daniel Kirui & Anor Monica Macharia & Anor, C.A.No. 261 of 2002 (UR).** To raise it again in this application is to my mind therefore ***res judicata.*** In any event, I do not see the justification of the 2nd defendant hiking a ride on the death of the 1st defendant. It would have been better for it to wait for its fate. The person who should infact be glowing with satisfaction is the 1st defendant. He is not and if anything he wants the suit against him to proceed. Why then should the 2nd defendant stand in his way? Finally, it must be appreciated that the substitution having been by consent, parties thereto are bound by its terms and cannot unilaterally resile from the same. If the 2nd defendant wishes not to bound by the substitution consent, he knows what to do. But a Preliminary objection on that basis will not do. The authorities relied on by the 2nd defendant on this issue such as **Vamos & Partners .v. Hassan (1964) 644 and James Akello .v. George Raphael Onyango, C.A No. 58 of 1984(UR**) do not advance its case at all. They are distinguishable on the facts.

With regard to the second issue, I do agree that this suit was in ***persona*** and not in ***rem.*** The pleadings clearly reveal that the plaintiff claims ownership of suit premises, and the discharge of the title documents currently held by the 2nd defendant. Being a suit for the recovery of land, it cannot be said that it was personal to the deceased and the claim passed on as well with the death of the initial 1st defendant. This suit survived the deceased. The current 1st defendant was perfectly in order to walk into the suit and defend it lest the estate of the deceased be deprived of a prime asset. In any event I doubt whether the substitution of the current 1st defendant could have been made , if the cause of action did not survive him. Further whether the suit was in **persona** or **rem** should be the concern of the plaintiff.

On the final issue of the ***nexus*** or ***privity*** between the plaintiff and 2nd defendant, it is quite apparent that the plaintiff's suit against the defendants is for recovery of the suit premises and the discharge of the security held by the 2nd defendant at the instance of the 1st defendant. The suit has survived the initial defendant. Therein then lies the ***nexus*** or ***privity*** between the plaintiff and 2nd defendant.

In the end, I hold that the Preliminary Objection was misconceived. Accordingly it is dismissed with costs to the plaintiff. The 1st defendant cannot benefit from an award of costs as he has sailed in the same boat with the 2nd defendant who filed the Preliminary Objection.

Coming to the application, the 1st defendant wishes to have the suit struck out on the basis that it discloses no reasonable cause of action, is barred by limitation or is otherwise a ***res judicata***. It has been stated times on end that the power to strike out a pleading should only be resorted to in plain and obvious cases and such jurisdiction should be exercised sparingly and with extreme caution. As stated by **Madan JA in DT Dobie & Company (Kenya) Ltd .v. Muchina (1984) KLR** 1 ***"…..No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblemence of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a***

case before it……" Looking at the pleadings herein, I have no doubt at all that the suit discloses a reasonable cause of action. In any event the hearing of the suit has commenced. The plaintiff has had his day in court. What is left is defence hearing. Can the 1st defendant be said to have brought this application in good faith therefore? I do not think so. Having heard the plaintiff's case, I do not think that it is right for the 1st defendant to use such evidence to mount this application. That is tantamount to pulling a rack under the feet of the plaintiff. The 1st defendant had all the time to mount the application before the plenary hearing of the suit commenced. He did not do so. I think that it is too late now for the 1st defendant to seek to strike out the plaintiff's suit. The plaintiff's suit as framed discloses a reasonable cause of action founded on fraud and should be allowed to go the whole hog.

On the question of ***res judicata*** and limitation, the record shows that those same issues were raised and canvassed before **Bauni J**. In reserved ruling delivered on 27th November, 2006, he rendered himself thus:-

"……..I have carefully considered the preliminary objection and the reply thereto. I find no merit on any of the issues raised. The plaintiff submitted that NBI HCCC.NO.75 of 1990 involved different issues from those in this suit. The defendant did not avail to this court the pleadings in that case and the decision made. It was up to him to show court that the issues adjudicated on in that case are the same as those in this case. That he did not attempt to do. The plaintiff had in para.8 of the plaint stated about that case. He was candid enough to say so. Defendant should have shown the court the issues decided in that case. He who alleges must prove and the defendant did not prove that the suit is res judicata.

As to substitution there is no legal requirement that once there is substitution then the plaintiff needed to amend the plaint . If there was any need for amendment then the court when it granted the order for substitution would have directed so.
The plaintiff submitted that the issue in this matter is registration of a plot which was done after the partnership was dissolved. The cause of action is therefore not based on contract and time did not start running from the time the partnership was dissolved. The suit is therefore not time barred. From the above therefore I find no merit in the Preliminary Objection and the same is dismissed with costs.

In view of the foregoing emphatic findings it is clear that the issues of ***res judicata*** and **Limitation** cannot be revisited again by this court as the 1st defendant has sought to do by this application. Suffice to that the issues are ***res judicata.*** If the 1st defendant was aggrieved with the ruling and the decision on the twin issues, he should have exercised his undoubted right of appeal. He did not do so and cannot therefore be allowed to re-agitate them before me perhaps with a misplaced hope that I might sit on appeal of my brethren's decision. That is an invitation I have declined to accept.

Finally, and as correctly submitted by counsel for the plaintiff, the defendants have chosen not to call defence evidence, in the case but have resorted to a plethora of unnecessary applications and Preliminary Objections, whose effect, is to delay and or stand in the way of the expeditious hearing and determination of the suit. No doubt the court record shows that the plaintiff's complaint is not at all wholly misplaced. The application dated 28th April, 2010 is accordingly dismissed with costs to the plaintiff. Folks get on with it.

Judgment dated, **signed** and **delivered** at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA

JUDGE