REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 58 of 2010

1. SANDRA GRIMMETT

2. PHILLIP GRIMMETT.....PLAINTIFFS/RESPONDENT

-VERSUS-

BENEDICT NDIGIRIGI GICHUHI.....DEFENDANT/APPLICANT

RULING

By Chamber Summons dated *12th March, 2010* and filed on *15th March, 2010* (brought under ss.3A, 7 and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Orders VI (rules 13 (i) (d),16) and XXXVI (rules 3, 12) of the Civil Procedure Rules, and s. 3(3) of the Law of Contract Act (Cap. 23, Laws of Kenya)), the applicants made the single prayer that "the suit herein be struck out with costs to the [defendant]."

The application is based on the grounds that: (a) the suit is *res judicata*; and (b) the suit is an abuse of the process of the Court.

The defendant depones, in the annexed evidence, that he had earlier been sued by the same plaintiffs, in HCCC No. 184 of 2009, the claim in that case being for the very same properties that are the basis of the instant suit; and the earlier suit "was marked as settled after both the [plaintiffs] and [the defendant] had signed a consent which consent was duly filed in Court".

The defendant believes to be true the advice given by his advocates, that the instant suit is *res judicata* "since the parties herein were the same parties in HCCC No. 184 of 2009
and the cause of action was the same and the matter was duly marked as settled when the consent was filed".

Learned counsel for the defendant/applicant began his submissions from the terms of s.7 of the Civil Procedure Act (Cap. 21, Laws of Kenya):

"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 substantially raised, and has been heard and finally decided by such court".

He then submitted that there is a former suit, HCCC No. 184 of 2009, *Sandra Grimmett and Phillip Grimmett v. Benedict Ndigirigi Gichuhi*, and the High Court had the competence to try the former suit and the instant suit.

The plaintiffs had, in the former suit, prayed for:

(a) a declaration that certain plots, being sub-divisions No. 4463, 4464 and 4465/Section III/MN together with the house situate thereon, lawfully belonged to them and the defendant held the same in trust for them;

(b) an order for specific performance compelling the defendant to transfer the plots to them and/or their nominees;

(c) (in the alternative) an order directing the Registrar of Titles to cancel, substitute, revoke and/or issue any memorial or entry in the register, or otherwise do such acts or make such entries as may be necessary to give effect to the orders of the Court so as to result in a reversal and/or an effecting of registration of the plaintiffs as the owners of the suit properties and/or of their nominees;

(d) a permanent injunction restraining the defendant by himself, his agents and/or servants and/or any other persons acting by his authority from leasing, selling,

transferring, alienating, disposing of, and/or dealing in any manner howsoever interfering with the plaintiffs' quiet possession of the suit plots together with the house situate therein;

(e) costs incidental to the suit and interests thereon;

(f) any further or other relief that the Court may deem fit and just to grant.

And in the instant Originating Summons suit the same plaintiffs have the following prayers:

(a) that the defendant be compelled to surrender the certificates of title in respect of the suit plots, No. 4463, No. 4464 and No. 4465/Sec. III/MN;

(b) that in the event of failure on the part of the defendant to surrender the said certificates of title, then the Registrar of Title, Mombasa, do cancel and/or nullify the said certificates of title as issued in the name of the defendant;

(c) that the Registrar of Titles, Mombasa, do register transfers to the plaintiffs in respect of CR 38258, sub-division No. 4463, Section III/M.N.; CR 38259, sub-division No. 4464, section III/M.N. and CR 38260, sub-division No. 4465, Section III/MN;

(d) that the Registrar of Titles do issue provisional certificates of title in the names of the plaintiffs, as shown in the transfers;

(e) that the production and presentation of original certificates of title for plots No. 4463, 4464 and 4465 be dispensed with;

(f) that costs of the suit be provided for.

Counsel urged that the prayers contained in the plaint, in HCCC No. 184 of 2009, and in the Originating Summons suit (HCCC No. 58 of 2010 (O.S.)) are "more or less the same";

the matters in the former suit "have been alleged by the respondents herein and either denied or admitted expressly or impliedly by the applicant herein"; the parties in the former suit "are the same as in the suit herein".

Counsel urged that since the parties signed and filed a consent marking the matter as settled, the plaintiffs herein are "barred from filing another suit against [the defendant] over the same subject-matter seeking the same reliefs as in the former suit which was settled".

The contention that abuse of Court process is disclosed, is founded on the terms of s. 3(3) of the Law of Contract Act (Cap. 23, Laws of Kenya): counsel urged that the said provision is to the effect that no suit shall be brought upon a contract for the disposition of an interest in land unless ?

(i) the contract is in writing;

(ii) the contract is signed by all the parties thereto;

(iii) the signature of each party signing has been attested by a witness who is present at the time of signing by the parties.

Counsel submitted that as the plaintiffs had not exhibited the contract under which they were claiming, the filing of the suit was an abuse of the process of the Court; counsel urged that the production of land transfers by the plaintiffs be ignored, because "the date when the parties herein executed the transfers is not indicated, and the advocates who allegedly certified the transfers did not indicate the specific date on which the [defendant] appeared before him and freely and voluntarily executed each of the three transfers".

Learned counsel for the plaintiffs began by making submissions on the circumstances in which "the former suit", HCCC No. 184 of 2009 had been withdrawn, and urged that this should not compromise the standing of the current Originating Summons suit: it is stated in the affidavit evidence that *Sandra Grimmett* (affidavit of *1st March, 2010*) was advised by her advocate that the defendant had already signed the transfer documents and "was to surrender titles for registration in [the plaintiffs'] names and [it is] on this understanding that she consented to [the withdrawal of the suit]". So the *consent*, counsel urged, "was therefore conditional upon the surrender of the title documents."
Counsel submitted that the two acts, filing of the consent, and drafting and signing of the transfer, happened "almost consecutively"; and "the understanding was that the defendant would transfer the titles of the suit property to the plaintiffs immediately and therefore the case would not have to proceed". The effect of the consent, counsel urged, was that "the defendant had admitted that the property belonged to the plaintiffs" – and this disposed of the first prayer in the plaint. As all the remaining prayers flowed from prayer 1, they would necessarily fall out, with prayer 1 duly fulfilled.

Counsel submitted that the defendant, once he signed the transfer documents, "failed/neglected and/or refused to surrender the certificates of title to the plaintiffs": and this is the basis of the current suit by Originating Summons. Learned counsel submitted that "whereas in HCCC No. 184 of 2009 the subject-matter was ownership, the current suit is based on failure by the [defendant] to surrender title documents thereby failing to perform his obligation under the consent".

Counsel submitted that the Court should find that the issues raised in the two suits are different, and so, this case is not *res judicata*: whereas in the earlier case what was sought was a *declaration* that the plaintiffs were the owners of the suit properties, in the instant suit the plaintiffs were seeking orders compelling the defendant to surrender the title documents, pursuant to the consent.

Counsel cited in support of his argument on the *res judicata* principle, the Court of Appeal decision in *Uhuru Highway Developments Ltd. v. Central Bank of Kenya & Two Others*, Civ. Appeal No. 36 of 1996, in which the following passage occurs:

"In order to rely on the defence of *res judicata* there must be:

(i) a previous suit in which the matter was in issue;

(ii) the parties were the same or litigating under the same title;

(iii) a competent court heard the matter in issue;

(iv) the issue has been raised once again in a fresh suit".

By the foregoing principles, counsel urged that the Originating Summons suit herein is not *res judicata*.

And counsel added, for effect, that a case resolved on the basis of consent was not a case determined by a competent Court, for the purpose of attracting the limitations of the *res judicata* principle – and thus this matter was not covered by the prohibition in s.7 of the Civil Procedure Act.
Counsel urged that this Court should not declare the instant suit to be *res judicata*, for such a declaration would have certain contradictory implications. In the first place, such declaration would permit the defendant in HCCC No. 184 of 2009 to be in contempt of the said consent order.

The High Court (*Ibrahim, J*) has held, in *Nicodemus Kebaso v. The Chairman, Board of Governors, Matongo Lutheran Theological College*, Eldoret HCCC No. 28 of 1998, that defendants who failed to comply with a consent order made by the Court were in contempt of Court orders.

Counsel urged that, in the instant case, the defendant failed to comply with the consent order: and it was urged that this Court should follow the persuasive authority in the *Nicodemus Kebaso* case, and find that the defendant/applicant is guilty of contempt of Court, and that the defendant is, besides, "seeking to rely on the contemptuous act to have the [plaintiffs'] suit dismissed".

Counsel urged, secondly, that a declaration that the instant suit is *res judicata* would have the consequence of conferring unjust enrichment upon the defendant. "Unjust enrichment" was adverted to by the High Court (*Kuloba, J*) in *Madhupaper International Ltd and Another v. Kenya Commercial Bank and Two Others* [2003] KLR, 31, as follows (at p. 33):

"….the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep….., and he should, in justice, restore it to the plaintiff. The gist is that a defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution".
Learned counsel urged this Court to find that the defendant had admitted, by signing the consent, and by signing the transfer, that the property belonged to the plaintiff: and consequently if the defendant's application is allowed, then the defendant "would thereby be enriched at the expense of the plaintiff and it would be unjust for the Court to allow the defendant to retain the benefit of the property".

Counsel contested the claim made by the defendant, that the plaintiff's suit is an abuse of the process of the Court: for "an action is an abuse of the process of the Court where it is [pretentious] or absolutely groundless"; and the defendant had not shown that the instant suit "is absolutely groundless"; the suit is "based on the transfer documents signed between the parties herein and the consent signed by the parties on *19th November, 2009*"; the defendant had not denied that he did sign the transfer.

Counsel urged that the defendant did not merit admittance to the table of equity, for he who comes to equity must come with clean hands; the defendant had failed to abide by the consent order filed in HCCC No. 184 of 2009. And he who comes to equity must do equity: the defendant must "fulfil his obligation under the consent order and the transfer,...before coming to Court".
It was the plaintiff's case that the land transfer herein, dated *21st November, 2009* was in all respects

proper, as it complied with the requirements set out in s. 34 of the Registration of Titles Act (Cap. 281, Laws of Kenya), which thus provides:

"When land is intended to be transferred or any right of way or other easement is intended to be created or transferred, the registered proprietor shall execute in original only, a transfer in Form F in the first schedule which transfer shall, for description of the land intended to be dealt with refer to the grant or certificate of title of the land or shall give such description as may be sufficient to identify it, and shall contain an accurate statement of the land and easement, or the easement intended to be transferred or created, and a memorandum of all leases, charges and other encumbrances to which the land may be subject and all rights of way, easements and privileges intended to be conveyed".
Counsel submitted that the law does not require a sale agreement to be produced, as a basis for the transfer.

Counsel further urged that the Originating Summons suit was seeking to compel the defendant to fulfil his obligations under the consent filed in Court on *19th November, 2009*, and that a consent was governed by the same principles as applied to contract. As the defendant had signed the consent, counsel submitted, he had consented to be bound by the terms of that consent; the defendant had not denied the consent, and was indeed, seeking to rely on the consent; he could not be heard to rely on the consent the terms of which he had failed to fulfil. It was urged that the consent was a proper contract binding the parties.

Counsel submitted that it was improper for the defendant to rely on the provisions of the Civil Procedure Act (Cap. 21) which confer upon the Court a wide discretion to make orders as dictated by considerations of justice, such as ss. 1A and 3A. Counsel relied on the Court of Appeal decision in *Hunker Trading Company Limited v. Elf Oil Kenya Limited*, Civil Application No. 6 of 2010 [2010]eKLR, in which an applicant failed to comply with the High Court's orders; and it was held that under s. 1A(3) of the Civil Procedure Act, the applicant had a duty to comply with the Court's orders and processes.

Counsel urged that the striking out of the suit as prayed for by the defendant, would not facilitate the just determination of the proceedings as envisaged under s. 1A of the Civil Procedure Act.
It emerges from the review of submissions, and from the case authorities cited, that the Courts have evolved the practice under which parties are required to comply with process and orders, including consent orders. Consent orders emerge from expressed consents that carry contractual force, but which subsequently take on the encrustation of express Court orders set for enforcement. In this case, the parties signed a consent order on *19th November, 2009*, bringing to an end the plaintiffs' suit by plaint, in HCCC No. 184 of 2009; the consent thus reads:

"By consent, the matter be and is hereby marked as settled with no order as to costs".

All the evidence on record shows that the defendant did not comply with the consent order aforesaid. Such non-compliance with an order recorded in Court, offends the principle
which, as already noted in this Ruling, the High court had applied in the *Nicodemus Kebaso* case; and where such non-compliance falls short of contempt, it certainly offends the principle contained in s.1A of the Civil Procedure Act, which places a duty upon parties to assist the Court in rendering substantial justice, on the facts and circumstances of particular cases.

I must hold that it is improper for the defendant to seek to rely on the said consent order as a foundation for contending that the instant Originating Summons case is *res judicata*.

I am also in agreement with the plaintiffs that the defendant has sought to access the table of equity without first rendering equity: he seeks to reply on s. 3A of the Civil Procedure Act; but that provision is concerned with the Court exercising unlimited discretion to dispense justice and equity; the defendant is not entitled to that.

I would also reject the defendant's contention that the plaintiffs, in filing the instant suit, were engaged in

an abuse of the process of the Court: it is the defendant who beguiled them to settle the original suit, and then he resiled on his outstanding obligations; the plaintiffs, in these circumstances, had a right to institute a fresh suit.

These considerations, in my opinion, suffice as a basis for dismissing the defendant's application, which I hereby do and also mulct the defendant in costs, in favour of the plaintiffs.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 25th day of August, 2010.

J. B. OJWANG
JUDGE