



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA  
(*Coram: Ojwang, J.*)

CIVIL SUIT NO. 274 OF 2004

1. ROBERT HANJARI BUKAH  
2. DAMA KAHINDI NGOWA  
3. FARAJ YASSIR SAID .....PLAINTIFFS/RESPONDENTS  
4. ALI RAMADHANI MWATSAHU  
5. WILLIAM MUSHURIRI WA HARE  
6. SOPHIA RAHIM

**-VERSUS-**

1. AL-SHERMAN LTD. ....DEFENDANTS/APPLICANTS  
2. MOHAMED ISLAM  
3. THE COMMISSIONER OF LAND .....DEFENDANTS/RESPONDENTS  
4. THE REGISTRAR OF TITLES, MSA

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> defendants came before the Court by Chamber Summons dated **21<sup>st</sup> June, 2007**, brought under Order **VI**, rule 13(1) (a) of the Civil Procedure Rules. The applicants' prayer is that the plaintiffs' suit dated **15<sup>th</sup> December, 2004** be dismissed with costs. The grounds for the application are stated as follows:

- (a) ***the suit is res judicata by reason of the assertion in paragraph 19 of the plaint;***
- (b) ***no action lies, by virtue of the provisions of Order VII, rule 1 (1) (e);***
- (c) ***under s. 12 as read with s.2 of the Government Proceedings Act, the plaintiffs have no chose in action against the 3<sup>rd</sup> and 4<sup>th</sup> defendants, with the consequence that the suit is not tenable in law;***
- (d) ***no injunctions can issue against 3<sup>rd</sup> and 4<sup>th</sup> defendants if and when they are acting within the scope of their duties;***
- (e) ***the action is time-barred, under s.26 of the Limitation of Actions Act.***

The plaintiffs/respondents filed a notice of preliminary objection dated **30<sup>th</sup> August, 2007**, bearing the following statements:

- (i) ***that the application is "misconceived, bad in law and an abuse of Court process";***
- (ii) ***that the firm of A.B. Patel & Patel, Advocates have no locus standi to file/prosecute action on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents;***
- (iii) ***that the Court "cannot entertain incurably/fatally defective proceedings".***

Learned counsel **Mr. Shah** began by citing the content of paragraph 19 of the plaint, dated 15<sup>th</sup> December, 2004; it states:

**“There is no suit pending between the plaintiffs and the defendants save for HC Misc. Civil Application No. 325 of 2000 against the 3<sup>rd</sup> and 4<sup>th</sup> defendants for orders of prohibition, certiorari and mandamus already decided.”**

In the said Misc. Civil Application No. 325 of 2000 **Lady Justice Khaminwa** made an order on 12<sup>th</sup> August, 2004 dismissing the matter with costs. In the plaint, the prayers were set out as for:

- (a) **revocation/quashing of grant to 1<sup>st</sup> defendant and the same be registered in the plaintiffs’ names;**
- (b) **restitution of the suit property to its former allottees, namely the plaintiffs,**
- (c) **compelling the 3<sup>rd</sup> and 4<sup>th</sup> defendants to register the plaintiffs as the allottees of LR No. 22804.**

In the judicial review application, still the subject was L.R. No. 22804; and the same officers who had been sued in the instant matter, were sought to be subjected to orders of prohibition, certiorari and mandamus.

Learned counsel relied on the provisions of s.7, Civil Procedure Act (Cap. 21, Laws of Kenya), and urged that Civil Suit No. 274 of 2004 was **res judicata**.

Learned counsel cited the authority of the High Court decision (**Onyancha, J**) in **Rose Wanjiru Rugendo v. M/s. Njiiri Hardware Limited and Another**, Mombasa HCCC No. 541 of 2001 as quite similar, and bearing principles which should apply in the instant matter. The learned Judge, in that case, took account of s.7 of the Civil Procedure Act, and thus stated:

**“To enable this Court to decide whether the suit or issues before us in this case are the same or similar to those that were directly and/or substantially determined in Misc. Application No. 214 of 1992, this Court should have been shown the pleadings in that application.”**

Learned counsel submitted that the plaintiff had not complied with the terms of the Government Lands Act (Cap. 280, Laws of Kenya), regarding the institution and conduct of proceedings in respect of land such as the one involved herein. Section 136 of that Act provides that:

**“(1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.**

**“(2) Notice in writing of the action, and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.”**

Counsel urged that the suit herein had not been preceded by the one-month statutory notice, and that it was statute-barred; that compliance with these limitations was required, in a matter other than a judicial review cause: **The Commissioner of Lands v. Kunste Hotel Limited**, Civil Appeal No. 234 of 1995 [Nakuru].

Counsel urged, on the basis of s.23 (1) of the Registration of Titles Act (Cap. 281, Laws of Kenya), that: **“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof.....”**

Learned counsel submitted that the plaint and the reliefs sought are in the nature of an injunction, compelling Government departments to do certain things; but this was a matter regulated by s. 13A of the Government proceedings Act (Cap. 40, Laws of Kenya) which the plaintiff had not taken into account. Counsel asked that the suit be dismissed.

Without hearing the plaintiffs’/respondents’ story, a story they elected not to come forward and tell, this Court has to determine the matter now before it. The standard approach to the resolution of a dispute of such a nature, is to find the balance of probability. The applicants raise cogent points of law which, particularly in the absence of a differing contention, must carry the day. I am so persuaded, especially, on the basis of the **res judicata** rule; this is found in s. 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which provides:

**“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”.**

While stating **obiter** that the foregoing rule does not necessarily rule out the prosecution of an ordinary suit, on the ground that related matter has been the subject of a judicial review cause, **Mr. Justice**

**Onyancha** held (in **Rose Wanjiru Rugendo v. M/s. Njiiri Hardware Ltd.**, Mombasa HCCC No. 541 of 2001) that the specific prayers in such sets of proceedings would have to be considered, and only a replication of trial issues would attract the play of the **res judicata** rule.

Now in the instant matter, it is clear that the case in Civil Suit No. 274 of 2004 perfectly reproduces the prayers in Miscellaneous Civil Application No. 325 of 2000 which had been dismissed with costs.

This is the reason why I must allow the application of **21<sup>st</sup> June, 2007**, and dismiss the plaintiffs' suit of **15<sup>th</sup> December, 2004**, with costs to the applicants.

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 5<sup>th</sup> day of November, 2010.**

**J. B. OJWANG**  
**JUDGE**