



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 769 of 2001

PHILIP KURIA WAINAINA.....PLAINTIFF

VERSUS

FAMILY FINANCE BUILDING SOCIETY.....1ST DEFENDANT

WILSON WAITHAKA GITAU.....2ND DEFENDANT

RULING

By an amended plaint dated 21st December 2001, filed on 10th January 2002, the Plaintiff Philip Kuria Wainaina amended his claim to include the 2nd Defendant Wilson Waitthaka Gitau to whom the Plaintiff claimed the 1st Defendant Family Finance Building Society unlawfully, illegally and fraudulently sold Plaintiff's land parcel Kiganjo/Gachika 1909 (hereinafter referred to as suit premises).

The Plaintiff in its amended prayer "aa" sought to have the sale declared null and void and the title issued to the 2nd Defendant nullified and cancelled. Following a chamber summons brought on behalf of the 2nd Defendant, Hon. Anyara Emukule struck out the suit as against the 2nd Defendant.

On the 9th February 2006, following an application brought by the Plaintiff under Order I rule 10, Waweru J granted leave to the Plaintiff, first, to join the 2nd Defendant and one J. M. Kariuki t/a Jomwaka Traders as Defendants to the Plaintiff's suit, and secondly to amend the plaint as necessary. Subsequent thereto the Plaintiff filed an amended plaint dated 17th February 2006 bringing in the 2nd Defendant as a party and J. M. Kariuki t/a Jomwaka Traders as a 3rd Defendant. The Plaintiff's cause of action in the amended plaint of 17th February 2006 as against 2nd Defendant was that the 1st Defendant unlawfully, illegally and fraudulently sold the suit premises to the 2nd Defendant by way of a private treaty for a paltry sum of KShs.3,100,000. The Plaintiff sought inter alia to have the sale made between the 1st Defendant and 2nd Defendant nullified and cancelled.

The 2nd Defendant has filed a defence to the amended Plaint under protest. In the defence 2nd Defendant claims inter alia:

- That the Plaintiff's suit is statute barred by virtue of the provisions of Section 26 as read together with Section 27 and 35 of the Limitation of Actions Act.
- That the issues raised in the amended plaint and the prayers sought thereunder as against 2nd Defendant are *res judicata*.

· That the Plaintiff having been evicted from the suit property pursuant to a court order and the 2nd Defendant's title in the suit premises being indefeasible, the Plaintiff's suit is frivolous and does not disclose any reasonable cause of action against the 2nd Defendant.

The 2nd Defendant has now followed up its defence with an application under Order VI rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules, and Section 7, 8 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya

sections 26, 27, 28 and 35 of the Limitation of Actions Act Cap. 21 Laws of Kenya seeking to have the Plaintiff's suit against the 2nd Defendant struck out and or dismissed with costs. The grounds upon which the application is brought as seen from the body of the application are as follows:-

1. The Plaintiff's claim against the 2nd Defendant is statute barred and the suit is therefore incompetent, null and void in law.
2. The Plaintiff did not seek and obtain leave of the court before commencing this action against the 2nd Defendant. Accordingly, the suit is null, void and fatally defective.
3. The Plaintiff's suit as pleaded is incompetent and fatally defective in that the issues raised in the Amended plaint and the prayers sought thereunder are *res judicata*.
4. This honourable court lacks the jurisdiction to try and determine the suit as framed against the 2nd Defendant
5. The 2nd Defendant is the registered and absolute proprietor of the suit property and the Plaintiff's remedy, if any is in damages as against the 1st Defendant herein.
6. The suit as drawn is frivolous, incompetent and does not disclose any valid or reasonable cause of action against the 2nd Defendant.
7. On the whole, the Plaintiff's suit against the 2nd Defendant is grossly incompetent and worthless in that:-
 - i) It is scandalous, frivolous and/or vexatious.
 - ii) It may prejudice, embarrass or delay the fair trial of this action.
 - iii) It is otherwise an abuse of the process of the court

In an affidavit sworn by the 2nd Defendant on the 13th April 2006, the 2nd Defendant has explained that He bought the suit premises at a public auction conducted by the 1st Defendant on 24th July 2001. The 2nd Defendant paid the purchase price of Kshs. 3.1 million to the 1st Defendant. A transfer of the suit premises was duly executed and registered and a title deed issued in the 2nd Defendant's favour on 16th August 2001. He explained that following the striking out of the Plaintiff's suit against the 2nd Defendant on 29th October 2004, the 2nd Defendant successfully filed a suit against the Plaintiff herein. i.e. HCCC 1190 of 2004, in which the 2nd Defendant obtained an order declaring the 2nd Defendant the legal owner and absolute proprietor of the suit property, an order of eviction of the Plaintiff from the suit premises and delivery of vacant possession to the 2nd Defendant. In the same suit i.e. Nairobi HCCC 1190 of 2004, the current Plaintiff's defence and counter-claim for a declaration that the sale of the suit premises to the 2nd Defendant was illegal null and void; an order for rectification of the Register; and an order of permanent injunction restraining the 2nd Defendant from selling, alienating disposing or in any way interfering with the current Plaintiff's occupation of the suit premises; was struck out.

For the above reasons the 2nd Defendant maintained that his acquirement and proprietorship of the suit premises was no longer in issue and that the issues raised in the amended plaint dated 17th February 2006 were *res judicata* and could not be revived. In this regard Mr. Kangethe who argued the application on behalf of the 2nd Defendant relied on the following authorities

1. ***Jared Iqbal Abdul Rahman & Another vs Bernard Alfred Wekesa Sambu & Ano. Civil Appeal No. 11 of 2001***
2. ***Bernard Samuel Mosi vs National Bank of Kenya Ltd Milimani HCCC No. 1863 of 2000.***
3. ***Barclays Bank of Kenya vs Dominic S Difu & 3 Others Milimani HCCC No. 2064 of 2000.***
4. ***Benson Ngugi vs Francis Kabui Kinyanjui & 3 Others Civil Appeal No. 1 of 1986.***
5. ***Kamunge & Others vs Pioneer General Assurance Society Ltd.***

Mr Kangethe further submitted that the 2nd Defendant having bought the suit premises at a public auction He is protected by law and by virtue of Sections 27 and 77 of the Registered Land Act his title cannot be impeached. Mr. Kangethe submitted that the Plaintiff's remedy if any can only lie in damages against the Bank and not the 2nd Defendant. The case of ***John Miringu Kariuki vs Equity Building Society & 3 Others Milimani HCCC No 145 of 2005*** was relied upon as authority for this proposition.

In so far as the amended plaint sought a claim based on fraud, Mr Kangethe submitted that the same was incompetent having been brought outside the statutory limitation period of 3 years without any leave from the court to file the suit out of time.

The Plaintiff has sworn a replying affidavit filed on 21st February 2007 in which He maintains that the 1st Defendant wrongly caused the 3rd Defendant to sell Plaintiff's land to the 2nd Defendant.

The Plaintiff maintained that the suit premises was sold to the 2nd Defendant illegally by way of a private treaty at an undervalue such that fraud can be inferred. The Plaintiff further maintained that He was granted leave by the court to enjoin the 2nd and 3rd Defendant to this suit.

Mr. Onindo who represented the Plaintiff at the hearing of the application maintained that the Plaintiff's suit against the 2nd Defendant was neither frivolous nor is it *res judicata*. He submitted that the amended plaint sought prayers which were totally different from the counterclaim which was struck out in HCCC No. 1190 of 2004. Mr. Onindo argued that it would not be appropriate for the suit to proceed only as against the 1st Defendant only as the orders that the court can grant would not be of benefit if 2nd Defendant is removed from the suit. He maintained that there were issues which needed to go to full trial.

It is evident from the amended plaint dated 17th February 2006 which enjoins the 2nd Defendant to the Plaintiff's suit, that the Plaintiff's claim against the 2nd Defendant is grounded on fraud particulars of which have been given at paragraph 7 (a) 7 (b), (a) (b) (c) (d) (e) & (f). According to paragraph 7 a) the cause of action arose on 24th July 2001 when the 1st Defendant is alleged to have illegally and unlawfully sold the suit premises to the 2nd Defendant at a paltry sum of Kshs. 3,100,000.

Under Section 4 (2) of the Limitation of Actions Act, Cap 22, the Plaintiff's claim against the 2nd Defendant had to be filed within 3 years from the date on which the cause of action accrued. The Plaintiff however enjoined the 2nd Defendant in this suit almost 5 years after the cause of action arose. Although under Section 26 of the Limitation of Actions Act, the court has powers to extend time for filing suit where action is based on the fraud of the Defendant or his agent, the Plaintiff never moved the court under these provisions for extension of time to file suit against the 2nd Defendant. The leave granted to

the Plaintiff to enjoin the 2nd Defendant to this suit on 9th February 2006 was granted under Order 1 rule 10(2) and 13 of the Civil Procedure Rules and no reference was made to filing the suit out of time. That leave could not therefore be used to file the suit out of time. On this ground alone it is clear that the Plaintiff's claim against the 2nd Defendant is a none starter as the same is statute barred.

As regards the issue of *res judicata* according to the pleadings which have been availed, there is no doubt that the subject matter of this suit and Nrb HCCC 1190 of 2004 is ownership of the suit property which the 2nd Defendant who was the Plaintiff in Nrb HCCC 1190 of 2004 claimed to be the absolute proprietor entitled to vacant possession and the Plaintiff who was the Defendant in that case counter-claimed a declaration that the sale to the 2nd Defendant was acquired through fraud and was therefore illegal. These are precisely the same issues which are now being raised in the current suit.

I am satisfied that Section 7 of the Civil Procedure Act is applicable as Nrb HCCC 1190 of 2004 involved the same parties as the present suit and involved the same subject matter and also raised identical issues as this suit. HCCC No. 1190 of 2004 having been finally determined, these issues cannot be revisited and the plea of *res judicata* therefore succeeds.

The judgement in HCCC 1190 of 2004 having been executed, the Plaintiff has been dispossessed of the suit property pursuant an order of a court. Plaintiff's attempts to re-open the matter by bringing another suit against 2nd Defendant can only be construed as vexatious and frivolous. I concur with Mr. Kangethe that even assuming that the suit property was wrongly sold, the sale having been done pursuant to a mortgagee's exercise of statutory powers of sale, the Plaintiff's only recourse is damages against the 1st Defendant. (***See the case of Priscilla Krobrought Grant vs. Kenya Commercial Bank & 2 others CA Nai 227 of 1995***).

For all the above reasons I am satisfied that the Chamber Summons dated 13th April 2006 succeeds. Plaintiff's suit against 2nd Defendant is accordingly struck out. Costs of this application and costs of suit as against 2nd Defendant are awarded to the 2nd Defendant.

Dated signed and delivered this 23rd day of March 2007.

H. M. OKWENGU

JUDGE