



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

Civil Case 540 of 2001

BETWEEN

**SOLOMON KITUNDU MUNYWOKI.....1ST
PLAINTIFF**

**JULIUS MUTHOKA NDOLO.....2ND
PLAINTIFF**

**PETER KYENGO MUNYOKI.....3RD
PLAINTIFF**

VERSUS

**PARK TOWERS LIMITED.....1ST
DEFENDANT**

KIRUNDI AND COMPANY ADVOCATES.....2ND DEFENDANT

G. CHEGE KIRUNDI, ADVOCATE.....3RD DEFENDANT

RULING

In this application (by notice of motion dated 15th December, 2005), the Defendants seek an order under Order 6, rule 13 (1) of the Civil Procedure Rules that the Plaintiffs' suit herein be struck out for being *res judicata* and an abuse of the process of the court. The grounds for the application as set out on the face thereof are:-

- 1. That the suit as filed offends section 8 of the Civil Procedure Act, Cap. 21.**
- 2. That the suit violates the decree in HCCC No. 871 of 1997 “in which the parties therein entered into a consent judgment which, inter alia, barred the parties thereto from raising and/or reviving any claim or claims against one another or as against their advocates”.**
- 3. That the Plaintiffs having been parties in HCCC No. 871 of 1997, they are estopped from raising issues that were substantially in issue in that said suit.**
- 4. That the entire suit as framed constitutes belated abuse of the process of the court and is *res judicata*.**

There is an affidavit sworn by the 3rd Defendant in support of the application. To it are annexed copies of the plaint and decree in HCCC No. 871 of 1997.

The application is opposed by the Plaintiffs upon the grounds of opposition dated 16th January, 2006. Those grounds are:-

1. **That the Defendants' application is frivolous and vexatious and is calculated merely to prejudice, embarrass or delay the fair trial of the suit which (was) set down for hearing on 30th January, 2006.**
2. **That the issues for determination in this suit arise purely from a contract of sale which is not in any way connected with the matters raised in the previously instituted suit, and in any event the 2nd and 3rd Defendants herein were not parties in the said previous suit.**
3. **That the consent alluded to by inference recognized the validity of the sale and cannot in anyway govern the way the sale was to be conducted, nor can it operate as an estoppel in regard to breaches of the terms of the sale.**
4. **That the consent in HCCC No. 871 of 1997 cannot by any stretch of interpretation entitle the Defendants to retain part of the purchase price.**
5. **That neither res judicata nor estoppel is of any application in this case.**
6. **That the Defendants are not entitled to the orders sought.**

I have considered the submissions of the learned counsels appearing. I am required in this application to determine three broad issues. One, whether the suit is *res judicata* under section 7 of Cap. 21. Two, whether the Plaintiffs are precluded under section 8 of the same Act from instituting this suit. And three, whether this suit is otherwise an abuse of the process of the court.

Is the suit res judicata?

Section 7 of Cap. 21 provides:-

“7. 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”.

As disclosed by the copies of the decree and amended plaint annexed to the supporting affidavits, the parties in HCCC NO. 871 of 1997 were BENSON KANUI, ALFONCE MUSAU and DAN MATHEKA (as plaintiffs) suing on their own behalf and on behalf of all members of (Machakos Public Transporters Self-Help Group). The Defendants in the suit were NAIROBI CITY COUNCIL, JOSEPH MULU MUTISYA, SOLOMON KITUNDU MUNYOKI, JULIUS MUTHOKA NDOLO, PETER MUNYOKI KYENGO and PARK TOWERS LIMITED. The Plaintiffs in the present suit, that is SOLOMON KITUNDU MUNYOKI, JULIUS MUTHOKA NDOLO and PETER KYENGO MUNYOKI, were in that previous suit as defendants. The 1st Defendant in the present suit, Park Towers Limited was also a defendant in that previous suit. However, the 2nd and 3rd Defendants in the present suit, KIRUDI & COMPANY, ADVOCATES and G. CHEGE KIRUDI ADVOCATE respectively, were not parties to that previous suit.

In the previous suit, as disclosed by the amended plaint (no other primary pleadings are annexed), the main reliefs sought were an order canceling the sale of Plot L.R. No. 209/8409 and Plot. L.R. No. 209/8408 and an order to mandate the Plaintiffs to appoint their own agents to collect parking fees and

remit the same to the 1st Defendant in the suit. In the body of the amended plaint the allotment of the two plots to the 1st defendant in that previous suit and his subsequent sale of the same to the 3rd defendant are challenged. In the present suit only one main relief is sought in the plaint, and that is judgement for the sum of KShs.4,054,529/35 and interest thereon at court rates. In paragraph 12 of the plaint it is pleaded that this is:-

“.....the total sum due and payable by the Defendants to the Plaintiffs (either as principal or agents or under the 2nd and 3rd Defendants undertaking as the case may be) in respect of the balance of the agreed price of leasehold properties known as L.R. Nos. 209/8408 and 209/8409 sold and transferred by the Plaintiffs pursuant to the agreement herein referred (to), full particulars whereof are well known to the Defendants”.

The agreement is pleaded in paragraphs 6, 7, 8, 9 and 10 of the plaint. It is pleaded that by that agreement the Plaintiffs herein agreed to sell to the 1st Defendant, and that the 1st Defendant agreed to purchase, the residue of the leases in the two properties for KShs.16,000,000/00, and that whereas the Plaintiffs duly performed their part of contract, the 2nd and 3rd Defendants each withheld a portion of the purchase price, all totaling to KShs.4,054,529/35, and failed to remit the same to the Plaintiffs in breach of their fiduciary duty to them. Particulars of that breach have been given in paragraph 9 of the plaint. It is pleaded in paragraph 8 of the plaint that the 2nd Defendant was the 1st Defendant's advocate in the transaction. From what is pleaded in paragraph 4 of the plaint it appears that the 3rd Defendant has been sued as the senior partner of the 2nd Defendant; I do not find any plea in the plaint that he was acting in the matter in his personal capacity separate and distinct from the 2nd Defendant.

It is clear that both suits were dealing with similar issues that arose from the sale agreement in respect to the two properties as set out above. In my view the issues in the former suit were directly and substantially the same issues in the present suit. The parties were also the same except the 2nd and 3rd Defendants who have been sued in the present suit in their professional capacity derived from having acted for one of the parties in the sale transaction. But as will be seen the decree in the former suit encompasses them as well.

I now must decide whether the decree in the former suit finally decided the issues in that suit. That decree issued on 12th October, 1999 contains the following orders entered by consent:-

“1. That this case is hereby settled in terms of the letter and agreement both dated 24th September, 1999 and signed by the Plaintiffs and the Third Defendant and produced in court by consent which provide:-

2. That the Plaintiffs jointly and severally hereby withdraw against all the Defendants allegations in High Court Civil Case No. 871 of 1997 and undertake to withdraw Court of Appeal Misc. Applications No. 43 of 1999 and No. 67 of 1999 and High Court Misc. Application No. 52 of 1999, and the Third Defendant, Park Towers Limited, the registered owner of L.R. No. 209/8408 and L.R. No. 209/8409, in turn undertakes to withdraw its complaint against the Plaintiff in Resident Magistrate Criminal Court Case No. 44 of 1998.

3. That the Plaintiffs jointly and severally do hereby deliver L.R. No. 209/8404 and L.R. No. 209/8409 forthwith to Park Towers Limited, the registered owner.

4. That the Third Defendant, Park Towers Limited, as the registered owner, do hereby take possession forthwith of L.R. No. 209/8408 and 209/8409 and resume formal general management and maintenance of the properties in line with Nairobi City Council by-laws and the laws applicable to the suits premises.

5. That the Third Defendant, Park Towers Limited, do forthwith resume collection of parking fees from all the users of L.R. No. 209/8408 and 209/8409 as the owners.

6. *That the Third Defendant, Park Towers Limited, do hereby appoint Sammy D. Muathe as its sole agent for the smooth exercise of delivery by the Plaintiffs of L.R. No. 209/8408 and L. R. No. 209/8409 to the Third Defendant, Park Towers Limited, and collection of parking and maintenance of L.R. No. 209/8408 and L.R. No. 209/8409 by the Third Defendant.*

7. *That the Plaintiffs jointly and severally hereby confirm and acknowledge that the issues raised in the High Court Civil Case No. 871 of 1997 and in the affidavits of Benson Syuma Kanui sworn on 9th April, 1997 and a supplementary affidavit of Benson Syuma Kanui sworn on 15th April, 1997 have been correctly and legally addressed by all the Defendants through their respective replying affidavits, and in particular that of the Town Clerk, Nairobi City Council, sworn on 5th September, 1997 and that of the Director of City Planning and Architecture sworn on 17th September, 1997, and the facts in the affidavits are in compliance with the Local Government Act, Cap. 265, the Physical Planning Act 1996, the land Acts, and the Companies Act, Cap. 486.....*

8. *That each party shall meet its Advocates cost.*

9. *That each and every party in the above suits and applications do hereby confirm severally and jointly that any claim or claims that may exist among them and to each of them by one of them or their lawyers are hereby withdrawn and no such claim or claims may hereinafter be raised or revived howsoever.*

10. *That the Third Defendant, Park Towers Limited, hereby withdraws its counterclaim against the Plaintiffs.*

11. *That each party to bear its won costs for the counterclaim.”*

It is plain to me that the above orders contained in this decree settled all the issues between the parties in the previous suit. The settlement was much wider than the issues in the suit. The settlement also settled all other issues between the parties arising and that may arise out of the sale agreement, both as between themselves and as may be extended to their advocates, including the 2nd and 3rd Defendants. The present suit seeks to canvass issues that arise out of the sale agreement in question, and which were finally settled by the decree in the previous suit. It is clearly *res judicata*, and I so hold. But the Plaintiffs are not estopped from bringing the suit under section 8 of Cap. 21 as urged for the Defendants. That section provides:-

“8. Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action he shall not be entitled to institute a suit in respect of that cause of action”.

In section 2 of the Act ***“rules” means rules and forms made by the Rules Committee to regulate the procedure of court’.*** No rule was brought to my attention during arguments that precludes, *per se*, the present suit. But as it turns out the suit is a non-starter for being *res judicata*, as I have already found above.

A suit that is *res judicata* is an abuse of the process of the court. The present suit is therefore an abuse of the process of the court, and I so find. I must therefore strike out the plaint and dismiss the suit as provided by rule 13 (1) of Order 6 of the Civil Procedure Rules with costs to the Defendants. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 19TH DAY OF MAY, 2006.