



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 59 OF 2020

SOFIA MANGINA KONSTANDINOY PLAINTIFF

=VERSUS=

IKONO INVESTMENTS LIMITED..... DEFENDANT

RULING

Background

1. The Plaintiff is the registered owner of **LR No.Nairobi/Block 91/48** whereas the Defendant is the registered owner of **LR No.Nairobi/Block 91/47**. These two properties which are situate in the upmarket Gigiri Estate Nairobi border each other. The Defendant is putting up a multi-storey hotel on its property. On 6th November 2017, the Plaintiff and the Defendant entered into a written agreement in which the Plaintiff agreed to grant a licence to the Defendant over a portion of her property to enable the Defendant construct the hotel on its property at an agreed amount. The agreement was for an initial period of 12 months but it was mutually extended for a period of 6 more months. Upon the lapse of the extended period, the agreement was never extended.

2. On 24th March 2020, the Plaintiff brought this suit against the Defendant in which she sought the following reliefs:-

- a) A mandatory order directed against the Defendant compelling it to demolish all structures / walls that have trespassed into the suit property title No.Nairobi/Block 91/48 at its own cost.***
- b) A permanent injunction against the Defendant, his employees, agents or anyone operating under his authority from interfering in any way whatsoever with the suit property and its boundaries /beacons namely Fb 77 and Fb 90.***
- c) Special damages of Kshs.350,000/= per month from November 2019 to-date for loss of income and Kshs.25,000,000 for depreciation in value of the suit property.***
- d) General and exemplary damages for unlawful trespass of title No.Nairobi/Block 91/48.***
- e) Costs of the suit.***
- f) Interests on (c), (d), and (e) above at court rates from the date of filing suit until payment in full.***
- g) Any other relief(s) that this Honourable Court may deem fit in the circumstances.***

3. The Plaintiff contemporaneously filed a notice of motion in which she sought the following orders:-

- 1) That this application herein be certified as extremely urgent and heard-ex-parte in the first instance.***
- 2) That this Honourable Court be pleased to issue an interim injunction restraining the Defendant whether by itself and its agents or whomsoever acting under its authority, from continuing with any further /and all works of constructing of a multi storied hotel on title No.Nairobi/Block 91/47 that have to continue to unlawfully trespass into the suit property herein title No.Nairobi/Block 91/48 pending the inter-partes hearing of this application.***
- 3) That this Honourable Court be pleased to issue an interim injunction restraining the Defendant whether by itself and its agents or whomsoever acting under its authority, from continuing with any further /and all works of constructing of a multi***

storied hotel on title No.Nairobi/Block 91/47 that have to continue to unlawfully trespass into the suit property herein title No.Nairobi/Block 91/48 pending the hearing and final determination of this suit.

4) That the costs of this application be borne by the Defendants.

The Preliminary objection.

4. Before the Notice of Motion could be heard, the Defendant raised a preliminary objection on the following grounds: -

1) That the Plaintiff in this suit filed an identical suit being ELC petition case No.48 of 2015-Sophia Mangina Konstandinou Vs Ikono Investment Limited & 2 Others which she wholly withdrew vide an order recorded by the Honourable Justice Eboso on 16th may, 2019 and this suit is an abuse of Court process.

2) That this suit is a nullity in law as the substantive issues it purports to raise were determined by the court presided over by Obaga J in ELC 473 of 2017 Rajni Patel & 10 others Vs Ikono Investments Limited & 2 Others.

3) That in the vent that this court does not have jurisdiction to adjudicate over or determine any of the matters now raised before it prior to the exhaustion of remedies available under the Physical Planning Act and Land Registration Act.

4) That the suit and application presented to this Honourable Court are an utter yet deliberate abuse of the court process.

Directions of Court.

5. The Court directed parties to dispose of the preliminary objection by way of written submissions. The Defendant filed its submissions dated 10th November 2020. The Plaintiff filed her submissions dated 20th November 2020.

Analysis

6. I have gone through the submissions. The Defendant contends that this suit is an abuse of the process of court. The Plaintiff together with ten (10) others sued the Defendant and two others in ELC 473 of 2017 in which the Plaintiffs in that case were litigating over the same suit property as in this one. The Plaintiff herein was the 10th Plaintiff in that case. That suit was struck out. Prior to the filing of the suit that was struck out, the Plaintiff had filed a petition No.48 of 2015 against the Defendant and two others. This petition which was seeking similar reliefs as those sought out in the suit which was subsequently filed were similar. This petition was withdrawn by consent of the parties. The Defendant argues that despite the Plaintiff's petition being withdrawn by consent and the subsequent suit which she had filed, being struck out, the Plaintiff has again come to court in which she has filed the present suit. The Defendant argues that the complaints by the Plaintiff in the body of the Plaint are related to the previous suits only that the reliefs are different.

7. In answer to the submissions of the Defendant, the Plaintiff argues that though she concedes that she withdrew petition No.48 of 2015 by consent and that ELC 473 of 2017 was struck out, the reliefs she is seeking are quite different and can neither be res judicata nor abuse of the court process. The Defendant relied on the case of **E.T Vs The Attorney General & another (2012) e KLR** to submit that where a case has been withdrawn by consent, a party cannot again revive the same suit through subsequent suits.

8. The Defendant further relied in the case of **Flora Wasike Vs Destino Wamboko (1988) e KLR** where the court of Appeal held that a consent order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion. The Court also held that there cannot be any appeal against the consent.

9. The Plaintiff had entered into a consent with the Defendant when the Defendants started building the hotel. She was paid money as a result of the hoarding agreement which she had entered into with the Defendant. She cannot then turn around and claim that the building was illegal and did not have approvals from the relevant authorities. By filing the suits which she has already filed, she is clearly abusing the process of the court and this has to stop. I therefore find that the filing of this present suit is an abuse of the process of the court.

10. The Defendant also argues that this suit is res-judicata . The Defendant argues that the issues which are being raised herein were determined vide a ruling which I delivered on 11th December 2019. Though the Plaintiff concedes that some of the issues which are raised in the body of her Plaint were determined by this court in the ruling which was delivered, she argues that the prayers she is seeking are new and cannot be said to be res judicata.

11. On the issue of res judicata, the Defendant relied on the case of **Omondi Vs National Bank of Kenya Ltd (2001) 1 E.A 177(cck)** where Justice Ringera as he then was stated as follows:-

“Having taken that view of the matter, it may seem unnecessary to consider whether the suit should fail for the additional reason that it is res judicata. However, as this Court is not the final Court, I am obliged to express my findings on all the issues raised for determination. And so I must deal with the issue of whether the suit is res judicata. In that regard, I accept the submission by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree

with the opinion of Kuloba J in Mwangi Njangu v Meshack Mbogo Wambugu (supra) where he said:-

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays”.

12. Paragraphs 28,30,31 32 ,36 and 40 of the Plaintiff clearly shows that what the Plaintiff is complaining about is what was determined in ELC 473 of 2017. She cannot evade the doctrine of res judicata by simply making prayers in the Plaintiff which were not in the two previous suits which had been determined by competent courts. The Plaintiff should have brought what she is now raising in the previous suits. I therefore find that this suit is res-judicata .

13. The Defendant contends that this court lacks jurisdiction to entertain the Plaintiff’s suit in view of the provisions of the Physical and Land Use Planning Act and the Land Registration Act. In this regard the Defendant argues that the Plaintiff did not exhaust the remedies available under the Physical and Land Use Planning Act and the Land Registration Act. This suit was filed in 2020 after the repeal of the Physical Planning Act which was the Act in force as at the time the alleged acts complained of occurred. Under the said Act, there are clear procedures to follow in redressing complaints regarding approval for development permissions and other licences. The Plaintiff did not exhaust those procedures. This court cannot therefore entertain this suit for lack of jurisdiction.

14. The Plaintiff is seeking reliefs based on alleged trespass to her property. The trespass is predicted on a boundary dispute between the two properties which are adjacent. This being the case, the provisions of Section 18(2) of the Land Registration Act prohibits this court from entertaining any action or proceedings relating to a dispute as to boundaries unless the boundaries have been determined in accordance with the section. The Plaintiff’s contention is that the Defendant has built part of its hotel on her plot. She goes on to point out where the beacons of her plot are and contends that the Defendant has gone beyond their common boundary. This being the case, the boundary dispute should have first been determined by the Registrar before this court could have jurisdiction to entertain the dispute. The Plaintiff has tried to argue that the Defendant has not filed a defence and raise the issue for it to be a boundary dispute. This is not the correct position. The pleadings of the Plaintiff clearly show that what the Plaintiff is complaining about is a boundary dispute. This Court cannot entertain the claim unless the boundary has been sorted out as provided for under the Land Registration Act.

Disposition.

15. Having analyzed the grounds contained in the notice of preliminary objection, I find that the preliminary objection is well founded. The preliminary objection succeeds on all the grounds in the notice of preliminary objection. I uphold the same and proceed to strike out the Plaintiff’s suit together with the notice of motion with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JANUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Tebino for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE