



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO. 112 OF 2020

MARGARET WANJIKU HENRY.....PLAINTIFF

VERSUS

ROAD TOUCH SERVICES LIMITED.....DEFENDANT

RULING

(Preliminary objection raising issue that the suit is res judicata; court on consideration of the objection being of the view that in the circumstances of the case, it is best that the matter be raised through a formal application)

1. The defendant has raised a preliminary objection drawn in the following fashion :-

1. THAT, the plaintiff's entire suit is fatally defective, null and void ab initio and the same ought to be struck out with costs in that the suit is res judicata as the matter has been heard and determined by the Honorable court in Mombasa H.C Matrimonial Cause No. 1 of 2008 (O.S); Margaret Wanjiku Henry versus Peter Kiragu Njuguna, Road touch services Limited and Fairmount Hotel Limited and as such this Honorable court has no jurisdiction to entertain the instant suit.

a. On 09/03/2017 Matrimonial Cause No. 1 of 2008 (OS) was dismissed under the provisions of Order 12 Rule 3 of the Civil Procedure Rules for non-attendance by the plaintiff.

b. On 04/08/2017 the Hon. Court reinstated Matrimonial Cause No. 1 of 2008 (OS) on conditions that the plaintiff (Defendant herein) within 60 days she complies with the order of court which had been issued on 06/09/2010 in default of which the suit stand dismissed. Court fixed the matter for mention on 10/10/2017.

c. On 10/10/2017, the plaintiff provided a receipt as proof of Ksh. 103,500/= deposited in court in compliance with the order of court issued on 06/09/2010 and further emphasized in the conditional ruling of the court that reinstated the suit on 04/08/2017.

d. On 10/10/2017, the defendants Peter Kiragu Njuguna, Roadtouch Services Limited and Fairmount Hotel Limited disputed the amount of Ksh. 103,500/= which was deposited by the plaintiff and therefore sought the Hon. Court which made orders and appointed an independent auditor to conduct an independent audit and file a report.

e. On 21/03/2018 the Hon. Court observed that the Auditor's report was filed on 27/02/2018. The Report indicated that the plaintiff (Margaret Wanjiku Henry) ought to have deposited in court Ksh. 42,473,395/= and not the papery amount of 103,500/=. Court declared that Matrimonial Cause No. 1 of 2008 (OS) stands dismissed per the orders of 04/08/2017.

2. In any event the plaintiff's suit does not warrant a full trial because; she has not and cannot raise any triable issues that could not have been raised in Mombasa H.C Matrimonial Cause No. 1 of 2008 (OS) Margaret Wanjiru Henry versus Peter Kiragu Njuguna, Road touch Services Limited and Fairmount Hotel Limited where the defendant herein was the 2nd defendant.

3. The marriage between Peter Kiragu Njuguna (one of the defendant's directors) and the plaintiff herein was dissolved by court on 28/11/2011.

2. To give a glimpse of the matter before me, the subject matter of this suit is the land parcel Mombasa/Block XVII/734/MI (the suit property), which is registered in the name of the defendant. The plaintiff has pleaded that she has a beneficial interest in the suit property and the rental building standing thereon "which arises out of an equitable right created in the property through a constructive trust and/or resulting trust created out of outright investment by the plaintiff, implied conduct by parties herein and/or detrimental reliance to the plaintiff's detriment." The plaintiff has pleaded that she initially had possession of the suit property but has since been evicted by the tenant

of the defendant. She has pleaded that she was involved in the purchase of the suit property and paid the purchase price which was drawn from a joint account with one of the former directors of the defendant. She has pleaded that the defendant company never gave a single shilling as purchase price for the suit property. She has pleaded that there exists a resulting trust, inter alia because the purchase was a joint business with her former husband, Peter Kiragu Njuguna, and that payment for the purchase price was from a joint account that the two held together. She has contended that there is a constructive trust in that she participated in signing the sale agreement; she was made to believe that she has a beneficial interest; and that she invested both time and resources in developing it. It appears that she had a case over division of matrimonial property with her former husband, which she has disclosed in her plaint as Matrimonial Cause No. 1 of 2008 (OS). She has pleaded that this case is separate and distinct from the matrimonial cause. In this suit, she seeks orders for a declaration that she has a beneficial interest in the suit property; a declaration that the suit property is held by the defendant in trust for herself and the defendant; an order of partition at equal shares in the name of herself and defendant; and a permanent injunction to stop the defendant from dealing with the building until her interest is registered.

3. The defendant entered appearance and filed this preliminary objection claiming that the suit is res judicata. The defendant filed an affidavit sworn by Peter Kiragu Njuguna, to support the preliminary objection. In it, he has annexed documents relating to *Mombasa High Court Divorce Case No. 25 of 2004* and *Mombasa High Court Matrimonial Cause No. 1 of 2008*. Mr. Njuguna has deposed that he petitioned for divorce through *Mombasa High Court Divorce Case No. 25 of 2004* and judgment for dissolution of marriage entered on 28 November 2011. He has deposed that the plaintiff does not hold any shares or interest in the defendant company. He has stated that the plaintiff filed *Mombasa High Court Matrimonial Civil Suit No. 1 of 2008 being Margaret Wanjiku Henry vs Peter Kiragu Njuguna, Road Touch Services Limited and Fairmont Hotel Limited*. He has deposed that the directors and shareholders of the defendant company applied to be enjoined as interested parties and they were so enjoined. He has averred that this case was dismissed under Order 12 Rule 3 of the Civil Procedure Rules for non-attendance. On 4 August 2017, the case was reinstated on conditions, which in default, the case would stand dismissed. It is said that there was non-compliance and the suit stood dismissed. It is stated that this suit is res judicata the dismissed matrimonial cause as the issues in this case and in that cause are similar. He has added in his affidavit that the plaintiff's suit is time barred, taking the date of 30 November 1999, as the date that any cause of action that the plaintiff may have had, arose.

4. There is a second affidavit sworn by Anthony Mwangi Njuguna, a director of the defendant. He has more or less repeated what Mr. Kiragu has stated in his affidavit.

5. Counsel agreed to argue the preliminary objection by way of written submissions. I have taken note of the submission of counsel. Inter alia, counsel for the defendant submitted that the Matrimonial Cause was dismissed under Order 12 Rule 3, and pursuant to that rule, no fresh suit may be brought in respect of the same cause of action. He submitted that the parties in this suit and in the matrimonial cause are the same; that this suit is not based on any new facts not raised in the Matrimonial Cause; that the matter in issue herein was directly and substantially in issue in the Matrimonial Cause. He has further gone through various paragraphs in the two suits to demonstrate that they are similar. He also made submissions to buttress the point that the case is statute barred.

6. On the part of the plaintiff, counsel submitted inter alia that this is an ordinary property claim founded on trust and not a matrimonial cause. He asked this court to distinguish the two claims. He submitted that the High Court does not have jurisdiction to hear a claim such as this and presented the argument that res judicata will only apply where the former suit was heard by a court of competent jurisdiction. He submitted that there are special circumstances which would exempt the res judicata rule. He submitted that the matrimonial suit was not heard and determined on merits.

7. I have considered all the above.

8. What is before me is couched to be a preliminary objection. Law J, in the case of *Mukisa Biscuit vs West End Distributors 91969* EA 696, stated as follows on what would constitute a preliminary objection :-

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. What should be in issue in a preliminary objection is thus a pure point of law. Both res judicata and limitation are certainly points of law which may be argued as preliminary objections. But it is not in all cases that such issues can be properly articulated as preliminary objections, for sometimes, the court will need to invite the parties to tender evidence towards such pleas, and in such instances, it is probably best that a formal application for striking out suit be filed for consideration instead of addressing the issue as a preliminary objection. It is unusual for a preliminary objection to be supported by an affidavit, though this is not to say, that the court can never have the discretion to direct that an affidavit be filed, but it would be in exceptional circumstances.

10. In our case, there was certainly need to introduce evidence to support the plea of res judicata and that is why the defendant filed an affidavit. The challenge here is that there may be contested facts, as indeed pointed out in the submissions of Mr. Mwangunya, counsel for the plaintiff, which may also require that an invitation be made to the plaintiff to give her version of events through a replying affidavit. But this being a preliminary objection, no opportunity for filing a replying affidavit has been given to the plaintiff, and I would not want to have the plaintiff feel that her factual position on the matter was not considered.

11. Moreover, although the preliminary objection as drawn, only brought forth the plea of res judicata, the submissions of Mr. Kariuki, counsel for the defendant, introduced the issue of limitation. There is thus a second plea of limitation, brought about through submissions, which was not presented within the preliminary objection.

12. My view, is that it is best for me not to make a pronouncement on the plea of res judicata and limitation, in the circumstances before me, without a formal application being filed and an opportunity being given to the plaintiff to state her position on the facts, through a replying affidavit. I think when the court is doubtful whether or not an issue would properly be canvassed as a preliminary objection or through an

application, the safer path would be to direct that the issues be canvassed through a formal application, so that the other party can have opportunity to fully respond.

13. I am doubtful as to whether it would be prudent to address the two pleas of res judicata and limitation through the preliminary objection presented herein, and I opt to take the safer route, of directing that the issues be canvassed formally through an application. For those reasons, I strike out the preliminary objection, but with a rider that the defendant is at liberty to revisit the issues raised therein, or any other issue that would invite the striking out of a suit, by filing a formal application for which the plaintiff can fully respond.

14. I will not make any orders as to costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 10 DAY OF FEBRUARY, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA