



REPUBLIC OF KENYA



**Gatabaki & another v Pleng Limited & 14 others (Environment & Land Case
E176 of 2023) [2023] KEELC 21316 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E176 OF 2023
EK WABWOTO, J
NOVEMBER 2, 2023**

BETWEEN

NANCY WANJA GATABAKI 1ST PLAINTIFF

BEATRICE GATHONI GATABAKI 2ND PLAINTIFF

AND

PLENG LIMITED 1ST DEFENDANT

MAINA KIABIGI 2ND DEFENDANT

MUGA DEVELOPERS LIMITED 3RD DEFENDANT

PETER KIARIE MURAYA 4TH DEFENDANT

SUE WACEKE MURAYA 5TH DEFENDANT

KAHURA INVESTMENTS LIMITED 6TH DEFENDANT

NAIROBI CITY COUNTY 7TH DEFENDANT

I & M BANK LIMITED 8TH DEFENDANT

BOMAS SURVEYS LIMITED 9TH DEFENDANT

BENSON. M. OKUMU 10TH DEFENDANT

EQUITY BANK LIMITED 11TH DEFENDANT

CHIEF LANDS REGISTRAR 12TH DEFENDANT

DIRECTOR OF SURVEYS 13TH DEFENDANT

PRICE WATER HOUSE 14TH DEFENDANT

NATIONAL LAND COMMISSION 15TH DEFENDANT



RULING

1. This ruling is in respect to the 11th Defendant's application dated 21st June 2023 and the 3rd, 4th and 5th Defendant's preliminary objection dated 22nd June 2023. In a nut shell the application and the preliminary objection are seeking orders to strike out the Plaintiff's suit on the grounds that the Honourable Court lacked Jurisdiction to entertain a matter that is time barred and res judicata pursuant to the provisions of section 4(2) & section 7 of the *Limitation of Actions Act*.
2. On 18th September 2023, during the plenary hearing of the application and the preliminary objection, the Plaintiff submitted that the cause of action arose in 2011 and it was their assertion that the fraud was discovered in April 2023.
3. In opposition. Learned Counsel for the 11th Defendant, Mr. Ondieki submitted that there had been three other proceedings by the Plaintiff in which issues of fraud had been raised and dealt with. It was also submitted that the Plaintiff was estopped from filing more cases citing Paragraph 5 and 6 of the consent filed earlier.
4. Learned Counsel Mr. Ouma for the 3rd - 5th Defendants associated himself with the position of Counsel Ondieki and relied on his written submissions on record.
5. I have considered the respective oral and written submissions and the authorities cited. The issues for determination are whether the preliminary objection filed herein and the Application dated 21st June 2023 are merited.
6. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukbisa Biscuits Manufacturing Co. Ltd v West-End Distributors Limited* [1969]. EA 696. Having raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.
7. In *Nitin Properties Ltd -v Singh Kalsi & another* [1995] eKLR, the Court of Appeal highlighted the principle when it stated:

“ ... A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
8. Section 7 of the *Civil Procedure Act*, reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows:-
 - i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.



9. My perusal of the ruling by Majanja J. dated 30th November 2020 in [Civil Case No. 30 of 2020 \(Formerly Nairobi ELC Case No. 364 of 2019\)](#) highlights several key issues:

It can be discerned that the plaintiffs were aware of the alleged fraud much earlier than as suggested in this suit.

Paragraph 20 states:

“...The Plaintiffs contended that the allegations of fraud only came to their notice after the previous suits were closed and upon extensive investigations. They maintained that some of the issues of fraud complained of came to light following a complaint by a neighbour to the National Land Commission in 2018, that the Plaintiffs had failed to surrender a 20-acre utility plot...”

10. This revelation is contrary to their averments that the fraud was discovered in April 2023. I must reiterate that this is not only duplicitous but also unbecoming on the part of the Plaintiffs.
11. The previous suits are premised on the same subject matter. The Court outlined the substantive prayers in other suits as well as brought out the existence of a consent order which settled the suit in HCCC No 352 of 2011. Paragraph 22 through to Paragraph 26 states:

“... it is important to set out the facts and issues in the previous suit, HCCC No. 352 of 2011. The case, set out in the Plaint dated 10th August 2011, is grounded on the same joint venture agreement between the Plaintiffs and the 2nd and 3rd Defendants in this case. The Plaintiff in that case accused the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants of breaching the joint venture agreement and development related agreements under which the Plaintiffs would be paid for the full value of the land in consideration for the development. The Plaintiff accused the Defendants of fraudulently altering the shareholding of the 1st Defendant with the intention of diluting her shareholding in the joint venture and excluding her from the management.”

12. In the previous suit, the Plaintiff further claimed that the Defendants were engaged in illegal transactions without her notice, authority and consent and without valid resolutions of the 1st Defendant. She alleged, *inter alia*, that the Defendants purported to transfer LR No. 5980/5/2 (LR No. 28223/2) measuring 200 acres from the Plaintiff to the 1st Defendant without consideration and then proceeded to charge it to I & M Bank without valid authority. She further accused the Defendants of illegally charging LR No. 28222/3 to the 8th Defendant without authority. She accused both banks of committing mortgage fraud against her by failing to recognize her as a shareholder of the 1st Defendant and therefore seek her consent and or involve her in any of the transactions. She also stated that she was not a beneficiary of the loan proceeds.
13. The thrust of that claim is that the 5th and 6th Defendants together with their associated companies, the 2nd, 3rd and 4th Defendants fomented a scheme to defraud her of her land. She explained that:

“(29) It emerged that the Company Muga Developers. 1st Defendant, and 4th Defendant was created with the intent to defraud the Plaintiffs of their land, benefits and profits, as the other shareholders/Directors had no funds to invest in the Company as had been represented. The Plaintiffs aver that the representations made by the said 2nd Defendants, 5th and 6th Defendants



Suraya Property Group Limited through its directors were fraudulent and calculated to deceive the Plaintiff.”

14. The Plaintiff sought various reliefs including a permanent injunction to restrain the Defendants from transferring or in any way dealing with the LR No. 28223/2 (Original 5980), a declaration that the transfer of LR No. 28223/2 (Original 5980) to the 1st Defendant and subsequent registration is null and void. declaration that the mortgages/and/or charges dated 20th April 2010 from the 1st Defendant to Equity Bank is null and void and the court orders that the mortgage be set aside.
15. This suit was settled by the consent dated 6th September 2011 which stated as follows:

“It is hereby Ordered by Consent

- i. That the suit be and is hereby marked as settled on the following terms.
- ii. The 2nd defendant shall pay the plaintiff the sum of Kshs. 725,619,000 in the manner set out below:
 - a. The sum of Kshs. 140,000,000 to be paid within 15 days from the date hereof.
 - b. The sum of Kshs. 262,219,000 to be paid within 6 months from the date hereof.
 - c. The balance of Kshs. 323,619,000 to be paid in the form of houses to be allocated to the plaintiff as follows:
 - i. 24 Tulip 3 bedroom apartments valued at Kshs. 7,500,000 each.
 - ii. 6 Daisy 2 bedroom apartments valued at Kshs. 4,900,000 each.
 - iii. 12 Lilac 3 bedroom villas valued at Kshs. 9,500,000 each.
 - iv. All the above properties to be allocated and transferred to the plaintiff within 24 months from the date hereof without any liabilities and encumbrances at no costs.
 - v. The 2nd defendant shall allocate and transfer to the plaintiff land measuring 3.6 acres free from all encumbrances or costs within the next 24 months from the date hereof. The land to be allocated within the project area.
- iii. The plaintiff and the 2nd defendant shall pay the 7th and 8th defendants costs in the sum of Kshs. 15 million each making a total of Kshs. 30 million within the next 14 days from the date hereof. The said sum of to be paid through the firm of Miller & Co. Advocates for onward transmission to the advocates appearing herein.



- iv. The plaintiff and the defendant shall pay the firm of Iseme. Kamau & Maema Advocates, the sum of Kshs. 10 million within the next 14 days from the date hereof being the mediation costs.
- v. The Winding up Cause No. 24 of 2011 be marked as withdrawn with costs of Kshs. 5 million to be paid to the Petitioner's advocates by the respondents in the cause within 14 days.
- vi. The plaintiff to resign as a director of the 1st defendant within 14 days from the date hereof. The resignation to be immediately registered with the company registrar.
- vii. That Sagana Developers Limited shareholding with Muga Holdings Limited shall be 33.3% only.
- viii. That Sagana Developers Limited shall cease being a shareholder of the 1st defendant and shall transfer its shares from the first defendant to Dr. Samuel Gatabaki absolutely within 14 days from the date hereof.
- ix. The interim orders issued on 25th August 2011 be discharged forthwith.
- x. That the plaintiff be discharged and indemnified by the 1st, 2nd, 3rd 4th 5th, 6th, 7th and 9th defendants of all obligations and liability arising from or in connection with the subject development and that she owes no liabilities as a result of the charge of the suit property. In the event that there is a default of the loan outstanding. Equity Bank shall not sell the properties there above allocated to the plaintiff.
- xi. That in the event of default of the terms set out in clauses No. 1 and 2 as payment to the plaintiff, the directors of the 1st to 6th defendants shall be personally liable.
- xii. That the charge in favour of Equity Bank save for the variations noted above continues to be a valid security and shall not be subject to challenge as a result of the guidelines and terms set out hereinabove..."

16. In the foregoing. I find that the subject matter and issues herein are similar to the previous suits and hence this suit is res judicata.

17. Having arrived at the conclusion that this suit is res judicata, the Court hereby finds merit in the 11th Defendant's Application dated 21st June 2023 and the 3rd to 5th Defendants preliminary objection dated 22nd June 2023. Consequently, the entire suit is struck out with an order that each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Owang for the Plaintiffs.



Mr. Leibor for the 1st and 2nd Defendants.

Mr. George Ouma for the 3rd, 4th and 5th Defendants.

Ms. Mbirwe for the 6th Defendant.

Mr. Isinta for the 7th Defendant.

Mr. Kabaiku for the 8th Defendant.

N/A for the 9th Defendant.

N/A for the 10th Defendant.

Mr. Kiragu Kimani S.C and Mr. Ondieki for the 11th Defendant.

N/A for the 12th Defendant.

N/A for the 13th Defendant.

N/A for the 14th Defendant.

N/A for the 15th Defendant.

Court Assistant; Caroline Nafuna.

