REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C NO 37 OF 2019

JOSHUA KIPRONO KAMOING

(suing as the personal representative of the estate of

ELIJAH KAMOING BOLDO).............PLAINTIFF

VERSUS

JOSEPH CHEPKWONY...................DEFENDANT

RULING

INTRODUCTION

1. I am called upon to determine a preliminary objection raised by the defendant – **JOSEPH CHEPKWONY** –which is based on a notice to raise it dated 5th November, 2019. The objection is two - pronged viz:

> *(1) That the plaintiff lacks capacity to institute these proceedings as he has no grant of letters of administration in respect of the estate of ELIJAH KAMOING BOLDO, the registered owner of land parcel NO KERICHO/CHEMOIBEN/129.*
>
> *(2) That the issues raised by the plaintiff in this suit and application are RE-JUDICATA as the same were determined in KERICHO CMCC NO 43 OF 2019.*

The application has a third limb, styled No 3, which essentially alleges that the suit is incompetent, misconceived and an abuse of the court process. This third limb would essentially derive its validity or legitimacy from favourable findings of the court regarding the first two. It cannot stand on its own, hence my assertion that the objection is two-pronged.

BACKGROUND

2. The plaintiff filed his suit here on 14th June, 2019 vide a plaint dated 29th May, 2019. By that plaint, he pleaded, interalia, that he was selling to the plaintiff a portion of land measuring four (4) acres from Land parcel NO KERICHO/CHEMOIBEN/129. The price was Kshs. 3,200,000 which the defendant intended to use on settlement of debts and commencement of succession proceedings. All this happened way back in year 2009.

3. The plaintiff alleged that the defendant has extended the boundaries of the land beyond the four (4) acres sold to him. He wants the agreement of sale treated as null and void as the land is still in his late father's name and the requisite grant has not yet been obtained from Probate and Administration Court. Among other orders, the plaintiff would wish to refund the defendant the money already paid towards purchase of the land.

4. The defendant denied the plaintiff's suit vide a defence filed 30th July, 2019. Paragraphs 9 and 10 of his defence are a precursor to this preliminary objection. They are worded in substantially similar terms.

5. But court engagement between the parties did not start with this suit. A similar suit- KERICHO CMCC NO. 43 OF 2019 – had been filed by the same plaintiff in the lower court. That suit was struck out as the plaintiff was found not to have capacity to file it, having not acquired the necessary grant in respect of the estate of his late father.

6. The striking out of the lower court matter and subsequent filing of this suit by the plaintiff without indication that he has acquired the

requisite capacity, is what led the defendant to raise the objection now under consideration.

SUBMISSIONS

7. The objection was canvassed by way of written submission. The defendant submissions were filed on 24th January, 2020. He submitted that Succession Law, specifically Section 45(1) of the Succession Act, is clear that a person cannot deal in, interfere, or intermeddle with the property of a deceased person unless allowed by Succession Act itself, or other written law. The Succession Act (cap 160) would require that you obtain the necessary grant of representation from a competent or authorized court of law. The plaintiff was said to have failed to demonstrate that he has the grant or any other authority to institute the suit. To reinforce the position, the defendant cited the case in **Re Estate of JOHN GAKUNGA NJOROGE (2015) eklr** where Mureithi J reiterated the position spelt out in Section 5 of the Succession Act.

8. Noting that the plaintiff has attached a grant of representation to his submissions, the defendant submitted that what is attached is a photocopy which is not certified as a true copy of the original. The grant was also said to have been sneaked into the submissions without the defendant being informed of its existence earlier. That was said to be prejudicial to the defendant as he would have wished to rebut it or confirm whether it's a genuine document.

9. As to whether the suit is **RES JUDICATA**, the defendant cited **Section 7** of the **Civil Procedure Act (cap 21)**, which is as follows:

> *"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."*

10. After citing Section 7 (*supra*) the defendant then made reference to the case that was struck out in the lower court vide a ruling delivered on 14th May, 2019. He submitted that this suit itself is an attempt to circumvent the earlier ruling of the lower court. The case of **Benard Mugo Ndegwa Vs James Githae & 2 Others (2010) eKLR** was cited to show that a plea of res judicata succeeds where a party shows similarity of suits or issues in dispute, similarity of parties or at least a close nexus between them; the concurrence of jurisdiction of the court, similarity of subject matter; and/or finality of determination. The defendant submitted that he has demonstrated all these requirements and the court should therefore find merit in his averments.

11. The applicant's submissions were filed on 3rd December, 2019. He submitted that the plaintiff was granted letters of Administration way back in 1985. He therefore said that the issue of the plaintiff lacking capacity to institute this suit does not arise at all.

12. On the issue of RES-JUDICATA, the plaintiff submitted that the decision of the lower court was on an application, not the suit. The plaintiff was also said to have issued a notice of withdrawal of the suit at the time the court was entertaining the application that gave rise to the ruling. He said that the lower court did not conclusively determine the matter.

ANALYSIS

13. When the plaintiff filed his submissions, he attached to it a grant of letters of Administration issued to him on 31st July, 1985. It is shown to have been issued in Succession Cause No. 14 of 1985, Kericho. At paragraph 5 of the plaintiff's plaint, he pleads that he was selling the land to raise money to offset some debts and commence succession proceedings. At paragraph 9 of the same plaint, the plaintiff seeks to get an order declaring the sale agreement null and void for lack of confirmed grant. It is in fact on that basis that he seeks to be allowed to refund the purchase money already paid to him.

14. When all this information is considered, one is bound to doubt the plaintiff's honesty. The grant made available by the plaintiff clearly shows that by the time he was filing this and the lower court matter, he had had the grant for over 30 years. It shows also that by the time he was selling the land to the defendant in the year 2009, he had had the same grant for over 20 years. Yet the plaintiff allowed the lower court matter to be struck out on the basis that he had no such grant. He then filed this case here and failed to bring the necessary documents – grant included – that the law requires to be made available.

15. It seems to me that the plaintiff realized that his dishonesty was not serving him well; for this case was bound to go the way of the case he had filed in the lower court. That is why he irregularly and belatedly made available the grant issued to him by the court long ago. It seems to me that he was dishonest to the defendant, for it seems clear that he represented to him that he was selling the land to commence succession proceedings, yet he had already done so and could therefore have taken the whole process of sale and/or transfer to its logical conclusion.

16. The defendant would like the court to ignore the grant because of the manner it was availed to court. He also expressed concern that the document was introduced at a stage where he couldn't rebut or interrogate it. These concerns are weighty but I think I should not take the drastic step of driving the plaintiff from the seat of justice. I would have easily done so had the grant filed been obtained after the case was filed with a view to curing an irregularity. The circumstances obtaining in this case, and even in the lower court matter, show that the plaintiff had capacity to file the suits, only that he concealed that capacity for reasons best known to himself.

17. It was a very imprudent move on the part of the plaintiff and it seems clear that he might even need to re-think his case, having hinged a large part of it on the alleged fact that there was no grant. At this stage therefore, I tentatively accept the grant. I use the word "tentatively" because the plaintiff has already shown himself as less than honest. If it should turn out ultimately that the grant is not genuine, then this case should terminate in the same manner as the earlier one in the lower court.

18. There is also the second limb that raises the issue of Res-Judicata. It is true the lower court matter was similar to this one. A reading of

Order 7 of the Civil Procedure Act (cap 21) shows clearly that res-judicata applies where a case "*has been heard and finally decided*." The case in the lower court was dismissed because it was a non-starter, the plaintiff having not demonstrated the requisite capacity to file it. It was never heard and determined. It never reached the hearing stage, let alone post-trial determination. True, the position that obtains seems to meet many other requirements of RES-JUDICATA. But the requirement that the case be heard and determined is not met. I would therefore hesitate to hold this matter as RES-JUDICATA. But while doing so, I wish to disagree with plaintiff counsel that the lower court ruling was on an application. It focused on the suit

DECISION

19. But I realise that the plaintiff gave the defendant good reasons to raise the objection. If he had shown the grant earlier, I doubt that the defendant would have raised the objection. I therefore need to point out that though I am not upholding the objection, it is not the defendant who will pay costs. Costs should be paid by the plaintiff. He is the author of the problem that gave rise to the objection.

20. The upshot is that I decline to uphold the objection herein but costs relating to the objection are to be paid by the plaintiff himself. And because of the cavalier manner in which the plaintiff has so far handled this matter, I order that he first pays the costs of this objection before he is entertained further by this court.

Dated, signed and delivered at Kericho this 6th day of May, 2020.

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A. K. KANIARU

JUDGE