



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.300 OF 2018

RASHID KOGI MUTURI(Suing on his

behalf and on behalf of members of Thika

Muslim Housing Co-operative Society Limited

claiming interest over L.R No.10821/531).....PLAINTIFF

VERSUS

SCREEN CHECK LIMITED.....1ST DEFENDANT

HASSAN A.A. ZUBEIDI.....2ND DEFENDANT

JOSEPH D.B.K KIMANI T/A

PYRAMID AUCTIONEER.....3RD DEFENDANT

THIKA LAND REGISTRAR.....4TH DEFENDANT

RULING

There are three Applications for determination. The first Application is dated **14th December 2018**, second is dated **21st January 2019** and the third is dated **12th March 2019**.

In the **Notice of Motion** application dated **14TH December 2018**, the Plaintiff/Applicant seeks for orders that:-

1. THAT the Honourable Court do issue a Temporary Injunction and/or Conservatory Orders restraining the 1st Defendant whether by itself its agents, nominees servants and/ or employees from subdividing, fencing off, interfering transferring, charging, disposing or in any way encumbering the property referred to as L.R 10821/53 Thika Municipality and or subsequent mutations subdivision thereof pending the hearing and determination of this suit.

2. THAT the costs of this Application be borne by the Respondents.

The Application is premised on the grounds that **L.R No.10821/53**, Thika Municipality was registered in the name of **Thika Muslim Housing Cooperative Society Limited**, where the Plaintiffs/Applicants were paid up members of the Cooperative Society who held the suit land in **trust** for them pursuant to its By-Laws and in line with its main objectives. That at all times the Plaintiffs/Applicants therefore had an overriding interest as provided under **Section 28** of the **Land Registration Act**.

Further that the suit land was unlawfully transferred to the 1st Defendant/Respondent by way of a **Public Auction** pursuant to a Decree in **HCCC No.493 of 2004**, and the 1st Defendant is in the process of erecting beacons transferring, alienating and disposing off the suit property. Further that the suit property was transferred to the 1st Defendant/Respondent in disregard to the Plaintiffs beneficial proprietary interest under a constructive and resulting trust in the Society as contemplated in **Section 42** of the **Cooperative Societies Act** and further subdivision and mutations will create a complex web of 3rd Party rights thereby prejudicing their interests.

It was further contended that the Plaintiffs have a legal interest in the suit property and therefore it is in the interest of justice that conservatory orders are issued so that Plaintiffs do not suffer irreparable loss and damage.

In its **Supporting Affidavit** sworn by **Rashid Kogi Muturi** on **14th December 2018**, Plaintiff/Applicant averred that the objective of the Society is to provide members with living accommodation within its area of operation at a fair and reasonable price and the same is achieved through purchase of property through funds held by the Society on behalf of its members and in furtherance of the said objective, the interested party bought the suit property and the considerations was paid through their contributions. Thereafter they balloted and each member was allocated portions of the suit land and they were issued with allotment letters proof of ownership and beacons certificates.

He further averred that the 2nd Defendant instituted a suit being **HCCC 493 of 2004**, against the interested party and it was determined in his favour vide a Judgment issued on **20th December 2010**. That the Judgment precipitated to the sale of the suit property by way of **Public Auction** and the 1st Defendant/Respondent was the highest bidder. He further averred that the process of alienating the suit property and registering the same in the name of the 1st Defendant/ Respondent was consummated on **20th June 2016**.

It was his contention that before the sale of the suit property, the 2nd and 3rd Defendants/Respondents had constructive Notice that there was a beneficial interest claimed by members of the society as demonstrated by a Valuation Report and before the 1st Defendant committed to completing the sale, they had a constructive Notice of the history of the property and the

fact that it belonged to Cooperative Society where members had an overriding interest. He alleged that the 1st Defendant has embarked on subdividing the said land and putting beacons in readiness for selling the same to third parties and that the same is illegal and irregular as it is meant to disenfranchise their proprietary rights in the suit property.

The Application is opposed and the 1st Defendant/Respondent filed a **Replying Affidavit** through **Andrew Kimani**, dated **12th March 2019** and averred that the subject matter of this suit has been the subject of litigation in a former suit being Nairobi **HCCC No. 493 of 2004**. It was his contention that the 1st Defendant/Respondent joined the former suit at the execution stage having purchased the suit property at an Auction. He further averred that the 1st Defendant now the interested party in this instant suit filed Appeals and numerous Appeals and Applications which were heard and determined by the Court. He further averred that the same issues and reliefs sought by the Plaintiffs/Applicants relating to the suit property were the same that were raised and sought during execution of the decree which were fully heard and determined. He averred that the interested party participated in the proceedings by opposing the Application for execution of the decree by sale of the subject matter and as the same were determined, they cannot be re-opened or relitigated as new issues and that the suit is an abuse of the Court process. He further averred that the Plaintiffs suit seeks **to review, set aside** and or **Appeal** the orders made in the earlier decision in the former suit while seeking to

plead new principles. Further that the Defendant failed to stop the execution, he applied for confirmation after sale and the orders were duly executed and have never been set aside and it is therefore clear that the sale and transfer was made in execution of a valid decree and the matter cannot therefore be litigated upon again. It was his contention that the Plaintiff's claim that they hold the property as the registered proprietor in trust for them is without any legal basis and their claim if any should be against the interested party pursuant to the Cooperatives Society Act. Further that the trial issues and Defenses were raised in the former suit and the issues for determination remain the same. That only the Plaintiff has now added parties who are not relevant to this suit to try and change the issues.

He contended that the Plaintiff has no *locus standi* to bring this suit on behalf of members of the interested party which was registered as proprietor of the suit property because the interested party upon registration as a Society became a body **Corporate** capable of being sued and to sue and for purpose of doing all things in accordance with the law. That it would be absurd if the Plaintiffs suit is entertained because if heard and determined as pleaded, it would have the effect of unprocedurally ousting a binding and already executed decisions of another Court that has parallel jurisdiction to this Court and therefore this suit should be struck out at the Preliminary stage.

The 2nd and 3rd Defendants also filed **Replying Affidavits** and averred that the Plaintiff lack *locus standi* to sue on behalf of the interested party as the interested party is a Corporate body with distinct personality and capable of owning property in its own name. It was contended that it was settled law that members of an incorporated body cannot claim proprietary interest on the Society's behalf. Further that the 1st defendant is a *bonafide* purchaser for value who acquired the suit property pursuant to Court orders and the orders are valid as no successful appeal and or review was filed therefrom and the Application and the suit is *res judicata*. It was averred that the Plaintiff is not the registered owner of the suit property, they fail the test of grant of injunction and that the Plaintiff has not demonstrated or justified its mischievous attempt to reopen the High Court case and since grant of injunction is discretionary in nature, the instant Application does not in any way show any basis for grant of the same

The 2nd Application is the one dated **21st January 2019**, by the 2nd and 3rd Defendants seeking for orders that;

- 1. THAT the Honourable court be pleased to strike out the Plaint and Application both dated 14th December 2018 filed herein for disclosing no reasonable cause of action as against the 2nd and 3rd Defendants**
- 2. THAT in the alternative to (2) above, the Honourable Court be pleased to strike out the plaint herein for being an abuse of Court process.**

The Application is premised on the ground that the interlocutory

Application dated **14th December 2018** and the Plaint disclose no direct or incidental cause of action against them neither are the reliefs as sought and therefore there is no reasonable cause of action known in law against them. Further that the Plaint's application are fatally defective and an abuse of the Court process as they are *res judicata* to the final Ruling and orders of **Justice F. Ochieng** dated **20th June**

2016, as they seek to relitigate legal issue of propriety of the sale effected to the 1st Defendant's legal title to **L.R No. 10821/53**, impeach the Certificate of title issued by the 4th Defendant to the 1st Defendant.

It was further averred that this Court lacks Jurisdiction to probe and reevaluate the merits behind the High Court Judgment and Order dated **20th June 2016**, which conclusively determined the underlying dispute on the basis that the Plaintiff and the Application are an abuse of the court for improperly and unprocedurally questioning the sale effected pursuant to a Court Order which remains valid as there is no appeal or review sought against the said Decree or Order of the High Court which issued it. Further that the Plaintiff has in two occasions lodged appeals in the Court of Appeal but was unsuccessful in obtaining orders setting aside sale to the 1st defendant and is now in this Court to shop for an appropriate forum.

It was therefore averred that these proceedings are an overt and gross abuse of Court process and must be struck out with costs to the 2nd and 3rd Defendants.

The Application is opposed and the Plaintiff filed a **Replying Affidavit** dated **26th February 2019**, and averred that the Application is a non-starter, substantively defective and an abuse of the Court process. It was his contention that the suit against the 2nd and 3rd Defendants is for breach of constructive and resulting trust in respect of their proprietary interest over the suit land. Further that the suit has raised triable issues regarding the conspiracy of the 1st, 2nd and 3rd Defendants in infringing their rights of ownership over the suit property under Article 40 of the Constitution. Further averred that the 2nd and 3rd Defendants knowingly perpetuated an illegality by countenancing the sale and disposal of the suit property whereas the same was under a resulting trust as demonstrated by a Valuation Report.

That their Advocate have advised them that the Doctrine of **Res judicata** is not applicable to the circumstances of this case and that this Court has jurisdiction to determine the matter in light of **Article 40, 162(1) & (2) of the Constitution, Section 26 and 28 of the Land Registration Act and Section 131(1) of the Environment & Land Court Act (2012)**.

Again that their Advocate had advised them that the law provides that no suit shall be defeated by misjoinder of parties. Further the members of the Society were not parties to the ongoing of the case as the Society had not held any AGMs during the Court proceedings and the 1st to 3rd defendants are culpable under the principles of the law of Trust and it will

be a travesty of Justice if they are blocked through dismissal of the suit.

The 3rd Application for determination is the one dated **12th March 2019**, wherein the 1st Defendant sought for orders that;

- 1. THAT this Honourable Court do strike out the Plaintiffs suit commenced by the Plaintiff and Notice of Motion Application both dated 14th December 2018 for being Res judicata**
- 2. THAT also this Honourable Court do strike out the Plaintiffs suit for otherwise being an abuse of Court process and for want of locus standi and capacity by the Plaintiff to sue.**
- 3. THAT costs of the suit and of this Application be borne by the Plaintiff/Respondent.**

The Application is premised on the grounds that the subject matter of this suit being **LR No.10821/53**, has been the subject of litigation in a former suit **Nairobi H.C.C.C No. 493 of 2004**, and Appeal filed under **Civil Appeal Application No.41 of 2016**. Further that the same issues and reliefs of injunction raised and sought by the Plaintiff in this suit are the same as those raised and sought during execution of the Decree in the former suit thereby described as Stay of Execution which were fully heard and determined as such all the issues raised have been fully determined by a court of competent jurisdiction and therefore cannot be re-opened and tried again. It was averred that the Plaintiffs suit is an abuse of the Court process in so far as the same purports to re-open and relitigate matters of sale of the suit property. Further that the Plaintiffs suit and Application

purports to **review, set aside** and/or **appeal** to this Court the earlier decisions made in execution of the Decree in the former suit and by filing this suit, and Application through members of the interested party which was previously the Plaintiff in the former suit and purporting to plead new principles of law do not in any way oust and/or remove the scope and Application of res judicata. That the Plaintiff has no capacity to bring these proceedings on behalf of members of the interested party which owned the subject suit property because the property of the society is distinct from its members who have no proprietary rights to the society's property and only the society has capacity to sue and file action to enforce its rights.

In his **Supporting Affidavit** the Director of the 1st Defendants/ Applicants reiterated the contents of the grounds on the face of the Application and averred that the suit property has been subject of litigation in a former suit. That it joined the said former suit at the execution stage as an interested party having purchased the suit land at a **Public Auction**. He averred that the interested party who was the Defendant in the former suit filed appeals and made numerous Applications for stay of execution and injunction to stop the sale and transfer of the suit property all of which were heard and fully determined by the Court. It was his contention that the issues and reliefs sought are the same ones during the execution of the Decree. Further that the Plaintiff participated in the former proceedings by opposing the Applications for execution of the Decree and the issues **cannot again be re-opened**.

He further averred that upon the Defendant's failure to stop the sale and transfer of the subject property, to the interested party in the former suit, the Plaintiff decree holder successfully applied for confirmation of the sale, the sale made absolute execution of the transfer by the Deputy Registrar, surrender of the title deed documents to the Land Registrar by the Judgment and in default the requirement for presentation of the original title be dispensed with and the Land Registrar to issue a provisional certificate of title to the purchaser and the

said orders were fully executed and they have never been set aside.

Further that the Plaintiffs claim that the 1st defendant holds the subject property as the registered proprietor in trust for them is without any legal basis and is misplaced and that the Plaintiffs claim if any should in law be made against the interested party pursuant to the provisions of the Cooperative Societies Act and the said disputes do not in any way concern it as purchaser of the suit property.

The Application is opposed and the Plaintiff filed a Replying Affidavit and averred that the doctrine of **Res Judicata** is not applicable in the circumstances of this case. That the parties in Nairobi **HCCC No. 493 of 2004**, are different from the parties herein, secondly the subject matter was for a debt owed by the interested party and the suit property only became the subject matter at the execution of the money Decree. It was his contention that the instant suit is premised on breach by the Defendants while acting in concert of the constructive and resulting trusts in respect of their proprietary rights.

Further that the issue as to whether the suit property was under **resulting** and **constructive trust** in their favour and whether the same was breached was never an issue on the former suit. He further averred that the suit is also predicated on the culpability of the 1st, 2nd and 3rd Defendants for the law of trust concept as they had already been allotted their respective plots and the same could not be alienated to third parties through sale. He denied the allegations that they did not have *locus standi* as the Society ceased having proprietary interest by virtue of the resulting and constructive trust created and thus it will be a travesty of justice if they are blocked by dismissal.

The Applications were canvassed by way of written submissions which the court has now carefully read and considered.

The Court finds the issues for determination are as follows;

- 1. Whether the Plaintiff has requisite *Locus standi* and capacity to file this suit.**
- 2. Whether the suit is *Res Judicata*.**
- 3. Whether the parties are entitled to the orders sought in their Applications.**

1. Whether the Plaintiff has requisite *Locus standi* and capacity to file this suit.

The Defendants/Respondents have called into question the **locus standi** of the Plaintiff/Applicant in bringing this suit. It is trite without the requisite capacity to bring the suit the same goes to the root of the suit and without **locus standi** the suit cannot stand. See the case of **Priscilla Jesang Koech ...Vs... Rebecca Koech & 3 Others [2018] eKLR**, where the Court held that;

“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of BV Law society of Kenya vs Commissioner of Lands & Others, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:

If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

As this is the most important issue, the Court will deal with it. First the Plaintiff has brought the instant suit on his behalf and on behalf of members of **Thika Muslim Housing Cooperative Society Limited**, claiming interest over the suit property. It is not in doubt that the said **Thika Muslim Housing Cooperative Society** is juristic body that can sue and be sued on its own. Under **Section 2** of the **SACCO Societies Act**, a ‘**SACCO**’ is defined as:

“... a Savings and Credit Co-operative Society registered under the Co-operative Societies Act, 1997 (No. 12 of 1997);”

In this regard, a SACCO is a Co-operative Society governed by the Co-operative Societies Act, CAP 490 of the Laws of Kenya. Upon registration as a Co-Operative Society, a SACCO enjoys certain privileges as set out in **Section 12 of CAP 490** which provides that:-

“Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.”

See the case of **Joseph Muthuri Ikunyua & 32 others v Co-operative Bank of Kenya Limited & 14 others [2018] eKLR** where the Court held that;

“Just like a company a co-operative society is recognized as a separate legal entity from its members for it has the capability to own property, to sue or be sued and enter into contracts in its own name. In this regard, the 3rd defendant, as a body corporate, entered into a banking facility with the 1st defendant separate from its members and holds the suit property independent of its members. See Salomon v A Salomon and Co Ltd [1897] AC 22 “

From the description of how the Plaintiff has come to court, it is clear that he is not suing as either the registered proprietor of the suit land or a party that was the registered proprietor. He has specifically stated that he is suing on behalf of members of the said body. However it

is clear that the members did not have any interest in the suit property as the same was registered in the name of the Sacco and also the said members did not have any proprietary interest in the said suit. See the case of Omondi ...Vs... National Bank of Kenya Limited and Others [2001] EA 177, where the court held:-

“The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights.”

The plaintiff, who is allegedly representing members of the interested party having no proprietary interest in the suit property have no *locus standi* to bring the present suit. The court says so because even as the Plaintiff has alleged that they were the owners of the suit land, no evidence has been produced to indicate ownership of the land and the only evidence available shows that the interested party is the owner. Annexure **RKM 4** annexed to the Plaintiff’s Affidavit claiming subdivision of the suit property bears the name proposed subdivision and before the same was carried out and the suit land actually transferred to the Plaintiffs the same remained a property of the Sacco and it only the Sacco that has proprietary interest and who can claim it.

Having taken into account the above analysis, the court finds and holds that the Plaintiff has no *locus standi* to bring forth this suit.

2. Whether the suit is Res Judicata

The doctrine of Res judicata is found in **Section 7 of the Civil Procedure Act** which provides that:

“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.”

The Court of Appeal in the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.***
- b) That former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

The Defendants have contended in their Applications that the matters that the Plaintiff has brought for resolution are the once that were already heard and determined by the High Court in Nairobi in **Civil Suit No.493 of 2004**, and the said Court has an equal status to this Court and therefore this Court cannot make a finding on the same as it would amount to relitigating or sitting on Appeal on issues that were already heard and determined by a Court of competent jurisdiction.

This Court has carefully gone through the Ruling and the Orders made by the Hon. **Justice Fred A. Ochieng** in **Civil No.493 OF 2004**. The Court has also gone through the orders sought by the Plaintiff in the current suit. Having the above case law in mind and the provisions of law, it is clear that the Plaintiff is claiming under the interested party that was also a party to the former suit. Further the title in contention is the same that was in the former suit. As to whether the parties are litigating on the same issues, the Plaintiff has averred that the issue of constructive and resulting trust were never an issue in the previous suit. However this Court notes that the plaintiff has urged it to make a finding that the 1st defendant herein holds the suit land in trust for them and further that this Court do order for the cancellation of the said title in the name of the 1st Defendant.

It is not in doubt that a Court of equal and competent jurisdiction had already made a finding that the 1st defendant held a valid title to the suit property and therefore directed that the same be transferred to the 1st defendant. What then can this Court do? To further make a finding that the 1st defendant was not a *bonafide* purchaser and further cancel his title to the property will be as if this Court is saying that the High Court which holds an equal status and had jurisdiction to determine the matter was wrong on the issue. Therefore this Court will be sitting on an appeal on the same and that means granting itself jurisdiction which it does not have.

There is no doubt that the issue of who owns the suit land had been litigated upon and determined and the changing of the roles by the parties in this instance the interested party and the Plaintiffs does not change the situation. See the case of **Omondi v National Bank of Kenya Limited and Others (2001)E.A 177** where the Court held that

“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once.”

Consequently, having carefully looked at both cases, the court finds and holds that the issues raised by both cases are the same as whatever is to be determined is the ownership of the suit property which issue had already been determined. Therefore the court holds and finds that the instant suit is *Res Judicata*.

4. Whether the parties are entitled to the orders sought in their Applications

The Plaintiffs had sought for orders of temporary injunction. However the Court has already held and found that Plaintiff had no **locus standi** to bring the matter and further the suit herein is *res judicata*. Therefore, the court finds the Plaintiff’s Application is not merited and the same is dismissed entirely with costs to the **1st, 2nd and 3rd Defendants/Respondents**

The 1st, 2nd and 3rd Defendants on the other hand had in their Applications urged the Court to find that the Plaintiff has no **locus standi** to bring the suit and that the suit is **Res judicata**. From the foregoing analysis this Court finds that the applications dated **21st January 1019** and **14th March 2019** by the Defendant are merited and the said applications are allowed entirely.

Having now carefully read and considered the pleadings by the parties and the rival written submissions, the Court finds and holds that the Plaintiff has no *locus standi* to bring the instant suit and further finds and holds that the suit is *Res Judicata*.

The Upshot of the foregoing is that the Plaintiff’s suit is found to be without merit for lack of standing (*locus Standi*) and for being *Res judicata*. Consequently, the said suit is struck out entirely with costs to the Defendants/Respondents herein. The above findings means that the Defendants’/Respondents’ two **Notices of Motion** dated **21st January 2019** and **14th March 2019** are found to have merit and are allowed entirely with costs to them.

It is so ordered.

Dated, Signed and Delivered at Thika this 1st day of November, 2019.

L. GACHERU

JUDGE

1/11/2019

In the presence of

Mr Gatuhi now for the Plaintiff/Applicant/Respondent

Mr. Ochieng for the 2nd & 3rd Defendants/Respondents/Applicants

No appearance for 1st Defendant/Respondent/Applicant

Jackline - Court Assistant.

Court – Ruling read in open court.

L. GACHERU

JUDGE

1/11/2019