



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 814 OF 2017 CONSOLIDATED WITH ELC NO. 638 OF 2017

MUSA ONSANDO OMARE PLAINTIFF/APPLICANT

VERSUS

YUSUF GITHINJI SALEH 1ST DEFENDANT/RESPONDENT

JOSEPH KAMAU MWANGI 2ND DEFENDANT/RESPONDENT

FRANCIS RUHIU MACHARIA

T/A CORO BAR & RESTAURANT 3RD DEFENDANT/RESPONDENT

RULING

What is before Court for determination is the Plaintiff's in ELC 814 of 2017 and the Defendant's in ELC No. 638 of 2017 Notice of Preliminary Objection dated the 27th November, 2017, in respect of the Plaint and subsequent pleadings filed thereafter, seeking the following orders:

1. That the suit together with any Defence, subsequent applications and Pleadings filed herein by the Plaintiff/Defendant in ELC 638 of 2017 and in ELC 814 of 2017 offends the mandatory relevant provisions of the law of limitations of Actions of the Laws of Kenya.
2. That the Plaint, defence and all pleadings filed herein offends the principles of res judicata as embodied in the Civil Procedure Act.
3. That further the Plaint and other Pleadings filed by the Plaintiff in ELC 638 of 2017 and by the Respondents had earlier been filed before in ELC No. 623 of 1991 and touches on the same subject matter.
4. That consequently any suit, defence and pleadings filed by the Plaintiff/Defendant in ELC No. 638 of 2017 and ELC No. 814 of 2017 is an abuse of the Court process and the same ought to be struck out with costs to the Applicant.
5. That as such the Honourable Court herein lacks jurisdiction to hear and determine the suit filed by the Respondents in ELC No. 638 of 2017

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Preliminary Objection herein including the submissions, the following are the issues for determination:

- Whether the two consolidated suits should be treated separately.
- Whether ELC 638 of 2017 should be deemed res judicata.
- Whether the Court has jurisdiction to heard and determine ELC No. 638 of 2017.
- Whether the court should strike out the pleadings filed by the plaintiff/defendant in the ELC NO. 638 of 2017 as well as ELC No. 814/17 respectively.

I note that vide the order of this Court dated the 27th July, 2017, ELC Case No. 635 of 2017 and ELC Case No. 814 of 2017 were consolidated into one suit. I further note that on 19th September, 2017 the Court gave directions where ELC Case No. 814 of 2017 was made the lead file. I note thereafter the Applicant raised the instant Preliminary Objection after the two suits had been consolidated. I note from the pleadings filed, the Respondent declared that Nairobi HCCC 6323 of 1991 had been dismissed for want of prosecution but they filed Kajiado ELC 638 of 2017 to seek for orders of eviction since they could not do so in ELC 814 of 2017 where the Applicant had sought for orders of adverse possession. It is the Applicant's contention that Plaintiff and other Pleadings filed by the Plaintiff in ELC 638 of 2017 and as the Respondents in ELC 814 of 2017 had earlier been filed before in ELC No. 623 of 1991. I note ELC Case No. 623 of 1991 was dismissed for want of prosecution in 2016 by Justice Mabeya. The Respondents have not informed Court on whether they applied to set aside the said order.

Since the two suits were already consolidated before the instant Preliminary Objection was raised. I wish to first deal with the issue as to whether the two suits are now one or should be considered separately. I note initially the two suits were seeking different prayers in court. One was seeking orders of trespass and eviction while the other was seeking orders of adverse possession.

A criteria for consolidation of suits was well laid down in the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** where the learned Judge explicitly stated as follows: ' **The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-**

- 1. Do the same question of law or fact arise in both cases?**
- 2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction**
- 3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party**

Order 11 rule 3(1) (h) of the Civil Procedure Rules provides that:

'1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—

(h) consider consolidation of suits;'

In the Supreme Court Case of **PREM LALA NAHATA & ANOTHER VS CHANDI PRASAD SIKARIA, (2007) 2, SUPREME COURT CASES 551** at paragraph 18:-

"It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits"

In so far as initially the two suits sought varied prayers, once they were consolidated they became one. As ably put in the abovementioned Supreme Court of India case, I find that in the instant case once the parties accepted the two suits to be consolidated, they were essentially united and should hence be treated as one cause or matter. However, since there existed an earlier suit which had determined the issue of the suit and it is pertinent if the consolidated suits are treated separately so as to handle the question of res judicata once and for all.

On the second issue as to whether ELC 638 of 2017 filed by the Plaintiff and by the Respondents had earlier been filed before in ELC No. 623 of 1991 should be deemed res judicata.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata:

' 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.'

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

' in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'

The Court of Appeal in the case of **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR** held as follows: ' We have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. There can be no doubt therefore that Njue's appeal to the High Court was decided by a competent court. The dismissal also meant that the

decision of the Appeals Committee stood unchallenged and final, warts and all. The fresh suit filed by Njue was christened a **'Declaratory Suit'** which he contended was an alternative to **'Judicial Review'**. By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial review application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac).'

In so far consolidated suits are deemed as one, it does not bar a party from raising the issue of res judicata which ought to have been determined in the first instance before the suits were consolidated. It is against the foregoing and relying on the above cited legal provisions as well as judicial authorities, I find that the subsequent suit ELC Case No. 638 of 2017 was indeed res judicata as the prior suit 6323 of 1991, where they raised the same issues and had the same was dismissed for want of prosecution. I will hence proceed to strike out ELC No. 638 of 2017.

On the issue of striking out the Respondent's Defence in ELC 814 of 2017, I will decline to do so as it is properly on record and it is the Respondents' Constitutional Rights to defend the suit where the Applicant is staking a claim for adverse possession.

Parties are urged to comply with Order 11 and set ELC 814 for 2017 down for hearing on its merits.

Date signed and delivered in open court at Kajiado this 2nd day of July 2018.

CHRISTINE OCHIENG

JUDGE