



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E064 OF 2020

LAKEVIEW DEVELOPMENTS LIMITED.....PLAINTIFF

VERSUS

BELGO HOLDINGS LIMITED.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

1. The 1st Defendant filed an application dated 9/10/2020 seeking to have this suit dismissed or struck off and for the persons acting as directors of the Plaintiff to personally pay the 1st Defendant the costs of the application and the suit. The application was made on the grounds that the suit is baseless, frivolous or vexatious and an abuse of the process of the court. Further, that the suit was barred by the doctrine of *res judicata* and that this court does not have jurisdiction to entertain it.
2. Further, that in a judgement delivered on 11/12/2007 in **HCCC No. 266 of 2005 Belgo Holdings Limited v John Armstrong Njogu and Others** consolidated with **HCCC No. 507 of 2003 (OS)** the 1st Defendant was declared to be the lawful proprietor of land reference numbers 3859 and 3860 registered at the Government lands registry in Vol.7 V351/31 and Vol.N.61 V5/234 (“the Suit Property”). The 1st Defendant contended that that was a final judgement in *rem* determining the status of the Suit Property and that there had been no appeal against that judgement.
3. The 1st Defendant referred to **High Court Constitutional Petition Number 21 of 2016- Belgo Holdings Limited v National Land Commission and Another** in which Onguto J. held on 14/11/2017 that the declaration was a judgement in *rem* and that Ang’awa J. had determined the legality and propriety of the 1st Defendant’s title over the Suit Property. Further, that the court declared that the two parcels of land could not be the subject of review by the National Land Commission in light of the declarations made by Ang’awa J.
4. The 1st Defendant added that Komingoi J. reconfirmed the judgement in *rem* in **ELC No. 545 of 2012 – Belgo Holdings Limited v KURA and Minister of Roads** when she declared that the 1st Defendant was the indefeasible owner and registered proprietor of portions of the Suit Property which the Government claimed to have acquired for road construction. The 1st Defendant contended that those court decisions were conclusive evidence of the 1st Defendant’s legitimate ownership of the suit Property under Section 44 of the Evidence Act.
5. In addition, the 1st Defendant contended that a suit to question the registration of the conveyance of the Suit Property in favour of the 1st Defendant dated 27/7/2015 should have been commenced within a year under Section 136 of the repealed Government Lands Act which was in force at the time. It further contended that the cause of action based on the alleged fraud expired three years after it was allegedly committed or three years after the Plaintiff could have discovered it with reasonable diligence and not 25 years later.
6. The application was supported by the affidavit of Akber Esmail, a director of the 1st Defendant who deponed that he was an advocate and partner in the firm of Esmail and Esmail Advocates which had acted for the 1st Defendant since its incorporation in December 1994. He deponed that the suit was an abuse of the court process and that it was *res judicata*. He deponed that he had read the affidavit of Gad Zeevi sworn on 21/7/2020 and that the contents of that document were baseless and were an attempt by Gad Zeevi and his co-conspirators to deprive the 1st Defendant of its valuable property 25 years after the event. Mr. Esmail referred to the court decisions on the matter. He deponed that he was still going through his firm’s records and files for the period 1994 and 1995 in order to find the correspondence he exchanged with Gad Zeevi as well as some of the completion documents which Mr. Zeevi handed over to him on 29/5/1995.
7. He added that the Plaintiff had no known assets and that it would be unable to pay the costs of this case which the court may award to the 1st Defendant. He attached a copy of a decree in **HCCC No. 266 of 2005** issued on 21/12/2008. He also attached a copy of the judgement dated 14/11/2017 in **High Court Constitutional Petition No. 21 of 2016**. He also attached a copy of the judgement in **ELC No. 545 of 2012**

8. The Plaintiff filed grounds of objection against that application and contended that for purposes of limitation, time begun to run in 2018 when the Plaintiff discovered the 1st Defendant's breach and fraud. It contended that even under the repealed Government Lands Act the cause of action arose when it discovered the 1st Defendant's breach and fraud and when demand for payment was made and not paid. It averred that it had given the particulars of fraud at paragraph 21 of the plaint. The Plaintiff contended that the issue of fraud and when it was discovered are matters for trial and relied on the decision in **Justus Tureti Obara v Peter Koipeitai Nengisoi [2014] eKLR** on the point that the issue as to when the Plaintiff discovered fraud alleged against a Defendant was to be ascertained at the trial.

9. On the issue of *res judicata*, the Plaintiff averred that it was never a party to the suits cited by the 1st Defendant and that the courts declarations as to the 1st Defendant's proprietorship of the suit land bound the parties named in those suits but not the Plaintiff. The Plaintiff pointed out that the 1st Defendant based its root of title on the Plaintiff's proprietorship of the Suit Property on the cases the 1st Defendant referred to. The Plaintiff contended that the present claim had never been adjudicated upon by any court of law. The Plaintiff went further to argue that while the rights over the Suit Property may have been declared *in rem* and bind the whole world, the rights were subject to the 1st Defendant's obligations as a trustee to the Plaintiff over the Suit Properties.

10. Gad Zeevi deponed in the affidavit 21/5/2020 that the Plaintiff was previously registered as the owner of the Suit Property and that it offered to sell the land to the 1st Defendant for Kshs. 20 Million in 1995. He deponed that the Plaintiff withheld the original title deed over the Suit Property awaiting payment of the purchase price by the 1st Defendant which was never remitted despite assurances from Mr. Akber Esmail. He maintained that the Suit Property was unlawfully transferred to the 1st Defendant. He averred that the Plaintiff's advocates wrote to the 1st Defendant on 5/9/2018 seeking confirmation of payment of the purchase price and that the Plaintiff rescinded the transaction on 18/9/2018 when the 1st Defendant failed to make payment.

11. Parties filed submissions on the application which the court considered together with the authorities that the parties relied on. The 1st Defendant submitted that this action was initiated by fraudsters in the Plaintiff's name and that the suit was ludicrous having been brought 25 years after the Suit Property was sold and transferred by the Plaintiffs to the 1st Defendant. The 1st Defendant submitted after years of absolute silence the Plaintiff now claimed that it was never paid the purchase price by the 1st Defendant and that the Suit Property still belonged to it. The 1st Defendant referred to the letters dated 7/9/2018 and 14/9/2018 from the Plaintiff's advocates' referring to the agreement for the disposal of the Suit Property before payment of the purchase price. The latter later purported to rescind and repudiate the agreement dated 29/5/1995.

12. The 1st Defendant relied on Section 7 of the Civil Procedure Act on the doctrine of *res judicata* and also made reference to Mulla on the Code of Civil Procedure (14th Edition) Vol. 1 at pages 148 and 149. The 1st Defendant urged that *res judicata* was an issue that concerned jurisdiction and that it goes to the root of the jurisdiction of the court to entertain a dispute. The 1st Defendant submitted that it had given the full details of the earlier litigation, events and transactions relating to the Suit Property while contending that based on the litigation, ownership of the Suit Property can no longer be the subject of litigation as courts of competent jurisdiction had determined the status of the Suit Property and declared more than once that the 1st Defendant was its lawful owner. The 1st Defendant gave a chronology of the suits previously filed regarding the Suit Property and the decisions made by the courts.

13. The 1st Defendant contended that Section 44 of the Evidence Act which deals with judgements *in rem* stipulated that a final judgement declaring any person as entitled to any specific thing was admissible when the existence of title of such a person was in issue. Further, that such a judgment was conclusive proof of the person's entitlement to the property declared by the judgement.

14. The 1st Defendant relied on Section 136 (1) of the repealed Government Lands Act which required suits brought under that Act to be commenced within a year of the date the cause of action arose and not afterwards. The 1st Defendant contended that this suit brought 25 years after the conveyance was registered on 10/8/1995 was hopelessly out of time.

15. The Plaintiff submitted that the Managing Director of the 1st Defendant Mr. Esmail Akber was for an appreciable period a director of the Plaintiff and that he held a share in the Plaintiff in trust for Mr. Gad Zeevi or his nominees until he resigned on 2/4/1990. That he continued holding the share in trust. The Plaintiff submitted that when Mr. Akber approached the directors of the Plaintiff representing that he needed to acquire the Suit Property, the parties signed an agreement on the understanding that even though the agreement was signed the Suit Property was not to be transferred until the 1st Defendant paid the full purchase price.

16. The Plaintiff submitted that it reposed in the expectation and belief that proprietorship of the Suit Property would continue in its name and that the 1st Defendant's Managing Director would continue to protect the Plaintiff's interest until the full purchase price for the Suit Property was paid. The Plaintiff contended that it discovered in 2018 that the 1st Defendant had transferred the property to itself fraudulently in breach of the agreement of the parties before paying the consideration. The Plaintiff contended that it asked the 1st Defendant to pay consideration of Kshs. 20,000,000/= and that when it failed to do so the Plaintiff rescinded the sale agreement.

17. The Plaintiff contended that rather than answer the suit and vindicate its ownership of the Suit Property especially given the fraud that is alleged to have preceded the registration of the 1st Defendant as the proprietor of the Suit Property, the 1st Defendant had taken the course of technicalities.

18. The Plaintiff submitted that for the plea of *res judicata* to succeed the former suit must have been between the same parties or parties under whom they claim. It emphasised that it had never been a party to the suits referred to by the 1st Defendant. It maintained that the present suit questioned the legal verity of the acquisition of the Suit Property from the Plaintiff which is an issue that has never been tried before any

court and was not tried in the cases referred to by the 1st Defendant.

19. The Plaintiff contended that the rights declared in *rem* by the courts concerning the proprietorship of the 1st Defendant over the Suit Property was subject to the validity of the sale from the Plaintiff. It urged that the registration of the 1st Defendant was subject to the legal verity of the process of the transfer. It emphasized that it contends in this suit that consideration was never paid and that the actual registration of the transfer of the Suit Property was fraudulent and illegal. Further, that the declarations made by the courts were made without knowledge of the foregoing legal undercurrents. The Plaintiff contended that the court was only affirming the exhibited record showing that the 1st Defendant was registered as the owner of the Suit Property and that the court was appreciating the chain of previous ownership of the land.

20. The Plaintiffs submitted that all interests inuring to proprietors under the Government Lands Act were transitioned to the Land Registration Act of 2012, Section 25 (2) of which states that nothing in that section should be taken to relieve a proprietor of any duty or obligation to which a person was a subject to as a trustee. The Plaintiff submitted that it had pleaded the implied, resulting and constructive trust and maintained that the 1st Defendant holds the Suit Property as trustee for the benefit of the Plaintiff. The Plaintiff submitted that the limitation period begun to run in 2018 when it discovered the 1st Defendant's breach and fraud.

21. The Plaintiff submitted that the present directors of the Plaintiff are the ones who signed the agreement dated 29/5/1995 for the sale of the Suit Property to the 1st Defendant. It added that the 1st Defendant has relied on and has been quoting this fact in all the cited cases which founded the 1st Defendant's right of proprietorship. The Plaintiff urged the court to look at paragraphs 14 and 15 of the 1st Defendants defence and the supporting affidavit of Gad Zeevi sworn on 21/7/2020. It urged the court to allow the matter to go for trial.

22. The 2nd Defendant filed submissions. The Attorney General (AG) submitted that Section 26 of the Limitation of Actions Act provided that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. The AG contended that the issue as to when the Plaintiff discovered the fraud alleged against the Defendant can only be ascertained at the trial.

23. The AG contended that since Mr. Akber Esmail was the director alleged to have aided the transfer of the Suit Property and at the same time was a partner in the firm of advocates which acted for the 1st Defendant since 1994, then the suit ought to proceed to full hearing for purposes of determining his activities and conduct in his capacity as a director and advocate on the issue of conflict of interest.

24. The AG argued that the Plaintiff had never been a party to the suits the 1st Defendant referred to and that the plea of *res judicata* would not therefore apply to the Plaintiff. The AG added that since the Plaintiff was not a party to those suits, it should not be condemned unheard.

25. Further, the AG contended that a company has independent legal personality and relied on paragraph 14 of the 1st Defendant's defence where it stated that Akber Esmail was the registered holder of one ordinary share in the Plaintiff since its incorporation which constituted 50% of the issued and paid up capital of the Plaintiff. That that fact read with Mr. Akber's replying affidavit showed that at all material times Mr. Akber was a director of the 1st Defendant and a partner in the firm of advocates that represented the 1st Defendant in these transactions. Further, that the issue of conflict of interest and the alleged fraudulent activities of the 1st Defendant in the transaction should be heard and determined in a full hearing of this suit. The AG urged the court to dismiss the application with costs.

26. The Plaintiff filed supplementary submissions in which it clarified that even though Lakeview Development Company Limited is cited as the 2nd Respondent in **HCCC No. 507 of 2003- Raphael Kawai Maitha and Others v Jays Syndicate Limited and others**, the Plaintiff was not a party to that suit. It denied that it was affiliated in any way to Lakeview Development Company Limited. The Plaintiff pointed out that in all those suits relied on by the 1st Defendant, the 1st Defendant solely placed reliance on the agreement for sale dated 29/5/1995.

27. The Plaintiff submitted that the agreement for sale and indenture were executed by Gad and Talia Zeevi as directors of the Plaintiff and that the proprietorship of the Suit Property by the 1st Defendant depended on the legality of the directorship of Gad and Talia Zeevi in the Plaintiff. Further, that if it was determined that the resolution by the Plaintiff's board of directors on 2/4/1990 was invalid then the execution of the agreement of sale and the indenture would be null and void and the Suit Property would still belong to the Plaintiff.

28. The Plaintiff submitted that regarding the directorship of the Plaintiff, it was possible that Mr. Esmail could still be a director of the Plaintiff. To augment this submission, the Plaintiff relied on paragraph 15 of the 1st Defendant's defence in which it challenged the appointment of Gad and Talia Zeevi as the Plaintiff's directors. Further, that if the position is as the 1st Defendant argues, then the agreement for sale dated 29/5/1995 and the indenture dated 27/7/1995 would be invalid in which case the Suit Property still belonged to the Plaintiff.

29. The Plaintiff contended that the 1st Defendant knew of the defect in 1990 but went ahead to rely on that defect and the invalid sale agreement and indenture in its pleadings before the court in **HCCC No. 266 of 2005, High Court Constitutional Petition No. 21 of 2016** and **ELC No. 545 of 2012**. The Plaintiff maintained that the findings in those cases which the 1st Defendant relied on were made because the 1st Defendant's evidence was that Gad and Talia Zeevi were properly the directors of the Plaintiff and that they had validly executed the agreement for sale dated 29/5/1995 and the indenture dated 27/7/1995.

30. The Plaintiff added that the original indenture was to be released to the 1st Defendant after full payment of the purchase price and that what was produced by the 1st Defendant in the further affidavit of Esmail Akber was not the original indenture. The Plaintiff argued that it was now settled law in the Kenyan jurisdiction that fraud unravels everything and that no court should allow a person to keep an advantage which he had obtained by fraud.

31. The Plaintiff submitted that going by the sheer volume and quality of the raised and contested facts in this case, and the plea of fraud and

its consequences, the court is better placed to assess these competing facts to fully appreciate those facts before it makes any proper findings on the questions of fraud, the issue of whether the registration of the 1st Defendant as proprietor of the Suit Property is based on trust on behalf of the Plaintiff or not and whether the suit is *res judicata*. The Plaintiff submitted that the just determination of these competing issues of facts was what a trial of the suit is intended to achieve and that this issues cannot be determined on affidavit evidence as the 1st Defendant seeks to do. The Plaintiffs submitted that this suit begged for a trial and that striking out the suit was a drastic and draconian event and that the power to do so has to be exercised very cautiously by the courts.

32. The issue for determination is whether the court should dismiss or strike off this claim as the 1st Defendant seeks in the application dated 9/10/2020. The 1st Defendant contended that this suit was *res judicata*, time barred and that the court lacked jurisdiction to determine it based on previous judgements in *rem* given by the courts which declared the 1st Defendant as the rightful owner of the Suit Property.

33. As the court observed in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, the rationale behind *res judicata* is based on the public interest in there being an end to litigation and the need to protect a party from facing repetitive litigation over the same matter. In other words, courts should not have to determine a dispute that has been determined before.

34. For *res judicata* to apply under Section 7 of the Civil Procedure Act, the matter must have been directly and substantially in issue in the former suit and must have been between the same parties or parties under whom they claim. In this court's view, the issue brought out in the current suit regarding the legality of the transfer of the Suit Property from the Plaintiff to the 1st Defendant has not been determined in the previous suits which the 1st Defendant cited. The 1st Defendant did not demonstrate that the Plaintiff was a party to those suits. What was determined in those suits did not address the propriety of how the 1st Defendant acquired the Suit Property from the Plaintiff.

35. This court does not agree with the 1st Defendant's submissions on the application of Section 44 of the Evidence Act to the previous judgements made in respect of the Suit Property. There would need to be a final judgement declaring the 1st Defendant to be entitled to the Suit Property not as against the parties sued in the cases cited by the 1st Defendant but absolutely which would be admissible in evidence and would be conclusive proof that the 1st Defendant was entitled to the Suit Property from the date of the judgement. In **HCCC No. 266 of 2005** the decree extracted on 21/12/2008 declared the 1st Defendant as the lawful proprietor of the Suit Property since 27/7/1995. That decree did not address the issue of how the 1st Defendant came to be the proprietor of the Suit Property in 27/7/1995 or how the suit land was transferred from the Plaintiff to the 1st Defendant and cannot therefore be said to be final.

36. The court notes that in paragraph 4 of the Amended Plaintiff filed in **HCCC No. 266 of 2005**, that the 1st Defendant who was the plaintiff in that case, averred that by the conveyance dated 27/7/1995 made between the Lakeview Developments Limited and Belgo Holdings Limited and for the consideration stated, the Suit Property was conveyed to the 1st Defendant and the conveyance was duly registered at the Government Lands Registry. It is clear that the manner in which the 1st Defendant acquired the Suit Property from the Plaintiff has not been challenged in any court before. Mr. Akber deposed in the supporting affidavit that he was still going through his firm's records and files for the period 1994 and 1995 in order to retrieve the correspondence which he exchanged with Gad Zeevi and some of the completion documents which Mr. Zeevi handed over to him on 29/5/1995. These documents will be crucial for the court to adjudicate over the present suit.

37. The Land Act provides at Section 7 the methods through which land may be acquired. These include allocation, land adjudication process, compulsory acquisition, prescription, transfers, transmissions and long term leases. This court does not agree with the 1st Defendant's contention that a judgement in *rem* can confer title more so where there is an allegation that the title which was the subject of previous proceedings was obtained through fraud or that it was unlawfully acquired. In this court's view, since the Plaintiff is challenging the transfer of the Suit Property from the Plaintiff to the 1st Defendant, then that is the determination that will have to be made by the court in this suit.

38. In the plaint, the Plaintiff pleaded fraud and misrepresentation on the part of Mr. Esmail Akber in the manner in which the Suit Property was transferred from the Plaintiff to the 1st Defendant. The allegations of fraudulent transfer of the Suit Property and when the fraud was discovered by the Plaintiff are matters to be determined at the trial. The issue of whether the 1st Defendant holds the Suit Property in trust for the Plaintiff will also have to be determined during the trial. The contention by the Plaintiff that the 1st Defendant did not pay the purchase price for the Suit Property as well as the other allegations made in the suit are what the court will determine in the suit.

39. The protection of the right to property afforded by Article 40 of the Constitution is not absolute. That protection does not extend to any property that is found to have been unlawfully acquired. Other laws also make provision for the grounds on which titles over land can be challenged.

40. The rights of a proprietor acquired for valuable consideration are protected under Sections 25 and 26 of the Land Registration Act to the extent that the land was not: subject to any leases, charges and other encumbrances; affected by such liabilities, rights and interests declared by Section 28 of the Act which do not require to be noted on the register; held by the proprietor who has a duty as a trustee; the title was obtained through fraud or misrepresentation which the person participated in; the title was acquired illegally, unprocedurally or through a corrupt scheme. What this means is that a proprietor's title can be challenged on the foregoing grounds. The proprietor would also need to prove under Section 25 of the Land Registration Act that he paid valuable consideration for the land.

41. Prior to the coming into force of the Land Registration Act in 2012, titles held under the Government Lands Act such as the one in issue here were governed by the Registration of Titles Act. Section 23 of that Act provided that a title could be challenged on grounds of fraud or misrepresentation where it was proved that the proprietor participated.

42. The application dated 9/10/2020 is dismissed. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Miller Bwire for the Plaintiff

Mr. Oching Oduol and Mr. M. Kivindyo for the 1st Defendant

Mr. M. Motari holding brief for Mr. A. Kamau for the 2nd Defendant

Mr. V. Owuor- Court Assistant