



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 70 OF 2018

(Formerly Nairobi ELC Case No. 1421 of 2014)

BROWN PAUL MUCHANGA.....PLAINTIFF

VERSUS

TEETA OLE KAMAKIA.....1ST DEFENDANT

JOHN PARSIMEI MORIO.....2ND DEFENDANT

DANIEL KIRONTET TITAA.....3RD DEFENDANT

MAINKE OLE MORIO.....4TH DEFENDANT

RULING

What is before Court for determination is the Defendants' Notice of Motion application dated the 29th August, 2019 brought pursuant to section 3, 3A of the Civil Procedure Act; Order 1 Rule 10 (2), Order 5 Rule 1 (1,2,5, 6) and 6, Order 2 Rule 15 (3&4) and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 4(1) (a) of the Limitation of Actions Act. The Defendants seek the following orders:

1. The suit herein is time barred by virtue of section 4 (1) (a) of Limitation of Actions Act as it relates to contract and has been filed after six (6) years lapsed since the alleged course of action arose.
2. The matter herein is Res Judicata as the same issues between the parties herein had been deliberated on in Succession Cause No. 36 of 2010.
3. The name of the 1st Defendant be struck out of the suit in accordance with Order 1 Rule 10 (2) , the 1st Defendant having passed away more than 10 years ago.
4. The suit herein has abated for failure by the Plaintiff to extract summons and serve the said summons upon the Defendants/Applicants herein.
5. The names of the Defendants herein be struck out of the suit for lack of locus standi.
6. The suit herein is an abuse of the court process and may prejudice, embarrass and delay fair trial of the action.
7. The prohibitory order or caution or any other restriction placed on the various land parcel numbers by the Plaintiff or any other person be removed and/or vacated.
8. The costs of the application and those of the entire suit be borne by the Plaintiff/Respondent.

The application is premised on the grounds on the face of it and the supporting affidavit of the 2nd Defendant JOHN PARSIMEI MORIO where he deposes that the Plaintiff filed this suit on 7th November, 2014 and an application dated 24th November, 2014 which was dismissed for want of prosecution. He explains that on 3rd June, 2016, under Succession Cause No. 36 of 2010, the Plaintiff filed an application seeking to be enjoined therein as a creditor being a bona fide purchaser for value which application was canvassed and dismissed for being time barred. He claims the Defendants filed a Notice of Appointment dated 24th June 2016 for purposes of canvassing application dated 3rd June, 2019. Further, the Plaintiff has never taken out summons or applied for an extension of the same to enable the Defendants enter appearance and file a Defence. He insists the suit has never been certified ready for hearing and Plaintiff did not adhere to procedure before seeking a

hearing date. Further, that the Plaintiff is not keen on prosecuting this suit which is an afterthought as it was filed six (6) years after the alleged contract. He reiterates that the Agreements in the Plaintiff's bundle of documents were entered into on the 9th October, 2000, 21st December, 2000 and 11th May, 2004 yet suit was filed in 2014. Further, that it is the 1st Defendant who was the owner of the suit land and there has never been a Power of Attorney allowing the Defendants herein to transact on behalf of their father, the 1st Defendant while still alive, hence they deny undertaking a sale on his behalf. Further, the undated and unexecuted Special Power of Attorney by the 1st Defendant bears the year 2004 which is after the Agreements. He insists the ownership of the subject land has always been with the 1st Defendant who has since died and a purported transaction with the other Defendants could only have been legally possible post 2012 after the grant was confirmed. Further, throughout the process in Succession Cause No. 36 of 2010, the Plaintiff never objected nor applied for revocation of the grant. He reiterates that the 1st Defendant having died 10 years before the suit herein was instituted cannot be legally enjoined as a party to the suit. Further, the property title number Kajiado/ Loodariak/ 1095 has since been distributed through succession cause no. 36 of 2010 to the Defendants. He confirms that post the succession process in 2012, parts of the suit property have further been sold to third parties.

The Plaintiff opposed the application by filing a replying affidavit where he made reference to the proceedings dated 27th March, 2019 and 24th September, 2019. He deposes that the suit is not time barred by virtue of section 4(a) of the Limitation of Actions Act as it relates to contract. Further, that the purchase of the suit property was done between 2001 and 2009 however, the cause of action arose in 2014 when the Defendants failed to forward to the Plaintiff the title upon subdivision of the property. He further explains that the last payment was made on 31st July, 2008 while the suit was filed on 3rd November, 2014 which was within the limitation period. On the issue of res judicata, he insists the issues herein were not deliberated in the succession cause no. 36 of 2010 as he sought to be enjoined as an interested party and listed as a creditor in the estate of the late Teeta Ole Kamakia (deceased). Further, the matter of ownership and illegality of the Defendants' claim on the property including breach thereof was never determined on its merits in the said succession cause. On the issue of abatement of suit for failing to serve summons, he contends that the application dated the 24th November, 2014 has never been dismissed for want of prosecution. Further, that the said application was heard by Justice Onguto on 21st January, 2015 who granted him injunctive reliefs and leave to serve the Defendants by way of registered post. He insists, he served the Defendants with the Plaintiff, Notice of motion upon Defendants by way of registered post and the firm of messrs Mulondo, Oundo, Muriuki & Company Advocates have held several meetings over the matter and confirmed they act for the Defendants. He avers that despite the Defendants' knowledge of the matter, they have failed to file their Statement of Defence, List of Witnesses and Witness Statements to date. He reiterates that the names of the Defendants herein should not be struck off the suit as they have locus standi having received the purchase price personally from him and witnessing the transfer of funds, including having possession of the title. Further, death of the 1st Defendant can be regularized and/ or cured by way of an amendment of the same and thus is not fatal. He reaffirms that the restrictions and cautions were placed by the Plaintiff with leave of the Land Registrar. Further, removal of the cautions and restrictions has to be determined in a full trial and not in an application. They further state that issue of the participation of the Defendants can only be determined upon a trial. Further, that the plaintiff can be amended and 1st defendant's estate which is represented by the 2nd to 4th Defendants replaced as a party to the suit. He insists subdivisions of the suit property was illegal and most of the said subdivisions are in the names of the 2nd to 4th Defendants. Further, the only way the Court can determine whether the property has been sold to third parties is by way of a trial.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Notice of Motion including the rivalling affidavits and parties' submissions, the following are the issues for determination:

- Whether this suit is statute barred and should be dismissed.
- Whether this suit is res judicata
- Whether the name of the 1st Defendant should be struck out of the suit
- Whether the suit has abated for failure by the Plaintiff to extract summons and serve the said summons upon the Defendants/ Applicants herein.
- Whether the names of the Defendants herein should be struck out of the suit for lack of locus standi.
- Whether the prohibitory order or caution or any other restriction placed on the various land parcel numbers by the Plaintiff should be removed.

As to whether this suit is statute barred and should be dismissed.

The Defendants claim this suit is statute barred as it was filed several years after the Plaintiff and the 1st Defendant entered into Agreements to purchase land. From the documents filed by the Plaintiff which have not been disputed by the Defendants as they are yet to file their Defence, I note the Defendants continued to receive purchase price in respect of the suit land until 2008. Further, the 1st Defendant who was the vendor and owner of suit land died in 2004, which in essence means time stopped running until his estate was distributed in 2012. I note this suit was filed in 2014. Bearing in mind that the dispute herein revolves around contract which period of limitation is 6 years, I find that the Plaintiff actually filed the suit before the period lapsed. In the circumstances, I find the suit herein is not statute barred as claimed by the Defendants.

As to Whether this suit is res judicata

The Defendants claim this suit is res judicata as the issues raised herein were already determined in a succession cause No. 36 of 2010, which fact the Plaintiff denies.

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 the case of **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.**’ Further in the case **Nancy Mwangi T/A Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR, J Gikonyo** states thus:

‘ **The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others 92001)EA 177, 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. In that case the court quoted Kuloba J.. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.**

On perusal of the documents produced from the aforementioned succession cause, I note the Plaintiff sought to be enjoined in the said cause as a creditor to the estate which application was declined by the trial Magistrate. In this instant suit the Plaintiff seeks orders for specific performance; General Damages; Declaration that he is entitled to lien on the suit properties and costs. I wish to further point out that for a party to rely on the defence of res judicata, it should be first raised in the Defence which is not the case herein. Based on this analysis while relying on the legal provisions cited above as well as associating myself with the case I have cited, I find that this suit is not res judicata as the prayers sought in the Plaintiff were not in issue in the succession cause, parties herein were not litigating under the same title and the trial magistrate did not determine any of the prayers in the Plaintiff on merit.

As to whether the name of the 1st Defendant should be struck out of the suit. It is not in dispute that the 1st Defendant who was owner of the suit land is deceased. It is further not in dispute that the 2nd to 4th Defendants undertook succession proceedings and his estate has now been distributed to them. Since he is deceased and the Defendants are his beneficiaries who now hold titles to the land. I opine that he should be replaced with the legal representatives of his estate. In the circumstances, I will proceed to strike him off and direct the Plaintiff to amend the Plaintiff and replace him with the legal representatives of his estate.

As to whether the suit has abated for failure by the Plaintiff to extract summons and serve the said summons upon the Defendants/ Applicants herein. The Defendants claim this suit has abated for failure by the Plaintiff to extract summons and serve them. I note as per the order of Justice Onguto dated the 21st January, 2015 the Plaintiff was allowed to serve the Defendants through registered mail. As per the affidavit of service sworn by CHRISPIN OLENGO filed in Court on 19th February, 2015, at paragraphs 2 and 3, he confirms receipt of Plaintiff dated 3rd November, 2014, Verifying affidavit, List of Witnesses, Witness Statement, List & Bundle of Documents , Notice of Motion dated 24th November, 2014, Hearing Notice dated 2nd February, 2015 which he proceeded to send by registered post to post box number 95 Ngong which was the Defendants’ postal address. Further, he annexed the Certificate of Posting to the said affidavit of service. I note the firm of messrs Mulondo, Oundo, Muriuki & Company Advocates came on record for the Defendants and on 26th March, 2019 a Notice of Change of Advocates was filed by the firm of Mulondo & Company Advocates taking over the matter. To my mind, these are pointers that the Defendants were duly served, instructed an advocate to represent them and now as an afterthought insists they were not served. It is my considered view that summons to enter appearance are simply there to inform a party of the suit and once the said party is represented I do not foresee the necessity of serving it again. The Defendants have further not denied receiving the said registered mail. From these analysis, I find that the Defendants were indeed served and I will decline to hold that the suit has abated for failure by the Plaintiff to extract summons and serve them.

As to whether the names of the Defendants herein should be struck out of the suit for lack of locus standi.

The Defendants seek to be struck off this suit for lack of locus standi. *Locus standi* is defined in **Black’s Law Dictionary**, 10th Edition (page 1084) as “**the right to bring an action or to be heard in a given forum**”.

While Order 1 Rule 3 of the Civil Procedure Rules describes a party who should be joined in a suit as defendants and stipulates that: ‘**All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise**’.

In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that; -

“**Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law**”.

I note the 2nd to 4th Defendants are not denying that the 1st Defendant's estate has since been distributed to them. Further, on perusal of the documents on record, the 2nd Defendant received certain payments as purchase price even after the 1st Defendant's demise. I also note on 9th February, 2007, the 2nd to 4th Defendants received Kshs. 50,000 as purchase price from the Plaintiff. Further, they have admitted that the suit land has been distributed to them. To my mind, I find that they are properly enjoined in this suit and will decline to strike them off.

As to Whether the prohibitory order or caution or any other restriction placed on the various land parcel numbers by the Plaintiff should be removed.

I wish to make reference to the various legal provisions within the Land Registration Act which relate to restrictions: Section 76 provides that: ***' (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure— (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register. (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.'***

While section 77 provides that: ***' (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.'***

Further section 78 stipulates that: ***' (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.'***

I note the Plaintiff's claim herein revolves around specific performance over land. Further, the fulcrum of the dispute herein revolves around land. Since the matter has not been heard and determined, and in relying on the legal provisions cited above, I opine that it is pertinent if a restriction or prohibitory order should subsist over the suit lands to protect the substratum of the suit. In the circumstances, I will decline to make an order for its removal.

The Defendants have claimed this suit was prematurely set down for hearing. I note there is no defence on record while the Plaintiff had filed his list and bundle of documents as well as witness statements hence there was nothing barring the court from granting him a hearing date. It is my considered view that the Defendants are seeking to rely on technicalities yet Article 159 (2) (d) of the Constitution directs courts to focus on substantive justice and not procedural technicalities. Further, the issues the Defendants are raising in this application should have actually been anchored in their Defence first.

It is against the foregoing that I find the Notice of Motion dated the 29th August, 2019 unmerited except for prayer for striking out 1st Defendant, off the suit and will proceed to dismiss it with costs to the Plaintiff.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF MAY, 2021.

CHRISTINE OCHIENG

JUDGE