



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. E025 OF 2020

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

DOUNE FARM LIMITED.....1ST DEFENDANT

SONOIYA SERSER.....2ND DEFENDANT

MOSES K. SIONGOK.....3RD DEFENDANT

JOEL K YEGON.....4TH DEFENDANT

JAMES LANGAT.....5TH DEFENDANT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT

THE REGISTRAR OF TITLES.....7TH DEFENDANT

RULING

1. This ruling is in respect of the 1st to 5th defendants Notice of Motion application made under Order 2 rule 15 and Order 4 rule 6 of the Civil Procedure Rules and Section 7 of the Limitation of Actions Act dated 8th December 2020 which sought for the following orders:

1. That the plaintiff's entire suit be struck out.

2. That cost of this application and the suit is granted to the 1st to 5th defendants/applicants.

2.The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by Richard Kay Muir dated 8th December 2020. He averred that he is one of the directors of the 1st defendant which is a company incorporated under the Companies Act. He averred further that the 2nd to 5th defendants are former officials and members of the plaintiff. He also averred that the 1st defendant has been in occupation of the suit property since the year 2001 when it acquired it. He stated there was another suit pending between the same parties herein which is Nakuru ELC 142 of 2019 (formerly Nakuru HCC 86 of 2002) over the same subject matter where the plaintiff is an interested party and has filed a statement of Defence and Counterclaim seeking similar orders to the one's sought in this suit.

3.He further averred that in the year 2002, the plaintiff had instituted another suit namely Nairobi HCC No.1561 of 2002 against the defendants in this matter and substantially sought similar orders/reliefs as are sought for in the present suit. That Nairobi HCC No. 1561 of 2002 was dismissed for want of prosecution and an application seeking its reinstatement was dismissed and thus asserted that the plaintiff is engaging in an abuse of the court process in bringing the instant suit.

4.The plaintiff/respondent filed grounds of opposition to the application dated 22nd December 2020 and a replying affidavit sworn on 2nd March 2021. The replying affidavit was sworn by Philip Kirui who deposed that he was the chairman of the plaintiff and averred that the present suit raises triable issues and serious allegations of fraud that the court has jurisdiction to hear and determine. On the issue of the pending suit between the parties herein he deposed that the court could exercise its discretion or on application by any party order for the consolidation of both suits.

5. He further averred that High Court case No. 1561 of 2002 was dismissed for want of prosecution and thus issues raised therein were not fully adjudicated upon and therefore the issues raised in this matter are not *res judicata*. On the issue that the suit was statute barred, he averred that they discovered fraud on 28th October 2020 and that the limitation period began to run from the date the fraud was discovered. He deposed that the plaintiff bought the suit property in the year 1999 and fully paid for it and thus the sum of Ksh.14 million from the 1st defendant allegedly released to the plaintiff did not go towards the purchase of the suit property. He deposed further that the present matter was not *subjudice* as Nakuru ELC case No. 142 of 2019 was instituted by the 1st defendant and that the plaintiff is an interested party and not a substantive party.

6. The 1st to 5th defendants/applicants and the plaintiff/respondent filed their submissions to ventilate their positions in regard to the application. The 1st to 5th defendants/applicants submitted that the present suit is frivolous, vexatious and an abuse of the court process. The applicants submitted that the parties in Nairobi HCCC No.1561 of 2002 were Borop Multipurpose Cooperative Society Ltd -vs- Doune Farm Limited & 8 others and were similar to the parties in the present suit. The plaintiff failed to prosecute the suit and it was dismissed for want of prosecution and that an application to reinstate the suit was also dismissed. That in the earlier suit sought similar reliefs and/or orders as are sought in the present suit and therefore the decision in the first suit should be binding in regard to those issues that were the subject of determination and should not be tried again. Consequently, the applicants submitted the present suit is an abuse of the court process and ought to be struck out summarily as per the provisions of **Order 2 rule 15**. They relied on the case of ***Kivanga Estates Limited -v- National Bank of Kenya Limited [2017] eKLR***.

7. The applicants further submitted that the present suit is *subjudice* and relied on **Section 6** of the Civil Procedure Act. They argued that the instant suit contravenes **Section 6** of the Civil Procedure Act as the matters in issue in the present suit are also in issue in ELC Case No. 142 of 2019 formerly Nakuru HCC 86 of 2002. The subject matter in both suits is land parcel **LR No. 9045/9** registered as **IR No. 86377**. In the pending suit (Nakuru ELC No.142 of 2019), the plaintiff herein is an interested party who has filed a statement of defence and counterclaim. The applicants in support of their submission relied on the case of ***Thika Min Hydro co. ltd vs. Josphat Karu Ndwiga [2013] eKLR*** where the court held as follows:

“It is not the form in which the suit is framed that determined whether it is subjudice. Rather it is the substance of the suit and looking at the pleadings in both cases.”

8. The 1st to 5th defendants/applicants further submitted that the suit is statute barred and relied on Section 7 of the Limitation of Actions Act and stated that the 1st defendant purchased the parcels of land in the year 2001 and occupied the same immediately and had been in occupation for a period of over 19 years before the instant suit was filed. The present suit was filed on 24th November 2020 which was out of time and contrary to Section 7 of the Limitation of Actions Act which provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person..

9. The plaintiff/respondent in its response submissions submitted that the 1st to 5th defendants/applicants sought to have the suit struck out without hearing the same on merit and argued that would be draconian and would deny the plaintiffs the opportunity of a hearing and effectively would drive the plaintiff from the seat of justice. The plaintiff relied on the cases of ***D.T Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR*** and ***Mugah v Kunga (1988) KLR***. On whether the suit is statute barred, the plaintiff/respondent argued that they discovered the fraud on 28th October 2020 and therefore the suit was not statute barred as that was the time the period of limitation started running. The plaintiff argued the issue of limitation ought to be determined upon hearing the parties at the trial. The plaintiff further submitted that by virtue of HCC No. 1561 of 2002 being dismissed for want of prosecution the same was not heard on merits and the issues raised therein cannot be said to have been finally determined.

10. The plaintiff further argued the instant suit was not *subjudice* as Nakuru ELC No. 42 of 2019 was instituted by the 1st defendant herein and the plaintiff/applicant was only an interested party and not a substantive party in the litigation and that no effective remedy can flow to an interested party.

Discussion analysis and determination.

11. After reviewing the application, grounds of opposition, replying affidavit and the submissions filed by the parties, the following issues arise for determination:

- (a) *Whether this suit is subjudice by virtue of ELC case No. 142 of 2019.*
- (b) *Whether this suit is Res Judicata by virtue of HCC 1561 of 2002.*
- (c) *Whether this suit is barred as per the provisions of section 7 of the Limitation of Actions Act.*

12. Section 6 of the Civil Procedure Act provides as follows:

6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

13. It is not in dispute that there is pending in court another matter which is Nakuru ELC 142 of 2019 (formerly Nakuru HCC 86 of 2002)

between *Doone Farms Limited* (the 1st defendant herein) versus *Richard Soi & 4 others* who are described in the plaint as the shareholders of Borop Multipurpose Co-operative Society Limited. The plaintiff herein is an interested party in that matter. The subject matter of the suit is land parcel No. LR No. 9045/9 comprising of 173.6 acres. The prayers sought in the suit are:

- (a) *A declaration that the plaintiff is the legal owner of all that piece or parcel of land known as LR No. 9045/9 Rongai – Nakuru comprising 173.6 acres or thereabouts together with all structures and/or houses erected thereon and the defendants do give vacant possession of the same.*
- (b) *Costs of and incidental to this suit.*
- (c) *Any other or further relief this honorable court deems fit to avoid miscarriage of justice.*

14. The plaintiff who is the interested party in ELC 142 of 2019 filed a defence and counterclaim where it sought the following orders:

- a. *A declaration that the transaction dated 29/11/00 and subsequent certificate of title issued in respect of all the property known as LR No. 9045/9 in the name of the plaintiff is null and void.*
- b. *An order that the certificate in respect to suit land namely LR No. 9045/9 and registered as LR No. 86377 in the name of Doone Farms Limited be cancelled.*
- c. *A permanent injunction to restrain the plaintiff (now defendant) from occupying, taking possession or in any other manner whatsoever intermeddling with all that property known as LR No. 9045/9 Rongai comprising of 173.6 acres or thereabouts.*
- d. *Costs of the suit.*

15. In the present suit the plaintiff seeks the following orders:

- a) *A permanent injunction to restrain the 1st defendant from occupying, from taking possession, from fencing, from cultivating, from cutting trees, from charging, from sub-dividing, from selling, from transferring and/or in any other manner whatsoever from intermeddling with all that property situated in south west of Rongai in the Nakuru District being land reference No. 9045/9 (original no. 9045/7/2 and registered as LR 86377.*
- b) *A declaration that the sale agreement dated the 29th November 2000 between the plaintiff and the 1st defendant over all that property situate in South West of Rongai Town Nakuru being Land Reference No. 9045/7/2 and registered as LR No. 86377 having been entered in to when the plaintiff had paid for the land in the year 1999 and the title registered in favor of the plaintiff on the 29th December 1999 freed and discharged from all encumbrances was therefore a product of fraud, mistake, misrepresentation and/or unprocedural scheme to which the 1st defendant was party to and accordingly illegal, null and void ab initio and for cancellation forthwith.*
- c) *A declaration that the sale agreement dated 29/11/2000 between the plaintiff and the 1st defendant and subsequent certificate of title issued in respect of all that property situated in south west of Rongai town Nakuru District being land reference No. 9045/9 (original No. 9045/7/2 and registered as L.R 86377 having been procured outside group by laws by the 1st defendant is invalid, null and void for being ultra vires.*
- d) *That by operation of the law the sale of Agricultural land dated 29th November 2000 to the extent that the land control board application for consent to transfer was done after the expiration of three months, then the entire agreement dated 29th November 2000, the sale and transfer of land effected on 15th June 2001 in favour of the 1st defendant became void for all purposes and the presence of the 1st defendant on the land reference No. 9045/9 (original number 9045/7/2 and registered as LR No. 86377 is an act of a trespasser.*
- e) *An order directed to the 7th and 8th defendants that the title certificate on No. LR 9045/9 (Original no. 9045/7/2) and registered as LR 86377 in the name of Doone Farm Limited be cancelled and the fresh certificate of title be issued in the name of Borop multipurposes Co-operative Society Ltd.*
- f) *That arising from the above the 1st defendant be ordered to execute a transfer of the suit land reference No. 9045/9 (original No. 9045/7/2 and registered as LR 86377 to the plaintiff within the next fourteen (14) days of judgement and in default the deputy registrar of the high court of Kenya at Nakuru is ordered to execute the transfer of suit land LR No. 9045/9 (original No. 9045/7/2 and registered as LR 86377 in favor of the plaintiff and the requirement of production of original title deed dispensed with.*
- g) *That the plaintiff be awarded mesne profits as against the 1st defendant from the 29th November 2000 to the date of judgement or vacation from land whichever is earlier.*
- h) *That upon the grant of the orders above an order be made that the 1st defendant vacates the suit land LR NO. 9045/9 (original no. 9045/7/2 and registered as LR 86377 within thirty (30) days of the judgement and in default they are liable to be evicted by court bailiffs with the sub-county police commander (SCPC) MOLO maintaining law and order and ensure that peace prevails on the suit property.*

i) *Costs of the suit and interest thereon at court rates.*

j) *Any other further order that this honorable court deems fit to grant.*

16. Section 6 of the Civil Procedure Act prohibits a court from proceeding with the trial of any suit or proceeding in which the matter in issue was directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

17. The parties in the present matter and in Nakuru ELC 142 of 2019 (formerly Nakuru HCC 86 of 2002) are the same and the orders sought are substantially the same as they touch and relate to the same parcel of land reference No. 9045/9 (original number 9045/7/2) and registered as IR No. 86377. The determination of the issues in Nakuru ELC No. 142 of 2019 would of necessity dispose of the issues in the instant suit. The institution of the present suit by the plaintiff quite evidently was in contravention of Section 6 of the Civil Procedure Act and so in my view, the present suit is *sub judice*.

Whether the suit is Resjudicata.

18. On whether this suit is *res judicata* by virtue of the plaintiff's suit that was dismissed for want of prosecution being Nairobi HCC No. 1561 of 2002 *Borop Multipurpose Co-operative Society Limited vs Dounne Farm Limited & 5 others*, it is not disputed that Nairobi HCC No. 1561 of 2012 was filed by the plaintiff herein against the defendant and 5 others and was dismissed for want of prosecution on 17th May 2012. The Plaintiff filed an application for reinstatement of the suit which was dismissed on the 13th day of December 2012. The orders that the plaintiff had sought vide the further amended plaint dated 5th day of May 2003 in HCC No. 1561 of 2002 were as follows:-

1a. *A permanent injunction to restrain the 1st defendant from occupying, taking possession, fencing, cultivating or in any other manner whatsoever intermeddling with all that property situate in South West of Rongai town in the Nakuru District being Land Reference No. 9045/9 (Original No. 9045/7/2) and registered as IR 86377.*

1b. *A temporary injunction to restrain the 1st defendant from occupying, taking possession, fencing, cultivating or in any other manner whatsoever intermeddling with all that property situate in South West of Rongai town in the Nakuru District being Land Reference No. 9045/9 (Original number 9045/7/2) and certificate of title registered as IR 86377.*

2a *A declaration that the transaction dated 29/11/2000 and subsequent certificate of title issued in respect of all that property situated in South West of Rongai Town Nakuru District being Land reference No. 905/9 (original No. 9045/7/2 and registered as IR 86377 having been procured outside group by laws by the defendants is invalid for being ultra vires.*

3a *An order directed to the 7th and 8th defendants that the title certificate on No. IR 9045/9 (original No. 9045/7/2) and registered as LR 86377 in the name of Doune Farm Limited be cancelled and the fresh certificate of title be issued in the name of Borop Multipurposes Co-operative Society ltd.*

4 *Costs of the suit.*

5 *Any other or further order that this honorable court deems fit to grant.*

19. The orders sought in the present matter and in Nairobi HCC No. 1561 of 2002 are substantially the same. Section 7 of the Civil Procedure Act provides as follows:

7. 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.

20. For *res judicata* to apply in any matter, there must have been a previous suit in which the matter was in issue, the parties in both matters have to be the same and/or were claiming under the same title and the previous matter must have been heard and determined by a competent court and the issue must be raised in the new suit. As indicated before it is not disputed that the parties in Nairobi HCC No. 1561 of 2012 and in the present suit are the same. Also the subject matter of the previous suit and the present suit is land parcel No. LR 9045/9 (original No. 9045/7/2) and that in both suits there are allegations of fraud.

21. In the case of ***Isaack Mugo Kamau & 10 others -vs- Stephen Gitau Ikere & 2 others (2021) eKLR*** this court considered the application of the *resjudicata* doctrine and at paragraph 36 of the judgment stated thus: -

36. *Whether or not a subsequent matter is res judicata is dependent on whether the ingredients necessary to constitute a matter as being res judicata are satisfied. The test predominantly is whether the earlier suit raised the same issues as are being raised in the current suit; whether the parties were the same and ultimately whether a final decision on the issues was rendered by the earlier suit. The Supreme Court in the case of ***Kenya Commercial Bank Ltd -vs- Muiri Cofffee Estate Ltd & another*** (supra) under paragraph 58 of their judgment provided guidance on how to determine whether a matter is res judicata as follows:-*

“(58) Hence, whenever the question of *res judicata* is raised a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction”.

22. The Supreme Court (Kenya) in the case of **Kenya Commercial Bank Ltd -vs- Muiri Coffee Estates Ltd & Another (2016)** at Paragraphs 54 and 55 of the judgment their Lordships had the following to say regarding the efficacy of the *resjudicata* doctrine: -

(54) *The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.*

(55) *It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the Constitution, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.*

23. Nairobi HCCC No.1561 of 2002 was dismissed for want of prosecution and the application for reinstatement was also dismissed. The ruling of the court dismissing the application for reinstatement constituted a final determination of the matter and in my view the plaintiff in the suit stood barred from bringing a new suit against the same parties on the same facts and issues. Any such subsequent suit would be *re judicata*.

24. In the case of **Njue Ngai -v- Ephantus Njiru Ngai & another [2016] eKLR** the Court of Appeal affirmed that where a suit is dismissed for want of prosecution constitutes a final judgment in the matter unless a successful application to set aside the dismissal is made. The court of Appeal at paragraph 18 of its judgment observed thus:-

“18. Another issue may arise as to whether the dismissal of suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this court answered that issue in the affirmative when considering the dismissal of a suit for failure to attend court in the case of **Peter Ngome -vs- Plantex company Ltd (1983) eKLR.....**”

25. The Court in the same judgment at paragraph 21 made it clear that the dismissal of a suit for want of prosecution amounted to a final judgment when they stated as follows: -

“21. Now 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 competent court. The dismissal also meant that the decision of the Appeals Committee stood unchallenged and final...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 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-desac)”.

26. Although the court of appeal in the Njue case was dealing with a situation where an appeal had been dismissed by the High Court for want of prosecution the position cannot be different where it was a suit that was dismissed as in the present matter.

Whether the suit is statute barred.

27. The 1st to 5th defendants/applicants have further contended that present suit is statute barred by virtue of **Section 7** of the Limitation of Actions Act which provides as follows:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

28. The 1st to 5th defendants/respondents have argued that the plaintiff’s instant suit is time barred on account of the Limitation of Actions Act, Cap 22 Laws of Kenya. The applicants contend that the cause of action arose in the year 2001 when the 1st defendant acquired the suit properties and was issued title. The plaintiff instituted the present suit vide the plaint dated 17th November 2020 filed on court on 24th November 2020. The plaintiff disputed that their suit is statute barred on account of limitation contending that the cause of action is founded on fraud which they claim they discovered in October 2020. The plaintiff relies on section 26 of the Limitation of Actions Act which provides that where an action is founded on fraud the limitation period starts to run from when the fraud is discovered.

29. Where the court is faced with a plea of limitation at the interlocutory stages as in the present matter, it is necessary for the court to determine such issue as a preliminary issue as it goes to the jurisdiction of the court to entertain the suit. If on the evidence placed before the court, it is evident that the suit is time barred then the court lacks the jurisdiction to proceed with matter and it must lay down its tools. If the court lacks jurisdiction, the proceedings are null and void and it would be futile to proceed any further.

30. In order to determine whether or not the suit is statute barred on account of limitation the court has to consider the pleadings of the parties and any other evidence laid before the court by the parties in form of documents in support of their respective cases. Amongst the documents annexed by the applicants in support of the application are pleadings in Nairobi HCCC No.1561 of 2002 and Nakuru ELC No.142 of 2019

(formerly Nakuru HCCC No. 86 of 2002). By the further amended plaint filed by the plaintiff/respondent in Nairobi HCCC No.1561 of 2001 it is evident that the plaintiff acknowledged the sale transactions between the 1st defendant (Doune Farms Ltd) and the 2nd to 4th defendants in that suit respecting the suit properties which took place in 1999/2000. The plaintiff/respondent under paragraph 15 (a) of the further Amended plaint pleaded as follows: -

15(a) That the 7th and 8th defendant in collusion with the 1st to 6th defendants fraudulently caused the certificate of Title registered as IR No.86377/1 to be issued in the name of the 1st defendant on 15th June 2001 to the detriment of the plaintiff's interests therein and the said title was obtained through fraud to which the defendants were party to.

31.The plaintiff pleaded particulars of fraud under (a)- (g) of the said paragraph 15 (a) of the Further Amended Plaint dated 5th May 2003. Looking at the prayers in the further amended plaint it is clear the Title certificate registered as IR No. 86377/1 related to LR No.9045/9 and is evidenced further by the instrument of Transfer received in the Central Registry Nairobi for registration on 15th June 2001.

32. There can therefore be no doubt that the plaintiff was at the very latest aware of the fact that the 1st defendant had become registered as the owner of the suit property by the time it filed the further amended plaint dated 5th May 2003. At the time the further amended plaint was filed, the plaintiff was aware of the alleged fraud as the plaintiff pleaded fraud and even gave particulars. If the suit was to be founded on fraud the suit ought to have been filed within three (3) years from the date the fraud was discovered by the plaintiff.

33. If the claim was for recovery of land, the limitation period is twelve years and on the basis of the evidence whether the plaintiff founded the claim on fraud and/or recovery of land the action is time barred. Pursuant to the provisions of the Limitation of Actions Act.

34. The assertion by the plaintiff that its action accrued as from 28th October 2020 when it allegedly discovered fraud is hollow as it is evident that the plaintiff was aware that the property had been transferred to the 1st defendant as far back as 2003 when it filed the amended plaint in the case at Nairobi setting out alleged particulars of fraud by the 1st defendant.

35. On the facts and the law I have no hesitation in finding that the present suit was filed by plaintiff outside the period of limitation and therefore the court lacks the jurisdiction to sustain the same. The filing of the suit offends the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The suit is unsustainable as it is statute barred. The same is accordingly ordered struck out. The costs of the application and the suit are awarded to the 1st to 5th defendants.

36.Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH JULY 2021.

J M MUTUNGI

JUDGE