



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 98 OF 2019

SIMON PETER WAWERU MAINA.....PLAINTIFF

VERSUS

MUNYAKA KUNA COMPANY LIMITED.....DEFENDANT

RULING

1. This is the Notice of Motion dated 1st October 2020 brought under orders 2 rule 15(1) (b), (c) & (d) of the Civil Procedure Rules 2010, section 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

1. That the plaint filed by the plaintiff herein be struck out and judgment be entered in favour of the defendant as prayed in the defence.

2. That the costs of this application and the suit be awarded to the defendant.

3. The grounds are on the face of the application and are:-

(a) The plaint is scandalous, frivolous and vexatious.

(b) The plaint may prejudice, embarrass or delay the fair trial of the action and related proceedings before another court HC P & A 625 of 2009; Nairobi touching on the same subject matter before this court and involving same parties.

(c) The plaint lacks merit and is otherwise an abuse of the process of court.

4. The application is supported by the affidavit of Dedan Kimathi Waigera, a director of the defendant/applicant sworn on the 1st October 2020.

5. The application is opposed. There is a replying affidavit sworn by Simon Peter Weru Maina, the plaintiff/respondent herein sworn on the 25th January 2021.

6. On the 25th October 2021 the court directed that the Notice of Motion be canvassed by way of written submissions.

The Defendant's/Applicant's Submissions

7. They are dated 8th February 2021. The plaintiff does not own the property known as LR No 42/32 & LR 42/33 and he has no title to the same and is not a beneficiary of the deceased, Domenico Demase the proprietor of the mother title LR 42/11 subject hereof. The administrator of the estate of the deceased from whom the plaintiff claims to have purchased the suit property has no legal capacity to sell the deceased's property and cannot pass any title for the purported sale specifically in the circumstances of the estate as above described.

8. The plaintiff has no title to the suit property hence he has no locus to make the claim he has made before this court having purported to hold a title which is now non-existent and he cannot sustain the suit he has filed against the defendant.

9. The law in intermeddling of an estate of the deceased is Section 45 of the Law of Succession Act. It has relied on the case of **In the**

matter of the Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR.

10. It has also relied on the case of **Kivanga Estates Limited vs National Bank of Kenya Ltd [2017] eKLR** and order 2 rule 15 of the Civil Procedure Rules on the issue of striking out pleadings. It has also put forward the case of **Cooperative Merchant Bank Ltd vs George Fredrick Wekesa Civil Appeal No 54 of 1999.**

The plaint discloses no cause of action and is incurable, the plaintiff having no title to the suit premises or colour of right whatsoever.

11. The plaintiff is abusing the process of court in insisting or furthering litigation over a matter that is *res judicata* to the extent that courts of law have found that the defendant has an interest in the estate of the deceased and the title that the plaintiff alleged to hold has been nullified and cancelled. It has also put forward the case of **SatyaBhama Gandhi vs Director of Public Prosecution & 3 Others [2018] eKLR.**

12. On the issue of abuse of the court process over matters that are *res judicata*, the defendant has relied on Section 7 of the Civil Procedure Act and the case of **Pangaea Holdings LLC & Another vs Hacienda Development Ltd & 2 Others [2020] eKLR.**

13. The subject matter in the previous litigation and the current previous litigation and the current suit is the same. Both the former suits and the present suits are between the same parties. It has relied on the cases of **E.T.V vs A.G. & Another [2012] eKLR; Gurbachau vs YowaniEkori (1958)EA 450** which cited a passage from the judgment of the Lord Chancellor in **Henderson vs Henderson (1) 67 ER 313.**

14. The plaintiff before this court is bringing to court issues that have already been determined by other courts and this court found as much in its ruling dated 30th January 2020. It has also put forward the case of **Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the Principle Secretary Treasury) & Another [2020] eKLR.** It prays that the plaintiff's case be struck out with costs.

The Plaintiff's/Respondent's Submissions

15. They are dated 5th March 2021. The plaintiff entered into a sale agreement with one Vincenzo Bernado Demasi for the purchase of parcel of Land Known as LR No 42/11, (42/32 and 42/33) in the year 2012 and 2013. That the vendor is the administrator of the estate of Domenico Demasi.

16. That upon purchase of the property, LR NO 42/32 and LR NO 42/33 was transferred and registered in the plaintiff's name. The plaintiff has taken possession of the same and has developed the properties by constructing an industry.

17. The defendant herein (plaintiff in ELC 107 of 2011 is in actual possession of the six (6) acres.

18. The plaint filed is not scandalous, frivolous or vexatious. The plaintiff seeks to protect LR NO 42/32 and 42/33. The suit ought to be heard on merit. He has put forward the cases of **Blue Shield Company Ltd vs Joseph Mboya Ogutu [2009] eKLR; DT Dobie vs Muchina.**

19. The power to strike out a suit should be used sparingly and only in the clearest of cases where the impugned pleadings are beyond redemption. The plaintiff's case ought to be allowed to proceed to full hearing so as to determine the true ownership of the suit property. He prays that the application be dismissed.

20. I have considered the Notice of Motion and the supporting affidavit. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

21. Order 2 rule 15(1) of the Civil Procedure Rules:-

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

22. The plaintiff's case that he bought the suit properties LR NO 42/32 and LR NO 42/33 from Vincenzo Bernado Demasi who was the Administrator of the Estate of Demenico Demasi in the year 2012 and 2013.

23. It is the defendant's case that LR No 42/11 is the property of the Late Domenico Demasi (deceased). The same is a subject of **Nairobi Succession Cause HC P & A 626 of 2009. In the matter of the Estate of Domenico Demasi (Deceased)**.

24. It is not in dispute that the defendant/applicant herein instituted **ELC 107 of 2011 Munyaka Kuna Company Ltd vs Vincenzo Bernado Demasi** in which judgment was delivered on 25th May 2018. The court issued the following orders:-

“(a) It is hereby confirmed and declared that the plaintiff Munyaka Kuna Co. Ltd, has acquired title of sixe (6) acres out of LR No 42/11 pursuant to the doctrines of Constructive trust and adverse possession.

(b) It is further confirmed that and declared that the plaintiff Munyaka Kuna Co. Ltd is entitled to be registered the proprietor of six (6) acres out of LR NO 42/11 currently registered in the names of Domenico Demasi now deceased.

(c) It is the plaintiff's evidence (Munyaka Kuna Co. Ltd) that after the purchase, it was actual possession of the six (6) acres purchased and the time of filing suit they were in possession”.

25. In the case of **Kivanga Estate Ltd vs National Bank of Kenya Ltd [2017] eKLR** the Court of Appeal stated thus:-

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order or last resort. It is a powerful jurisdiction, capable of brining a suit to an end before it has even before heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip slide is that it is also unfair to drug a person to the seat of justice when the case brought against him is clearly a non –starter. The exercise of the power to strike out pleadings must balance these two rival consideration.”

26. Given the judgment in the ELC 107 of 2011 the defendant herein was declared the owner of six (6) acres out of the LR NO 42/11. The plaintiff herein is aware that LR NO 42/11 is still registered on the name of Domenico Demasi (deceased). He hold the title to the suit property. The titles allegedly held by the plaintiff being LR NO 42/32 and 42/33 have been nullified and cancelled vide a ruling of Honourable Justice Onyiego on HC P & A Succession Cause No 625 of 2009, Nairobi. This suit is therefore an abuse of the court process.

27. This suit is *res judicata*. **Section 7** of the Civil Procedure Act 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.”

In the case of **IEBC vs Mama Kiai & 5 Others [2017] eKLR** the Court of Appeal stated as follows:

“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 distinctive but conjunctive terms:-

(a) The suit or issue was directly and subsequently in issue in the former suit.

(b) The 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 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 for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice”.

It is clear from the pleadings that the subject matter in this suit and the previous suit is the same. The plaintiff's/respondent's claim that the issues in the instant suit were not raised in the previous suit and adjudicated upon cannot stand.

28. In the case of **Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the PS Treasury) & Another [2020] eKLR** the court stated thus:-

“Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection. I find that this suit is res judicata and an abuse of the court process. The preliminary objection has merit and hence upheld. Plaintiff’s case is dismissed with costs.

The plaintiff seeks to re-open issues that were litigated upon in the previous suit.

29. In conclusion, I find merit in this application and the same is allowed. I grant the orders sought namely:-

(a) That the plaint filed by the plaintiff be struck out with costs of the defendant/applicant.

(b) That costs of this application be borne by the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of July 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mureithi for Mr. Kabaka for the Plaintiff.

Ms R Chege for the Defendant.

Phyllis- Court Assistant