



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 629 OF 2015

LYDIA S YESWA.....PLAINTIFF

=VERSUS=

TERAKATE PROPERTIES LIMITED.....DEFENDANT

RULING

1. The Plaintiff instituted this suit against the defendant through a plaint dated 24/06/2018. He sought a refund of the purchase price of Kshs. 1,400,000/= in relation to Plot Numbers 121 and 122 which were subdivisions out of a parcel of land known as **Land Reference Number 11329**, located along Thika Road. When the case came up for hearing, the defendant sought an adjournment on the ground that it had lodged a notice of motion dated 30/01/2020, seeking orders of stay of proceedings of this suit. The said application dated 30/01/2020 is the subject of this ruling.

2. The notice of motion dated 30/01/20 seeks an order of stay of proceedings in this suit, pending the hearing and determination of **ELC Case No 3 of 2009; Terakate Properties Limited v Develco Investments Limited & others**. The application is premised on the grounds that: (i) the two suits are similar and affect the ownership of **Land Reference Number 11329**, along Thika Road; (ii) there is a likelihood of the courts reaching conflicting decisions, thus delaying the course of justice; (iii) there would be absurdity and confusion, including compliance challenges, if the courts handling the two matters arrive at conflicting decisions; (iv) there would be unnecessary duplication of work; (v) **ELC Case No. 3 of 2009** has twenty six interested parties who, like the plaintiff, were purchasers of plots that were subdivisions out of **Land Reference Number 11329**; (vi) there is an injunction in **ELC Case No 58 of 2011**, injunctioning the defendant from transferring the suit property, thus exhausting their proceeds; and (vii) it would be in the interest of justice if the application is allowed. The application was supported by a supporting affidavit sworn on 30/1/2020 by Stephen Muriuki Maathai in which he reiterated the grounds set out in the application.

3. In response, the plaintiff filed a replying affidavit sworn on 4/03/2020. The plaintiff contended that she was not a party to **ELC Case No 3 of 2009; Terakate Properties Limited v Develco Investments Limited and others**. She added that the application was fatally defective, frivolous, vexatious and unmeritorious. She further deposed that the prayers sought in the two suits were different; ELC Case No 3 of 2009 was filed before execution of the contract of sale between the parties herein; she was a stranger to the assertions contained in the defendant's supporting affidavit; and she would be prejudiced if the orders sought were granted.

4. The application was canvassed through written submissions. In their submissions dated 26/4/2021, the defendant framed one issue for determination: whether the defendant qualifies for grant of stay of proceedings pending hearing and determination of **ELC Case No 3 of 2009**. Reliance was placed on **Section 6** of the **Civil Procedure Act**. The defendant reiterated the grounds in support of their application and placed reliance on the case of **H. Young (E.A) Limited & another v James Mwangi & Another (2016) eKLR** in which the court, on applying the *res sub-judice* test, dismissed the plaintiff's application for stay of proceedings.

5. In her submissions dated 5/3/2021, the plaintiff reiterated the contents of her replying affidavit in opposition to the defendant's application. She submitted that the two suits were different. She added that she was not a party to the transactions between the defendant and the third parties. She further submitted that she had a right to seek legal redress if she was aggrieved. She contended that the defendant never informed her about a pending suit prior to her executing the agreement for sale. She placed reliance on the persuasive decision in the case of **Hirschfield and another v Management Associates (Pty) Limited [2003] 1 BLR 174 (IC)** where a Botswana court dismissed an application for stay of proceedings on the ground that a stay would seriously delay proceedings and not resolve the issues in dispute. She also relied on the decision in **Global Tours & Travels Limited; Nairobi HC Winding up Cause No.43 of 2000** where Ringera (J) [as he then was] was of the view that before an order of stay of proceedings is granted, the pros and cons should be weighed by the court so as not to prejudice a party.

6. I have considered the application, the rival affidavits, and the rival submissions. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which an order of stay is granted pending the hearing and determination of a related suit. Put differently, the question is whether the application has satisfied the criteria upon which our courts invoke the doctrine of *res sub-judice* under **Section 6** of the **Civil Procedure Act**.

7. The application under consideration is to be evaluated on the basis of the framework in **Section 6** of the **Civil Procedure Act** which provides as follows:

“No court shall proceed with the trial of any suit or proceedings 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.*” [Emphasis mine]

8. The Supreme Court of Kenya outlined the tenor and import of the doctrine of *res sub-judice* in the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** as follows:

“...A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; *there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...*” [Empashis]

9. There is common ground that **ELC Case No. 3 of 2009** was filed earlier than this suit and that the two suits are being handled by courts of competent jurisdiction. I will therefore focus on the other essential elements of the doctrine of the *res sub-judice*.

10. The first question is whether there is more than one suit relating to the same subject matter. From the pleadings in this suit, although the plaintiff makes reference to L.R. Number 11329, the subject matter of her suit is the purchase price paid to the defendant. She seeks a refund of the purchase price. She does not seek orders of specific performance. In **ELC case No. 3 of 2009**, the subject matter is land and the defendant seeks among other reliefs, declaratory and injunctive orders. It is therefore apparent that the subject matter in the two suits are not the same.

11. The second question is whether there are two suits between the same parties or their representatives. A look at the plaint in **ELC Case No. 3 of 2009** shows that though the defendant is the plaintiff in **ELC Case No. 3 of 2009**, the plaintiff in this suit is not a party in **ELC Case No. 3 of 2009**.

12. Has the defendant established the essential elements of the doctrine of *res sub-judice*? My answer to this question is in the negative. It is in the negative because the subject matter and the reliefs sought are not the same. Secondly, the parties in the two suits are not the same. There is therefore no proper basis upon which to invoke the doctrine of *res sub-judice*. It is therefore my finding that the defendant has not satisfied the criteria upon which our courts invoke the doctrine of *res sub-judice* and exercise jurisdiction to stay a suit pending the hearing and determination of a related suit.

13. Ultimately, I make the following disposal orders: -

a) The defendant’s notice of motion dated 2nd April 2019 is dismissed for lack of merit

b) The defendant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JULY 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Oniana holding brief for Mr Muchemi for the Defendant

Ms Wambugu for the Plaintiff

Court Assistant: June Nafula