



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 78 OF 2019

MARY WANENE KANGETHE.....PLAINTIFF

-VERSUS-

ESTATE OF PAUL KANGETHE WARUHIU (Sued on behalf of

PAUL KANGETHE WARUHIU(deceased)).....1ST DEFENDANT

BEIGE INVESTMENTS LIMITED.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

NAIROBI CITY COUNTY.....4TH DEFENDANT

AND

THE NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

RULING

Background:

By an agreement dated 29th December, 1975 between Paul Kangethe Waruhiu, deceased (hereinafter referred to only as “the 1st Defendant”) on one hand and Francis John Kangethe and Mary Wanene Kangethe who were a husband and wife on the other hand (hereinafter together referred to as “the Kangethes”), the Kangethes sold to the 1st Defendant a portion of all that parcel of land known as L.R No. 27/52 (hereinafter referred to as “the suit property”) at a consideration of Kshs. 55,000/-. The 1st Defendant paid the full purchase price to the Kangethes but the Kangethes refused to complete the agreement by transferring a portion of the suit property to the 1st Defendant.

In 1986, the 1st Defendant filed a suit against the Kangethes at the Resident Magistrate’s Court at Nairobi in RMCC No. 6043 of 1996(hereinafter referred to as “the lower court case”) seeking specific performance of the said agreement for sale. The Kangethes filed a defence in the lower court case denying that the 1st Defendant was entitled to an order for specific performance. The Kangethes contended that although the suit property was registered in their joint names, the agreement was signed only by Francis John Kangethe. The Kangethes denied that Mary Wanene Kangethe, the Plaintiff herein signed the agreement. The Kangethes contended that the signature in the said agreement that purported to be that of Mary Wanene Kangethe (hereinafter referred to only as “the Plaintiff”) was a forgery as it was not hers.

At the trial of the lower court suit, the Kangethes called a document examiner who testified that the signature on the said agreement for sale that was said to be that of the Plaintiff was different from the Plaintiff’s known signature. The lower court after analyzing the evidence that was tendered by both parties made a finding that the Plaintiff had signed the agreement for sale and that the agreement was enforceable. The lower court stated in its judgment delivered on 4th April, 1990 that even if it had held that the Plaintiff had not signed the agreement for sale, that would not have had any effect on the enforcement of the agreement since the interest of the two Kangethes in the suit property was severable. The lower court granted the 1st Defendant’s prayer for specific performance and ordered the Kangethes to transfer half of the suit property that was not developed to the 1st Defendant. The court also authorized the Executive Officer of the court to sign all necessary documents for the subdivision of the suit property and transfer of half portion thereof to the 1st Defendant in the event that the Kangethes failed to sign the same.

The Kangethes were dissatisfied with the decision of the lower court and preferred an appeal against the same to the High Court in Nairobi HCCA No. 93 of 1991 (hereinafter referred to as the "High Court Appeal"). The High Court upheld the decision of the lower court. The High Court made a finding that the agreement of sale had been signed by the Kangethes and that the 1st Defendant was entitled to an order for specific performance. With those findings, the High Court dismissed the appeal by the Kangethes on 7th June, 1996.

The Kangethes were again dissatisfied with the decision of the High Court on their appeal and preferred a second appeal against the same to the Court of Appeal in Court of Appeal at Nairobi Civil Appeal No.164 of 1996. That appeal was however struck out by the Court of Appeal on 8th June, 1998 on the ground that the record of appeal was not complete the Kangethes having omitted to include in the record, the exhibits that were produced by the parties in the lower court. After the striking out of that appeal, the Kangethes filed an application in the Court of Appeal in Court of Appeal Civil Application No. NAI.24 of 1999 for extension of time to file a new notice of appeal and a record of appeal out of time. The application was heard by M. Ole Keiwua J.A who dismissed it on 9th May, 2003. The single judge of the Court of Appeal found that the application was filed after inordinate delay that was not explained and that the intended appeal did not have any chances of success.

After the Kangethes attempts to appeal against the decision of the High Court to the Court of Appeal failed, all went quiet and in accordance with the decision of the lower court, the suit property was subdivided and a portion that was to be transferred to the 1st Defendant given L.R No. 27/114 (Original No. 27/52/2) (hereinafter referred to as "the subdivision"). By an agreement for sale dated 17th March, 2008, the 1st Defendant sold the subdivision to Daniel Kimeu Muhia and Beige Investments Limited at a consideration of Kshs. 15,000,000/-. Beige Investments Limited has been joined in this suit as the 2nd Defendant.

The Kangethes did not give up on their dispute with the 1st Defendant over the suit property even after they lost the cases that they lodged in the lower court, the High Court and the Court of Appeal. On 17th March, 2008, the Plaintiff herein filed a fresh suit in the High Court (HCCC No. 101 of 2008) against the 1st Defendant herein and Daniel Kimeu Muhia to whom the 1st Defendant had sold the subdivision together with Beige Investments Limited (the 2nd Defendant herein). In HCCC No. 101 of 2008 (hereinafter referred to only as "the High Court suit"), the Plaintiff sought an injunction restraining the 1st Defendant and the said Daniel Kimeu Muhia from trespassing, transferring, selling, alienating and/or in any other way interfering with the Plaintiff's quiet enjoyment of the suit property. The Plaintiff's High Court suit did not also see the light of the day. The 1st Defendant and Daniel Kimeu Muhia who were the Defendants in the suit filed an application seeking among others the striking out of the suit on the ground that the same was *res judicata*. In a ruling delivered on 12th July, 2010, the High Court found the Plaintiff's High Court suit *res judicata* and struck out the same with costs. The court found that the issues that were the subject of the High Court suit had been litigated and determined conclusively and as such the Plaintiff's new suit was an abuse of the process of the court.

The present suit:

The Plaintiff filed this suit against the Defendants and the Interested Party on 1st March, 2019. The plaint was amended on 3rd June, 2019. In the amended plaint, the plaintiff averred that she was the registered proprietor of the suit property on which she had her matrimonial home where she lived with her deceased husband, Francis John Kangethe who was a co-owner of the property. The Plaintiff averred that on or about 29th December, 1975 her deceased husband, Francis John Kangethe (hereinafter referred to only as "the deceased") with the intention of selling half of the suit property entered into an agreement for sale with Paul Kangethe Waruhiu, deceased (the 1st Defendant) under which it was agreed that the deceased would sell half of the suit property to the 1st Defendant at Kshs. 55,000/-. The Plaintiff averred that as a joint owner of the suit property, she neither consented to the sale of a half portion of the suit property to the 1st Defendant nor signed the agreement for sale dated 29th December, 1975. The Plaintiff averred that her failure to give consent and to sign the agreement rendered the said agreement for sale void.

The Plaintiff averred that despite the fact that she did not execute the said agreement for sale and did not consent to the sale, a portion of the suit property measuring 0.9378 hectares given L.R No. 27/114(Original No. 27/52/2) ("the subdivision") was carved out illegally and fraudulently transferred to the 1st Defendant. The Plaintiff averred that the registration of the subdivision was null and void for want of consent of the Land Control Board and Housing Finance Company of Kenya Limited. The Plaintiff averred that the 1st Defendant colluded with the 3rd and 4th Defendants to have the suit property transferred to his name. The Plaintiff averred that on or about 10th February, 2009, the 1st Defendant sold and/or transferred the subdivision to the 2nd Defendant through a conveyance registered on 28th April, 2009. The Plaintiff averred that the 1st Defendant did not have a good title in the subdivision that he could transfer to the 2nd Defendant and that the transfer of the said property was part of a fraudulent scheme to dispossess the Plaintiff of part of the suit property.

The Plaintiff averred that the transfer and registration of the subdivision in the name of the 1st Defendant and subsequently in the name of the 2nd Defendant were carried out illegally, unprocedurally and through a corrupt scheme that was erroneously sanctioned by the lower court. The Plaintiff averred that although she appealed the decision of the lower court to the High Court and subsequently to the Court of Appeal she did not at any time raise the issue of fraud. The Plaintiff averred that at no time was the issue of fraud raised, heard and determined. The Plaintiff averred that even in her subsequent suit in the High Court against the 1st Defendant and Daniel Kimeu Muhia that was struck out on 12th July, 2010, she did not raise the issue of fraud.

The Plaintiff averred that on 22nd January, 2015, she asked the Interested Party to investigate under what circumstances, the 3rd Defendant had registered the subdivision in the name of the 1st Defendant and the subsequent transfer in favour of the 2nd Defendant. The Plaintiff averred that after investigating her complaint, the Interested Party observed that injustice had been committed against her and her deceased husband and that the fraud had been allowed to go far. The Plaintiff averred that the 2nd, 3rd and 4th Defendants were attempting to subdivide the subdivision into eight (8) new subplots in furtherance of their fraudulent scheme against her. The Plaintiff averred that the fraudulent activities have been continuous and was manifest before, during and after the hearing and determination of the various suits between the parties and that the evidence of the Defendants' acts of fraud was only brought to the fore during the investigations that were

carried out by the Interested Party.

The 2nd Defendant filed a defence dated 21st March, 2019 in which it denied the Plaintiff's claim in its entirety. The 2nd Defendant averred that the plaint disclosed no reasonable cause of action against it. The 2nd Defendant averred that the issues raised by the Plaintiff in the suit had been in issue in the lower court, the High Court and the Court of Appeal and had been conclusively determined. The 2nd Defendant averred that the Plaintiff was estopped from litigating the same issues again. The 2nd Defendant averred that he was an innocent purchaser of the subdivision for value without notice. The 2nd Defendant averred that the proceedings before the Interested Party were a nullity in that the Interested Party purported to revisit issues that had already been determined by courts of competent jurisdiction. The 2nd Defendant averred that the Plaintiff's suit is time barred, frivolous, vexatious and an abuse of the process of the court.

The 1st Defendant filed a defence on 24th October, 2019. The 1st Defendant denied that the Plaintiff was registered as the proprietor of the suit property. The 1st Defendant averred that the Plaintiff only resides on a portion of the suit property. The 1st Defendant averred that the lower court, the High Court and the Court of Appeal had all made a finding that the Plaintiff had signed the agreement for sale of the suit property to the 1st Defendant. The 1st Defendant averred that the Plaintiff was well aware of the sale of the suit property and as such the issue of fraud in the transfer of the subdivision to the 1st Defendant does not arise. The 1st Defendant averred that the Plaintiff is a perennial litigant who does not get satisfied with decisions that she gets from the courts and has continued to move from one court to the other peddling lies in the name of seeking justice. The 1st Defendant averred that the 1st Defendant had a good title to the subdivision, the same having been conferred upon him by the decisions that were made in his favour by various courts. The 1st Defendant averred that the subdivision was transferred to the 1st Defendant procedurally and not through a corrupt scheme as claimed by the Plaintiff. The 1st Defendant averred that the issue of fraud that has been raised by the Plaintiff is an afterthought as the Plaintiff had an opportunity to canvass the same in her earlier suits.

The 1st Defendant averred that he was not a party to the proceedings before the Interested Party and had no notice of the same. The 1st Defendant averred further that the proceedings before the Interested Party were a nullity since the Interested Party purported to adjudicate on matters that had already been determined by courts of competent jurisdiction. The 1st Defendant averred that the suit disclosed no cause of action against the 1st Defendant and that the same is an afterthought and an abuse of the process of the court having been brought to reopen decided matters.

The 3rd Defendant filed its statement of defence on 1st October, 2019 in which it denied the Plaintiff's claim in its entirety. The 3rd Defendant denied that it colluded with the 1st and 2nd Defendants in the alleged fraudulent registration of the subdivision in the name of the 1st Defendant and subsequently in the name of the 2nd Defendant. The 3rd Defendant averred that the suit is *res judicata* and that it reserves its right to raise a preliminary objection to the suit and seek its striking out.

The matters before the court:

On 6th May, 2019, the 2nd Defendant filed an application by way of Notice of Motion dated 30th April, 2019 seeking for the following orders;

1. The Plaintiff herein be struck out and the suit dismissed
2. The Attorney General be directed to commence vexatious litigant proceedings against the Plaintiff.
3. The 1st (sic) Defendant be awarded costs of suit.

The application that was supported by the affidavit of Simon Kagwanja Thuo dated 30th April, 2019 was brought on several grounds. The 2nd Defendant contended that the dispute over the ownership of the subdivision as between the Plaintiff and the 1st Defendant had been heard and fully determined by courts of competent jurisdiction whose decisions are final and conclusive. The 2nd Defendants contended that the Plaintiff having had a chance to assert her claim in courts of competent jurisdiction was estopped from re-litigating the same issues by the doctrine of *res judicata*. The 2nd Defendant contended further that the suit is time barred, scandalous and vexatious. The 2nd Defendant contended further that there was no privity of contract between it and the Plaintiff and as such the suit discloses no or any reasonable cause of action against it.

On 1st October, 2019, the 3rd Defendant filed a Notice of Preliminary Objection dated 30th September, 2019 seeking the striking out of the suit on the ground that the suit is *res judicata*, time barred and an abuse of the court process.

On 24th October, 2019, the 1st Defendant filed a Notice of Preliminary Objection dated 17th October, 2019 seeking the striking out of the suit on the grounds that the suit is time barred, *res judicata* and that the court lacks jurisdiction to determine the same.

The main contention in the 1st and 3rd Defendants' preliminary objections is that in addition to the Plaintiff's suit being time barred, the suit is *res-judicata* since the issues raised in the suit have been adjudicated upon by courts of competent Jurisdiction in Nairobi RMCC No.6043 of 1986, High Court Civil Appeal No.93 of 1991, Court of Appeal Civil Application No.245 of 1996(89/96 UR), Court of Appeal Civil Appeal No.164 of 1996, Court of Appeal Civil Application No. 24 of 1999 and High Court Civil Suit (ELC) No.101 of 2008 and as such the court lacks jurisdiction to hear and determine the same issues again.

The Plaintiff's response to the 2nd Defendant's application:

The Plaintiff opposed the 2nd Defendant's application through a replying affidavit sworn on 4th June, 2019. In her affidavit, the Plaintiff reiterated the contents of her amended plaint the contents of which I have highlighted above. The Plaintiff reiterated that the issue of fraud that she has raised in the present suit was never raised and determined in the earlier suits between the parties. The Plaintiff contended further that save for the property in dispute there was no similarity between this suit and the previous suits. The Plaintiff contended that the reliefs sought in the present suit and the parties to the suit are different from the reliefs she had sought in the previous suits in which the parties were also not the same as the parties before the court. The Plaintiff urged the court to allow her to canvass her suit to its logical conclusion.

Submissions:

The 2nd Defendant's application and the two preliminary objections by the 1st and 3rd Defendants were heard by way of written submissions.

The 2nd Defendant filed submissions dated 12th March 2021. The 2nd Defendant submitted that the Plaintiff's suit is *res judicata*. The 2nd Defendant relied on section 7 of the Civil Procedure Act and the cases of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [2016]eKLR and Benard Mugo Ndegwa v James Nderitu Githae & 2 Others. [2010]eKLR in which the ingredients of *res judicata* were summarized as follows; (i) the matter in issue is identical in both suits, (ii) the parties in the suit are the same (iii) sameness of the title /claim (iv) concurrence of jurisdiction and (v) finality of the previous decision.

The 2nd Defendant submitted that the court had warned in the above cited cases that courts have to be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new parties or introducing new causes of action so as to seek the same remedy before the court. In support of this submission, the 2nd Defendant also cited E.T. v Attorney-General & Another [2012]eKLR and Omondi v National Bank of Kenya Limited and Others[2001]E.A 177.

In its submissions, the 1st Defendant submitted that all the issues that have been raised by the Plaintiff in the present suit such as whether the consents from the Housing Finance Company of Kenya and the City Council of Nairobi were obtained to subdivide the suit property were conclusively determined by the lower court whose decision was upheld by the High Court. The 1st Defendant submitted that the Plaintiff's second appeal to the Court of Appeal was struck out. The 1st Defendant submitted that the Plaintiff's fresh suit in the High Court seeking an injunction restraining among others the 1st Defendant herein from interfering with her quiet enjoyment of the suit property was similarly struck out for being *res judicata*.

The 1st Defendant submitted that the suit herein involves the same parties as in the original suit in that, the Plaintiff in the original suit was Paul Kangethe Waruhiu, deceased while the Defendants were the Plaintiffs' deceased husband as the 1st Defendant and the Plaintiff herein as the 2nd Defendant. The 1st Defendant submitted that in HCCC(ELC) No. 101 of 2008, the Plaintiff in the present suit was the Plaintiff, while the Defendants were Paul Kangethe Wahuhiu, deceased, the 1st Defendant in the present suit and the property in dispute was LR. No. 27/144 being a subdivision of L.R 27/52 which is in dispute in the current suit.

The Plaintiff filed her submissions dated 18th December, 2020. The Plaintiff submitted that this claim is based on a finding by the National Land Commission made on 8th April, 2016 that an injustice and fraud had been committed against the owners of suit property among them the Plaintiff and that the 2nd and 3rd Defendants were subdividing the suit property into eight (8) sub-plots in furtherance of their fraudulent scheme.

The Plaintiff submitted that for a plea of *res judicata* to succeed, the elements laid out in the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR must be proved to exist and the matter herein does not carry any of the said elements. The Plaintiff submitted that in the lower court, the 1st Defendant had sought an order for specific performance of the forged Sale Agreement dated 29th December, 1975 and that the issue of fraud in the transfer of the suit property to Paul Kangethe Waruhiu (deceased) and the 2nd Defendant was never the subject of determination in that suit. The Plaintiff submitted further that the remedies sought in the current suit are different from those that were sought in the previous suits. The Plaintiff submitted further that the 2nd, 3rd and 4th Defendants in the present suit were not parties to the previous suits and that the only similarity in the present suit and the previous suits is the suit property. In support of this submission, the Plaintiff cited Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others [2014]eKLR.

The Plaintiff submitted further that this suit is not statute barred. The Plaintiff submitted that the Interested Party made its findings on 8th April, 2016 and that under Section 26 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya causes of action based on fraud accrues on discovery of the fraud. In support of this submission, the Plaintiff cited Daniel G.Mwangi & Another v Leiyan Tumuti [2018]eKLR, Alba Petroleum Limited v Total Marketing Kenya Limited [2019]eKLR, Justus Tureti Obara v Peter Koipeitai[2014]eKLR and Mintina Ene Keton Koponi (Suing as a legal representative of the estate of Keton Ole Koponi Parsena (Deceased)) v Francis Njakwe Gathiari & 2 others[2018]eKLR.

Determination.

There are only two issues arising for determination in the application and the two preliminary objections before me. The first issue is whether the present suit is *res judicata* and the second issue is whether the suit is time barred. I will start with the issue of time bar after which I will consider that of *res judicata*. The limitation period for recovery of land is set out in section 7 of Limitation of Actions which provides as follows:

7. 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.

Section 26 of the Limitation of Actions Act that was relied on by the Plaintiff provides for extension of limitation period in cases of fraud or

mistake. It is on the following terms:

26. Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, 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 Plaintiff while admitting that the limitation period for recovery of land which is what she is seeking in this suit is 12 years from the date of the accrual of the cause of action has contended that her cause of action is based on fraud that was not discovered until 8th April, 2016 when the Interested Party made its findings on her complaint against the 1st and 2nd Defendants. The Plaintiff has contended that by virtue of the provisions of 26 of the Limitation of Actions Act, her cause of action against the Defendants accrued on 8th April, 2016 and as such this suit that was filed on 1st March, 2019 is not time barred.

I have no problem with the Plaintiff's interpretation of the effect of section 26 of the Limitation of Actions Act. The only question that the Plaintiff has not answered to my satisfaction is when she discovered the alleged fraud on the part of the 1st and 2nd Defendants. The evidence before the court shows that the Plaintiff is not truthful when she claims that she discovered the alleged acts of fraud on the part of the 1st and 2nd Defendants on 8th April, 2016. The acts of fraud on which the Plaintiff's claim herein is based relates to the execution of the agreement of sale 29th December, 1975 by the Plaintiff. The Plaintiff has maintained that her signature on the document was forged. The Plaintiff has also taken issue with the subdivision of the suit property and whether the necessary consents were obtained. I am in agreement with the Defendants that these issues were raised in the lower court suit that was filed in 1986 and were determined. The signature of the Plaintiff in the agreement dated 29th December, 1975 was contested in the lower court suit and the Plaintiff even called a document examiner to prove that she did not sign the document. The issue as to whether or not the City Council of Nairobi and Housing Finance Company of Kenya had given consents for the subdivision of the suit property was also before the lower court. These were among the issues that were framed by the lower court for determination and which the court proceeded to pronounce itself on. What this means is that as at the year 1986 when the lower court suit was filed, the Plaintiff was already aware of the alleged fraud involving her signature on the agreement of sale and in the subdivision of the suit property. It is not true therefore that the Plaintiff discovered the alleged fraud in April, 2016. The Plaintiff having been aware of the alleged fraud in 1986, that is the date when her cause of action accrued under section 26 of the Limitation of Actions Act that she has relied on. The Plaintiff's suit filed in 2019 seeking the recovery of land on account of fraud that was within the Plaintiff's knowledge in 1986 is in the circumstances time barred under section 7 of the Limitation of Actions Act.

In Bernard Mugo Ndegwa v James Nderitu Githae & 2 others(supra), the court stated that a party alleging that a suit is *re judicata* must establish the following:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) a court is competent to try such subsequent suit;
- (iv) sameness of the suit property; and
- (v) finality of the previous decision.

I am satisfied from the history of the dispute that I have set out at the beginning of this ruling that the Defendants have demonstrated that this suit is *res judicata*. I must say that apart from adding new parties to the suit and raising the issue of fraud, there is nothing new that the Plaintiff has raised in this suit that was not determined in the previous suits between the parties. The dispute between the Plaintiff and the 1st Defendant was whether the Plaintiff and her deceased husband had sold a portion of the suit property to the 1st Defendant and whether the said portion of the suit property was to be transferred to the 1st Defendant. That issue was determined by the lower court whose decision was upheld in the High Court. The Plaintiff's appeal to the Court of Appeal was struck out. The lower court had ordered that the said portion of the suit property be transferred to the 1st Defendant by the Plaintiff and her deceased husband. The court gave the Executive Officer of the court permission to execute the transfer and any other document necessary for the subdivision of the suit property and transfer of the said portion thereof to the 1st Defendant in the event that the Plaintiff and her deceased husband declined to do so. The suit property was subdivided and a portion thereof registered in the name of the 1st Defendant in terms of the said lower court judgment. The Plaintiff has now come to court to challenge the subdivision of the suit property and registration of a portion thereof in the name of the 1st Defendant. The Plaintiff cannot be allowed to do that while the decisions of both the lower court and the High Court remain unchallenged. The issue of the validity of the agreement of sale between the Plaintiff and her deceased husband and the 1st Defendant and the 1st Defendant's entitlement or right to a portion of the suit property was settled conclusively by the lower. I am in agreement with the Defendants that this court has no jurisdiction to reopen the issues for rehearing a fresh. A similar attempt by the Plaintiff to re-open the same issues for fresh determination in HCCC(ELC) No. 101 of 2008 was rejected by the court who struck out the suit as *res judicata*. There is no evidence that the Plaintiff appealed the said decision of the High Court. The Plaintiff has not persuaded me that there is any reason that would justify departing from the findings of the High Court in HCCC(ELC) No. 101 of 2008.

I have found no merit in the Plaintiff's argument that he did not raise the issue of fraud in the earlier suits and that the parties in this suit are different and as such this suit is not *res judicata*. I am in agreement with the defendants that a party cannot be allowed to escape from the doctrine of *res judicata* by adding more parties or introducing new causes of action into a dispute that had been conclusively determined by a court of competent jurisdiction.

In ELC Misc. Suit No. 113 of 2015, Simon Muchiri Mugambi v Cyrus Murage Kariuki, this court stated as follows:

“The applicant’s suit fits squarely the description of a suit which is *res judicata*. This court is barred by section 7 of the Civil Procedure Act aforesaid from entertaining the present suit. I am in agreement with the submission by the respondent that the inclusion of the interested parties in the present suit does not change the issue before the court for determination which remains the ownership of the suit property. The applicant’s suit cannot also be saved from the grip of *res judicata* by the fact that the applicant has based the present claim on the alleged fraud by the respondent. Explanation 4 to section 7 of the Civil Procedure Act aforesaid provides that:

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In the case of Uhuru Highway Development Ltd. vs. Central Bank of Kenya & Others CA No. 36 of 1996 (unreported), the court stated that:-

“The Plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

In Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court stated that:

“Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit”.

In the same Omondi case (supra), the court cited Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) where the court had stated that:

“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*”

The essence of the doctrine of *res judicata* was well expounded in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR where the court stated as follows:

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

I think that I have said enough to show that the Defendants objection to the Plaintiff’s suit on the ground that the same is *res judicata* also succeeds.

Conclusion:

In the final analysis, I find merit in the 2nd Defendant’s application and the two preliminary objections by the 1st and 3rd defendants. I have however not found good reason why the Plaintiff should be declared a vexatious litigant. She has a constitutional right to bring any dispute to court for determination. The following are my final orders in the matter;

1. The 2nd Defendant’s Notice of Motion dated 30th April, 2019 is allowed in terms of prayer 1 thereof. Consequently, the Plaintiff’s suit as against the 2nd Defendant is struck out with costs to the 2nd Defendant.
2. The Preliminary Objections by the 1st and 3rd Defendants are upheld. Consequently, the Plaintiff’s suit as against the 1st and 3rd Defendants is truck out with costs to the 1st and 3rd Defendants.

DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2021

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Koele h/b for Prof. Lumumba for the Plaintiff

N/A for the 1st Defendant

Mr. Odhiambo for the 2nd Defendant

N/A for the 3rd Defendant

Mr. Maroa for the 4th Defendant

Ms. C. Nyokabi - Court Assistant