



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 61 OF 2019

MICAH CHUMO (suing as the Legal Representative of the Estate of

DAVID CHUMO NGELECHEI – Deceased).....PLAINTIFF

VERSUS

DOUGLAS NGUNJIRI WAICHUNG.....1ST DEFENDANT

HASHAM LALJI PROPERTIES LIMITED.....2ND DEFENDANT

RULING

1. This is a ruling in respect of a Preliminary Objection dated 6th May, 2019, in which the 1st Defendant contends that this suit is res-judicata and is an abuse of the process of court. The parties were directed to canvass the of the Preliminary Objection by way of written submissions.
2. The 1st Defendant filed his submissions on 15th May, 2019. The Plaintiff filed his submissions on 11th June, 2019. I have considered the submissions. There are only two issues for determination. The first is whether this suit is res-judicata and the second is whether this suit is an abuse of the process of the court.
3. The 1st Defendant filed Kitale HCCC No.92 of 2004 against seven Defendants. Three more Defendants applied and were joined in the suit making the total Defendants to be ten. The three who were joined as Defendants were from the family of David Chumo Ngelechei (Deceased). The three new Defendants raised a Counter-Claim in which they contended that they had purchased LR No.838/22 (suit property) from the 2nd Defendant.
4. Kitale HCCC No.92 of 2003 was heard and in a judgment delivered on 10th December, 2014, the 1st Defendant was declared as the owner of the suit property. The Counter-Claim by the 8th to 10th Defendants was dismissed with costs. The Defendants in Kitale HCCC No.92 of 2004 preferred an appeal to the Court of Appeal against the judgment which was delivered on 10th December, 2014. The Court of Appeal in a judgement delivered on 17th January, 2019 dismissed the appeal with costs holding that the judge was right in finding in favour of the Plaintiff (now the 1st Defendant) and dismissing the Counter-Claim by the 8th to 10th Defendants.
5. The 1st Defendant therefore contends that the issues which are now being raised in the present suit were the very ones which were determined in Kitale HCCC No.92 of 2004 and by the Court of Appeal and that the filing of the present suit is an abuse of the process of court.
6. There is no contention that the 8th to 10th Defendants in Kitale HCCC No.92 of 2004 and the Plaintiff in the present suit are from the family of the deceased. In Kitale HCCC No.92 of 2004, the 8th to 10th Defendants were contending that they had purchaseD the suit property from the 2nd Defendant. In other words, they were acknowledging the fact that the deceased had sold the suit property to the 2nd Defendant.
7. In the present suit, the Plaintiff is contending that the deceased never sold that suit property to the 2nd Defendant who would have in turn sold it to the 1st Defendant. The counsel for the Defendants participated in the hearing before Kitale HCCC No.92 of 2004. The Defendants case was closed without the 8th to 10th Defendants testifying as an application for adjournment was rejected.
8. The Plaintiff in this case obtained Limited grant of letters of administration on 29th March, 2019 before filing this suit on behalf of the Estate of the deceased. This is after two months from the date the judgment of the Court of Appeal was delivered affirming the position that

the suit property belonged to the 1st Defendant. This is also after the decree in Kitale HCCC No.92 of 2004 had been executed and the building on the suit property had been demolished.

9. The present suit is therefore clearly an abuse of the process of the court. The Plaintiff watched from the sidelines as the 8th to 10th Defendants who came from the same family litigated and after they lost the battle both in the High court (now ELC) and the Court of Appeal, he has now come to court seeking to revive the suit by claiming that the 8th to 10th Defendants were litigating in their individual capacity and that in any case, they were not acting on behalf of the Estate of the deceased as they did not have grant of letters of administration.

10. In the case of the **Independent Electoral and Boundaries Commission =vs= Maina Kiai & 5 others [2017] eKLR** the Court of Appeal held that:-

"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 disjunctive but conjunctive terms;

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

b) That 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, and

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 Court further explained the role of the doctrine thus:-

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

11. In **Bullen & Leak and Jacob's precedents of pleadings, 12th Edition**, the authors state that: -

".....The term "abuse of the process of court" is a term of great significance. it connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation".

12. In the case of **Muchanga Investments Limited =vs= Safari's Unlimited (Africa) Ltd & 2 others (2009) eKLR** the Court of Appeal had this to say on what constitutes abuse of the process of court:-

"To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice. "

In BEINOSI =v= WYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process. " It can be said in genera/ terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective. "

Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO =v= BAGUDO 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. "

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- a. *"Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.*
- b. *Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*
- c. *Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.*
- d. *(sic) meaning not clear)*
- e. *Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness. "*

13. It is therefore clear that this suit is not only res-judicata but is also an abuse of the process of court. I uphold the Preliminary Objection on the two limbs and proceed to dismiss the Plaintiff's suit together with the Notice of Motion dated 2nd May, 2019 with costs to the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF NOVEMBER, 2021.

E.O. OBAGA

JUDGE

In the virtual presence of:-

Mr.Kiptoo for Mr.Sambu for Plaintiff

Court Assistant – Mercy

E.O. OBAGA

JUDGE