



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. E175 OF 2021

MUMBU HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

SPIRE LIMITED.....1ST DEFENDANT

MBUKABU LIMITED.....2ND DEFENDANT

GEOFREY WEKESA ADVOCATE.....3RD DEFENDANT

KIMANI & MICHUKI ADVOCATES.....4TH DEFENDANT

MINISTRY OF LANDS.....5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

SISINDE FARMS.....7TH DEFENDANT

RULING

1. The Plaintiff filed a Complaint dated 21st May 2021. Together with the Complaint it filed a Notice of Motion dated 21st May 2021 seeking orders:-

a) Spent.

b) Spent.

c) Pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders restraining the 1st Defendant/Respondent either by themselves, their agents, representatives, assigns or anyone acting for or on their behalf or through them from advertising, putting up for sale, selling, charging, transferring, alienating, trespassing onto and or in any other way interfering with the title to the property known as L.R No.7158/312 and L.R No.209/2054 Muthithi road.

d) Spent.

e) This Honourable Court be pleased to issue orders it deems just and fit in the circumstances.

2. In response to the said Application the 1st Defendant filed a Replying Affidavit through its Senior Legal Officer, John Wageche, sworn on the 24th June 2021.

3. In response, the 3rd and 4th Defendants filed a notice of preliminary objection dated 29th June 2021. The grounds are:-

1. That the application dated 21st May, 2021 is res judicata.

2. The honourable court lacks jurisdiction to grant the orders sought by dint of section 7 of the Civil Procedure Act.

3. That therefore the application by the plaintiff/applicant should be struck out with costs.

4. On the 30th June 2021, the court with the consent of parties directed that the Preliminary Objection be canvassed by way of written submissions.

5. The 1st Defendant intimated that they were in support of the 3rd and 4th Defendant's Preliminary Objection dated 29th June 2021.

6. The Plaintiff, 2nd, 5th, 6th and 7th Defendants did not file any submissions.

The 1st Defendant's Submissions

7. They are dated 26th July 2021. Counsel for the 1st Defendant submitted that the Plaintiff filed **HCC E336 OF 2020** seeking injunctive orders restraining the 1st Defendant from selling **LR No.7158/312 Spring Valley** and the parties were similar to the suit before the court with the exclusion of the 7th Defendant. He submitted further that the application was determined and an appeal on the High Court's ruling was also determined by the court of Appeal.

8. He also submitted that while the 7th Defendant was not a party in the previous suit, adding the 7th Defendant herein does not mean that the issues raised herein are new. The issues raised herein are substantially the same issues raised and determined in **HCCC E336 OF 2020**. He relied on the case of **Diocese of Eldoret Trustees (Registered) V Attorney General (On behalf of the Principal Secretary Treasury) & Another [2020] eKLR**.

The 3rd and 4th Defendants' Submissions

9. They are dated 6th October 2021. Counsel submitted that the application raises two issues for determination:-

a. Whether the application is res judicata.

b. Whether the court has jurisdiction thereof.

10. On the issue whether the application is res judicata, he submitted that the application offends Section 7 of the Civil Procedure Act for reason that the application directly and substantially deals with a prayer for injunctive orders which issue was determined by the High Court and the Court of Appeal. He relied on the Supreme Court's decision in **Independent Electoral & Boundaries Commission V. Maina Kiai & 5 Others [2017] Eklr** and a legion of other authorities.

11. He also submitted that the preliminary objection dated 29th June 2021 fits within the requirements of **Mukisa Biscuits Manufacturing Co.Ltd V. West End Distributors (1969) EA 696** since it raises res judicata as a bar to this suit and which is a pure point of law without delving into the merits and demerits of this case. He called upon the court to re-affirm the principle that litigation must come to an end by disallowing the application.

12. On the issue of whether this court has jurisdiction, he submitted that it does not have it thus it can only down its tools for the issue has been determined by other courts of competent jurisdiction. He relied on the case of **The Owners of the Motor Vessel "Lilian's" V. Caltex Oil Kenya Ltd (1989) KLR1**.

13. I have considered the Preliminary Objection and the submissions filed on behalf of the parties. The issue for determination is whether the suit is *res judicata*.

14. It is the 1st Defendant's case that the court has already made a determination in **HCCC E336 of 2020**. In that suit the Plaintiff herein had sought to restrain the 1st Defendant from selling the suit property; LR NO 7158/312 Spring Valley on the grounds that the sale of LR NO 209/2054 Muthithi Road was marred with fraud. The said application was dismissed by Honourable Judge Mativo on 26th February 2021.

15. The Plaintiff dissatisfied with the said ruling proceeded to the Court of Appeal in **Civil Appeal No E068 of 2021**. The said application was dismissed by the Court of Appeal on 7th May 2021.

16. The 3rd and 4th Defendants have taken the same position as the 1st Defendant's

17. As to whether the preliminary objection herein raises a pure point of law. I am guided by the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696** where it was held:

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which is argued as a preliminary point may dispose of the suit"

Sir Charles Newbold P. added as follows page 701:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion"

I am satisfied that the preliminary objection herein raises pure points of law.

18. 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.”

It is not in dispute that the issues herein had been raised by the Plaintiff in HCCC E336 of 2020. A determination has been made on the same in the High Court and in the Court of Appeal.

19. In the case of **IEBC 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 and 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.”

20. Similarly, in the case of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** it was held thus:

“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 agree with the defendants’ submissions that the issue of injunctive orders was directly and substantially in issue in HCCC E336 of 2020 and in the Court of Appeal Civil Appeal E068 of 2021.

21. In the case of **ET vs Attorney General & Another [2012] eKLR** it was held by Majanja Judge that:-

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

22. I find that the inclusion of another party in the name of the 7th Defendant cannot afford the Plaintiff a new cause of action.

23. I find that the notice of motion dated 21st May 2021 is *res judicata* and so is the Plaint dated 21st May 2021.

24. The notice of motion dated 21st May 2021 and the entire suit are hereby struck out with costs to the 1st, 3rd and 4th Defendants for being *res judicata*.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wamukoya for the Plaintiffs

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Mr. Gakunga for the 3rd and 4th Defendants

No appearance for the 5th and 6th Defendants

Steve - Court Assistant