



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC E032 OF 2021

CELINE WAMBUI KIGWE.....PLAINTIFF /APPLICANT

VERSUS

KIGWE LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT

MSAHIBU HOUSING COMPANY LTD .....2<sup>ND</sup> DEFENDANT/RESPONDENT

RULING

1. The 2<sup>nd</sup> Defendant raised the instant Notice of Preliminary Objection dated 12/8/2021 on grounds that;

a. This Court lacks jurisdiction to hear and determine the suit herein as the same is res judicata.

b. There is a prevailing judgment that was issued by a competent Court in Nairobi ELC Case No. 454 of 2013 Kigwe Limited vs Violet Wacuka Ngugi, Mhasibu Housing Company Limited, The Hon. Attorney General and Susan Wanjiru Muriti as an Interested Party.

c. The above judgment was delivered by Hon. Justice L. Komingoi on the 22<sup>nd</sup> July 2021 in regards to the same subject matter as the suit herein.

d. Therefore the Plaintiff'/Applicant's suit is incompetent as it offends the mandatory provisions of Section 7 of the Civil procedure Act cap 21.

e. The application and Complaint dated the 9<sup>th</sup> March 2021 are mischievous and /aimed at frustrating the 2<sup>nd</sup> Respondent from obtaining peaceful possession and occupation of the suit property.

f. The application and complaint dated the 9<sup>th</sup> March 2021 are an abuse of the Court process and should be dismissed with costs.

2. The Plaintiff opposed the Preliminary Objection. She filed her Replying Affidavit sworn on 10/9/2021. Admitting the existence of Nbi ELC Case 454 of 2013, the Plaintiff deposed that she was neither a party to it nor aware of its proceedings. That indeed she has been in occupation and carrying on quarry business on 16 acres of LR No. 10823/13 and when she learnt of the case, she sought to be enjoined therein. That she filed an application dated 25/9/2020 annexed as CWK1 which was opposed. That the case being almost concluded, she withdrew the said application vide a Notice dated 8/3/2021. She maintained that she disclosed the details of that suit in paragraphs 14-18 and 21 of her Complaint and witness statement dated 9/3/2021.

3. On 21/10/2021, directions were taken to canvass the Preliminary Objection by way of written submissions. None of the parties complied. The Court has therefore been denied the benefit to know the submissions of the parties on the objection. That said the Court will proceed to determine the matter based on what is on record.

4. The singular issue for determination is whether the Preliminary Objection is merited.

5. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

**“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

6. At page 701 Sir Charles Newbold, P added:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”**

7. For a Preliminary Objection to succeed the following criteria ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

8. The instant Preliminary Objection impugns the Plaintiff’s suit for being *Res Judicata*.

9. The legal provisions for res judicata are anchored in **Section 7** of the Civil Procedure Act the forgoing;

**“7. Res judicata**

**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.**

**Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation.(2)—For the purposes of this Section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.**

**Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation.(4)—Any matter which might and ought to have been made 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.**

**Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this Section, be deemed to have been refused.**

**Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this Section, be deemed to claim under the persons so litigating.”**

10. There are a wash decisions of this Courts’ determinations on this subject. The Black’s Law Dictionary 10th Edition defines “res judicata” as:-

**“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue,**

**(2) a final Judgment on the merits and**

**(3) the involvement of same parties, or parties in privity with the original parties...”**

11. The doctrine of res judicata has stated has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held 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.”

12. The Court 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 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 foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”** (emphasis mine)

12. It is the 2<sup>nd</sup> Defendant’s position that this suit is res judicata on account of the Judgment in Nairobi ELC Case No. 454 of 2013 **Kigwe Ltd vs Violet Wacuka Ngugi, Mhasibu Housing Co. Ltd and 2 others** delivered on 22/7/2021. The Plaintiff admits that suit but contends that she was not a party to it. That her attempt to be enjoined fell late in the course of the hearing prompting her to withdraw the application of joinder.

13. The test herein is whether the determination in Nbi ELC 454 of 2013 satisfies the criteria in Section 7 above. Firstly, a reading of the prayers in the plaint herein dated 9/3/2021 *inter alia* seeks injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from dealing and interfering with parcel L.R No. 10823/13. Those prayers are compared with the Plaintiff’s prayers in Nbi case *inter alia* that; permanent injunction restraining the Defendants jointly and severally from utilizing or interfering with LR No. 10823/13; cancellation of any entry made on the certificate of title indicating that either Violet Wacuka or Muhasibu Housing Limited owns LR No. 10823/13 and a declaration that LR No. 10823/13 is owned by Kigwe Ltd. In my view, the prayers are one and the same and precisely impugn the 2<sup>nd</sup> Defendant’s title to the suit land.

14. The next consideration is what was the outcome of the ELC 454 of 2013? The Court dismissed the Plaintiff’s suit and upheld the 2<sup>nd</sup> Defendant’s counter claims as follows;

**“...In conclusion I find that the Plaintiff has failed to prove its case against the Defendant on a balance of probabilities and it is dismissed with costs to the Defendant.... Accordingly Judgment is entered for the 2<sup>nd</sup> Defendant in terms of the counterclaim as follows:-**

**a. That a declaration is hereby issued that the 2<sup>nd</sup> Defendant (Plaintiff) by way of counter claim is the legal and bona fide registered proprietor as the lessee from the Government of Kenya for the remainder of the term of 943 years from 1<sup>st</sup> June 1964 of all that parcel of land known as LR NO. 10823/13, IR No 140285 containing measurements 40.52 Ha or thereabouts.**

**b. A permanent injunction is issued restraining the Defendant by way of counter claim whether by itself or through its authorized or unauthorized disclosed or undisclosed directors, officials, agents or other representatives or any other persons from interfering with the right of the Plaintiff in this counter claim to quiet possession and enjoyment of the suit land...”**

15 From the above highlight, it is not in doubt that the subject matter in both suits is LR No. 10823/13 and the cause of action in both suits was founded on fraud. The ultimate prayer in the instant suit target revocation of the 2<sup>nd</sup> Defendant’s title to suit land. If this Court were to hear and determine a similar plea, it would amount to sitting on appeal on the above findings based on similar cause of action. Consequently the first limb of Section 7 Civil Procedure Act above is met.

16. The second limb is the capacity of parties to sue in the respective suits. The criteria is that the matter should be between the same parties or parties under whom they or any of them claim. According to the Plaintiff, her late father Charles Kigwe registered the suit land in the 1<sup>st</sup> Defendant’s name in trust for his children. In disputing any adverse ownership, it is correct to state that any member of the late Charles Kigwe can therefore pursue their claim as Plaintiff(s). The 2<sup>nd</sup> Defendant as already mentioned was sued in a similar capacity in ELC 454 of 2013. Indeed the Plaintiff and the 1<sup>st</sup> Defendant in ELC 454 of 2013 admitted that they were biological siblings. It is not surprising therefore that the Court in its final disposition, specifically order **b** issued a permanent injunction against Kigwe Ltd and **anyone that would claim under it** in the manner specified therein.

17. Kigwe Ltd supported the Preliminary Objection in its statement of defence filed on the 18/10/2021 when it pleaded under para 3 that;

**“The Honourable Court herein lacks jurisdiction to hear and determine the suit herein as the same is resjudicata.”**

The meaning of this is that the 1<sup>st</sup> Defendant under whom the Plaintiff has brought a suit under has accepted that the suit land was sold legally to the 2<sup>nd</sup> Defendant and that the issue of ownership has been heard determined and adjudicated fully in favour of the 2<sup>nd</sup> Defendant. In ELC 454 of 2013, the 1st Defendant, Violet Wacuka, Susan Wanjiru Muriti litigated for the land whose roots was founded in Kigwe Limited. The land held by the Company is alleged to have been held in trust for the contestant’s late mother and mother in law respectively. Celine Wambui Kigwe claim is predicated on the said 100 acres registered then in Kigwe Limited. It is my view that the parties being related are suing under the same title

18. The last test is whether matter in issue was heard and finally determined in the former suit by a Court of competent jurisdiction. There is no doubt that the former suit has been heard and determined vide the Judgement dated 22/7/2021 by a competent Court with jurisdiction. It is not open for this Court therefore to entertain this suit in light of the said outcome. The avenues that a litigant can pursue are either appeal or review of the Judgement.

19. In the persuasive authority of **E.T.V –v- Attorney General & Another [2012] eKLR** Majanja J stated 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.”**

20. The Supreme Court in the case of **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016]eKLR** held that the doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. (emphasis mine)

21. Having considered the objection, the responses and all the materials laid before the Court, the Court is persuaded that this is a case that runs afoul to the doctrine of resjudicata so much so that the suit herein is incompetent. The objection succeeds and the suit be and is hereby dismissed with costs to 2<sup>nd</sup> Defendant payable by the Plaintiff.

22. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Masore Nyangau for Plaintiff/Applicant

Magiri for 1<sup>st</sup> Defendant

Ms. Wachuka for Defendant/Respondent

Ms. Phyllis – Court Assistant