



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 394 OF 2016**

**TERESIA MURUGI MURIGI.....PLAINITFF**

**VERSUS**

**PHYLIS WAIRIMU KONCHELLA**

**LAND REGISTRAR**

**MOMBASA DISTRICT LANDS REGISTRY.....DEFENDANTS**

**RULING**

***(Plaintiff filing suit seeking specific performance from 1<sup>st</sup> defendant on a sale of land transaction; there having been a previous suit where it was held that title to the suit land vests in the 3<sup>rd</sup> defendant; clear therefore that the plaintiff is litigating under the alleged title of the 1<sup>st</sup> defendant; suit res judicata and struck out)***

1. This ruling is in respect of a preliminary objection raised by the 3<sup>rd</sup> defendant. It is the position of the 3<sup>rd</sup> defendant that this suit is res judicata.

2. To put matters into perspective, this suit was commenced through a purported plaint. I have used the word “purported” deliberately for the reason that the plaint in the file is not dated nor signed. If I am to assume that this is a good plaint, the said plaint was against two defendants, being Phylis Wairimu Konchella and the Land Registrar, Mombasa. it is averred that sometimes on 15 April 2014, the 1<sup>st</sup> defendant sold to the plaintiff the Plot MN/III/6903 CR No. 53285 at a price of Kshs. 6,500,000/=. It is contended that contrary to the agreement, the 1<sup>st</sup> defendant has failed to effect transfer to the plaintiff. In the suit, the plaintiff wishes to have an order of specific performance directed at the 1<sup>st</sup> defendant. That purported plaint was amended on 23 March 2017. The plaint was amended so that it reads that the 1<sup>st</sup> defendant executed a transfer of the property to the plaintiff which the plaintiff lodged at the Mombasa Land Registry but the Land Registrar declined to register and issue title to the plaintiff. The plaintiff now wished to have an order directing the 2<sup>nd</sup> defendant (the Land Registrar) to register and issue title to the plaintiff. Through an application filed on 14 May 2018, Kevin Donald Binnie sought orders to have him enjoined to these proceedings. He did point out that through the suit Mombasa High Court Matrimonial Cause No. 6 of 2014, the suit property was vested in him. He disclosed that he was married to the 1<sup>st</sup> defendant but they later divorced after which the suit land was vested in him following the matrimonial suit. He mentioned that it was during the pendency of the matrimonial cause that the 1<sup>st</sup> defendant sold the suit property to the plaintiff. This application was allowed and the said Kevin Donald Binnie enjoined to the suit as 3<sup>rd</sup> defendant through an order dated 1 October 2018. He subsequently filed a defence and counterclaim vide which he asserted ownership of the suit property and provided the history of it as I have described above. He has sought a declaration that he is the bona fide owner of the suit property.

3. It will be noted that in this suit, the 3<sup>rd</sup> defendant contends that this suit is res judicata. I have gone through the submissions of counsel for the 3<sup>rd</sup> defendant and the rival submissions of counsel for the plaintiff.

4. The concept of res judicata is enshrined in Section 6 and 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :-

**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.*

5. The above does not need much elaboration for it is the principle of the law that litigation should come to an end and that where rights have been determined through previous litigation, fresh litigation over the same rights should not be entertained.

6. In the instance of our case, it is apparent to me that the plaintiff seeks orders of specific performance based on the contention that she has acquired the suit property from the 1<sup>st</sup> defendant. It is thus apparent to me that the plaintiff seeks to claim title to the suit property on the basis that the 1<sup>st</sup> defendant holds a title to it which is capable of being transferred to the plaintiff. However, it has been held, and that is not in dispute, in the suit Mombasa High Court Matrimonial Cause No. 6 of 2014, that the title to the suit property vests in the 3<sup>rd</sup> defendant and not the 1<sup>st</sup> defendant. I have not been shown any evidence of an appeal from that decision. Given that position, the plaintiff is thus litigating under the alleged title of the 1<sup>st</sup> defendant, but as I have pointed out, it has already been held that the 1<sup>st</sup> defendant has no title to the suit land. I therefore do not see how the plaintiff can succeed in her suit for specific performance, for the 1<sup>st</sup> defendant has no title to transfer to her, since it has already been decided in a previous suit that she is not the owner of the suit property. In my view, this suit is res judicata, for the reason that the issue of whether or not title to the suit land ought to vest in the 1<sup>st</sup> or 3<sup>rd</sup> defendant has already been decided. The plaintiff may not have been a party in the suit between the 1<sup>st</sup> and 3<sup>rd</sup> defendant, but that suit involved a party under whose title the plaintiff claims, and the res judicata rule thus applies as noted in Section 7 of the Civil Procedure Act.

7. It is also clear to this court that the plaintiff's suit cannot succeed for the plaintiff seeks orders of specific performance from a person who is incapable of transferring title to him. There is no need of wasting any of the court's time on such a suit, for it is clear as the light of day, that the same cannot succeed even if we put aside the arguments on res judicata.

8. It is for the above reasons that I strike out this suit. With the striking out of the suit, there is no purpose served in the counterclaim of the 3<sup>rd</sup> defendant and the same is also struck out. The plaintiff is of course at liberty to pursue a suit for refund which will be considered on its merits if at all it is filed.

9. The only issue left is costs. The plaintiff may have thought that the 1<sup>st</sup> defendant had title and one can thus argue that she was perfectly entitled to file this suit seeking orders of specific performance. Having that in mind, I will order each party to bear his/her costs.

10. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JANUARY 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mrs. Waswa for the 2<sup>nd</sup> defendant.

Mr Odundo holding brief for Mrs. Mutua for 3<sup>rd</sup> defendant.

Court Assistant; David Koitamet.