



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 45'A' OF 2019

CHARLES NJIHIA NGANGAPLAINTIFF

VERSUS

JOSEPH KIMANI GITARA & 22 OTHERSDEFENDANTS

RULING

1. By Notice of Motion dated 20th February 2020, the defendants seek the following orders:

1. *THAT this Honourable Court be pleased to strike out the suit against the Defendants/Applicants as the suit is time barred.*
2. *THAT the Honourable Court be pleased to strike out the suit against the Defendants/Applicants as the suit is consequently res judicata.*
3. *THAT in any case the suit is bad in law, vexatious and amounts to an abuse of the court process.*
4. *THAT the cost of this application be awarded to the Defendants/Applicants against the Plaintiff/ Respondent.*

2. The application is supported by an affidavit sworn by John Gichuru Mwangi who is one of the defendants/applicants. He deposed that the issues raised in this suit were determined in Nakuru CMCC No. 516 of 2001 and further that the plaintiff filed another suit being Nakuru CMCC No. 217 of 2018 raising similar issues as those in this suit but which suit was later withdrawn. He further deposed that the issues raised in this suit arose in the year 1994 and that the suit is therefore time barred.

3. The plaintiff who is appearing in person opted not to file any replying affidavit, instead responding to the application through his submissions. The application was canvassed through oral submissions. In her submissions, Ms Wairimu, learned counsel appearing for the applicants argued that the respondent had filed many suits on the subject matter including Nakuru CMCC No. 516 of 2001 which according to her was dismissed through a ruling delivered on 21st August 2001. She therefore urged the court to allow the application.

4. In response, the respondent argued that save for Nakuru PMCC No 24 of 1990 in which he was a defendant and which was abandoned, all the cases referred to by the applicants do not relate to him directly. He urged the court to dismiss the application.

5. So as to better appreciate the circumstances surrounding the application, I will give a brief overview of the plaintiff's case as pleaded in the plaint. The plaintiff averred therein that he is a shareholder of a land buying company known as Tayari Farmers Company Limited. That he holds one fully paid up share pursuant to which he was allocated two plots by the company in the year 1984: plot 623 which measures 1.5 acres and plot 153 which measures 50 by 100 feet. That he constructed a timber house on plot 623 but in the year 2001 a group of people invaded the plot, evicted his workers and destroyed his house as well as the crops. Owing to insecurity, he was unable to continue with any activity on the plot until the year 2012 when he went to check on it only to find that it had been illegally and fraudulently subdivided into 26 plots namely Mau Summit/Molo Block 7/1529 through to 1554 (hereinafter "the suit properties") and titles in respect thereof issued to the 1st to 22nd defendants. That the subdivision was done in collusion with the 23rd defendant and that he issued a notice to vacate but the 1st to 22nd defendants did not comply. He further averred that save for Nakuru PMCC No 24 of 1990 in which he was defendant and which was abandoned, there have been no previous proceedings between him and the defendants over the same cause of action. He therefore seeks judgment against the defendants for a declaration that he is the rightful owner of the suit properties, cancellation of the defendants' titles in respect of the suit properties, eviction of the defendants and a permanent injunction restraining the defendants from selling or alienating the suit properties or interfering with his ownership and enjoyment thereof.

6. A perusal of the prayers sought in the application shows that the issues raised in it are whether the suit is time barred, whether the suit is *res judicata* and lastly whether the suit is an abuse of the court process.

7. On the contention that the suit is time barred, **Section 7 of the Limitation of Actions Act** provides:

7. Actions to recover land

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.

8. I note that this suit was filed on 15th May 2019 and that the plaintiff seeks judgment for cancellation of the defendants' titles and their eviction from the suit properties. Besides the statement made in the supporting affidavit that the issues raised in the suit arose in the year 1994, no arguments were advanced to support that hypothesis. It has therefore not been shown that the cause of action arose in 1994 or that twelve years had passed as at the date the suit was filed. I find no merit in the contention that the suit is time barred.

9. It is also argued that the suit is *res judicata*. The doctrine of *res judicata* has statutory expression at **Section 7** of the **Civil Procedure Act** which provides:

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.

10. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

11. The applicants have referred to two suits in their arguments on *res judicata*: Nakuru CMCC No. 516 of 2001 and Nakuru CMCC No. 217 of 2018. They have however admitted that Nakuru CMCC No. 217 of 2018 was withdrawn and consequently *res judicata* does not apply in respect of it since the issues therein were not heard and conclusively determined on the merits. Regarding Nakuru CMCC No. 516 of 2001, it is argued that the suit was dismissed through a ruling delivered on 21st August 2001. I have however not seen any evidence of such a dismissal. Instead, what I see from the material annexed by the applicants is a ruling dated 21st August 2001 pursuant to which an application for an interlocutory injunction was dismissed. Further, a reading of the ruling does not reveal the plot number of the "suit property" in the said suit. It has therefore not been demonstrated that the said suit was finally determined on the merits or that the issues raised herein are the same as those that were raised in that suit. In short, it has not been shown that *res judicata* is applicable with regard to Nakuru CMCC No. 516 of 2001. Similarly, it has not been shown that the suit is an abuse of the court process.

12. In view of the foregoing discourse, I find no merit in Notice of Motion dated 20th February 2020. I dismiss the application with costs to the plaintiff.

13. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE