REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC. NO. 129 OF 2019

SAMMY K. SAMICH.....PLAINTIFF

VERSUS

ABRAHAM K. KIPTANUI.....1ST DEFENDANT

DAVID K. MARITIM.....2ND DEFENDANT

AND

VICTOR KIMITAI MATELONG.....PROPOSED INTERESTED PARTY

RULING

This ruling is in respect of an application dated 4th February 2020 by the 1st Defendant/applicant seeking for the following orders:

a) That the orders issued on 3rd December 2019 be stayed pending hearing and determination of this application inter partes.

b) That the orders issued on 3rd December 2019 be varied, lifted and/or set aside pending the hearing and of the substantive notice of motion dated 13th November 2019.

c) That the Honourable court be pleased to set aside the ex parte proceedings herein taken on 3rd December 2019.

d) That the Honourable court be pleased to grant leave to the defendant/applicant to file their response/objection to the plaintiff's application dated 13th November 2019 or upon such conditions as are fair and just in the circumstances.

Before the hearing of the application by the 1st defendant applicant an interested party filed an application dated 7th January 2020 seeking for orders that;

a) The orders of this Honourable court issued on 3rd December 2019 be stayed pending the hearing and determination of this application inter parties.

b) There be an order to enjoin one **Victor Kimutai Matelong** to these proceedings as an interested party/ 3rd defendant in this suit.

c) The orders made on 3rd December 2019 in favor of plaintiff and the proceedings commenced herein be stayed forthwith pending the inter parties hearing and determination of this application.

d) The orders made on 3rd December 2019 be set aside and or/ vacated.

e) There be an order of status quo and/or injunctive orders in favor of the interested party pending the hearing and determination of this suit.

This matter came up for mention on 27th February 2020 when counsel for the 1st defendant indicated to the court that he was not opposed to the application dated 7th January 2020 by the proposed interested party. This essentially means that they are not opposed to the application for enjoining the interested party one **VICTOR KIMUTAI MATELONG** and setting aside the ex parte orders issued on 3rd December 2019.

Counsel for the proposed interested party indicated that he was opposed to the application by the 1st defendant dated 4th February 2020 for setting aside the ex parte orders issued on 3rd December 2019 and an order to be allowed to respond to the application.

The court notes that the proposed interested party at the time of opposing the application was not even a party to the suit as he has not yet been enjoined as an interested party. The application that he is opposed to, is similar to the one that the 1st defendant is seeking for so I do not understand the logic behind this opposition.

The plaintiff however filed submissions in opposition to the enjoinment of the interested party to the suit as he has not shown any stake or interest in the suit.

The 1st defendant further filed a notice of preliminary objection on the ground that the plaintiff's suit is res judicata and therefore should be struck out.

INTERESTED PARTY'S SUBMISSION

Counsel for the interested party submitted that the applicant/ interested party is affected by the order of this honourable court made on 3rd December 2019 as he is currently in possession and occupation of the suit property. Further that the suit was fraudulently filed by the plaintiff who has no locus standi over the suit property as the true beneficial owner of the suit property is the deceased Hellen Chepkoech Matelong.

Counsel also submitted that the 1st defendant bought the suit land on 16th September 1986 from the deceased plaintiff Ayub Arap Chepkwony of which the interested party took possession of the suit property on the 12th November, 2016 and has been in occupation and use of property until the date of her demise on 6th October 2019 but her estate is still in occupation and use of the land.

Mr. Kigen, Counsel for the interested party submitted that at the time of selling the suit property to the 1st defendant, the deceased Ayub Arap Chepkwony had not obtained ownership documents but agreed to facilitate the transfer of interest to purchase on receipt of the same.

Counsel relied on the case of **Pastor Antony Makena Chege vs Nancy Wamaitha Magak and another (2015) eKLR** where the court stated that

> *"Joinder of parties comes with it unfettered discretion on the part of the court and respondents should have realized that the bank is a necessary party and applied for its joinder.*

Mr. Kigen Counsel for the interested party further cited the case of **Julius Gatoto Maina v Johnson Gaitho Wanjohi & 3 others [2018] eKLR** where Gacheru J stated that:

> *" it is evident that **Order 1 Rule 10(2)** for the **Civil Procedure Rules**, allows the court to order for joinder of any party at any stage of the proceedings so long as the said party is necessary for complete and effectual adjudication of the disputes before the court.*

Counsel therefore urged the court to allow the application for enjoinment of the interested party.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the proposed interested party must establish that he has an actionable interest in the matter and a right to be in the suit. That the interest sought to be protected must be within the zone of interests meant to be regulated by the statutory or constitutional guarantee question.

Mr. Kigamwa Counsel for the plaintiff submitted that the proposed interested party has not met that criterion. Counsel submitted that from a cursory glance at the agreement purported to be the gist of the interest, the 1st defendant is indicated as selling land as an owner but the 1st defendant has no title hence cannot exercise proprietorship rights.

It was counsel's further submission that the proposed interested party must demonstrate that the estate of the late Hon. Ayub Chepkwony has privity of contract to the agreement he seeks to enforce.

Counsel relied on the case of **Robert Githua Thuku v William Ole Nabala & 9 others [2018] eKLR** where the Court of Appeal held that:

> *"Nonetheless, as with any inclusion to a suit, the party seeking to be joined must demonstrate an interest in the matter. The circumstances of the suit must justify the joinder. In addition, the joinder should not be intended to vex the other parties or convolute the matter (See. **Attorney General vs. Kenya Bureau of Standards & Another [2018] eKLR**). Consequently, the appellant was in this case required to first and foremost, demonstrate that he had an actionable interest and a right to be in the suit; what is otherwise known as locus standi. As per the decision of this Court in the case of **Alfred Njau & 5 others v. City Council of Nairobi [1983] eKLR;** locus standi was defined thus:*
>
> *"The term locus standi means the right to appear in court and, conversely, as is stated in Jolowitt's Dictionary of English Law, to*

say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding"

What gives a person a right to be heard or standing before Court is well defined by the ***Black's Law Dictionary, 9th Edn,*** *which states that to have standing, one must show that:*

1) The challenged conduct has caused him actual injury and;

2) The interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.

Put simply, the party must not only show the injury suffered, but that the injury is being unfairly visited upon him as a valid holder of a legal, possessory or beneficial interest. In the present case, the appellant asserted his right as having derived from his purchase of a portion of the suit property, an assertion that was denied by the 1st respondent.

In the circumstances, it behoved the appellant to substantiate his interest before the trial court. However, the record shows no such proof was provided as no title document was furnished as proof of the appellant's proprietorship in the land. At the very least, not even a sale agreement was ever produced to show that the purchase ever took place. As such, the appellant failed to establish his actionable claim or standing in the matter and the trial court cannot in the circumstances be faulted for declining the joinder. The appellant failed to prove that he was adversely affected and a bona fide party entitled to be joined in the suit and the trial court was right in declining to join him to the suit."

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

1ST DEFENDANT'S SUBMISSION ON THE PRELIMINARY OBJECTION

Counsel for the 1st defendant submitted that the suit is res judicata as per the provisions of section 7 of the Civil Procedure Act which stipulates as follows:

"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."

Counsel relied on the case of **DSV Silo vs the Owners of Sennar (1985) 2 All ER 104 as cited with approval in Bernard Mugi Ndegwa vs James Nderitu Githae & 2 others (2010) eKLR and Henderson vs Henderson (1843) 67 ER 313 has also been cited where res-judicata was described as follows;**

"….where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time".

Counsel also relied on the case of **Attorney General & another ET vs (2012) eKLR** where it was held that;

"The courts must always be vigilant to guard 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata…..".

Ms. Bett Counsel for the 1st defendant submitted that the plaintiff should not be allowed to lodge a similar claim after 15 years which had been adjudicated upon by a competent court and no appeal having been lodged against the judgment.

Counsel submitted on the grounds that make the suit res judicata as follows:

a) That the matter directly and substantially in issue is the same as **NAKURU HCCC NO. 537 OF 2000 HON. AYUB CHEPKWONY VS ABRAHAM KIPTANUI** which plaint was annexed in the list of documents? The plaint was for a claim for ownership/trespass of the suit property **LR. PLOT NO. 133 BAHARINI SETTLEMENT SCHEME** by the defendants. That the same was heard and determined by Justice D. M Rimita hence this suit should be dismissed as it is a replica of the previously dismissed suit.

b) That the parties are similar to the previous suit that was dismissed being **NAKURU HCCC NO. 537 OF 2000 HON. AYUB CHEPKWONY VS ABRAHAM KIPTANUI.** In the current suit the plaintiff acts as the personal representative of the estate of the late **HON. AYUB CHEPKWONY** and the only party that has been added to the current suit is the 2nd defendant.

c) That this matter had been heard and determined vide NAKURU HCCC NO. 537 OF 2000 by Justice Rimata who found and held in the ruling that the suit property had been sold to the 1st defendant for a consideration of Kshs. 500,000/ and urged the court to find that the suit is res judicata.

On the 2nd issue as to whether the suit is bad in law, counsel submitted that the suit is time barred pursuant to section 7 of the Limitation of Actions Act which provides that:

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.

Counsel therefore submitted that it is mischievous for the plaintiff to lodge a claim after 15 years and the same should be struck out. Counsel relied on Order 2 Rule 15 of the Civil Procedure Rules which provides as follows:

15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

Ms. Bett submitted that this case is an abuse of court process and should therefore be struck out. She further relied on the case of **Joseph Ndung'u Njoroge v Lilian Atieno Siwolo [2015] eKLR** where it was held that proceeding with a case that is res judicata would embarrass the court.

PLAINTIFF'S SUBMISSION ON RES JUDICATA

Mr. Kigamwa Counsel for the plaintiff submitted that the 1st defendant applicant hinges the preliminary objection on res judicata on a ruling on an interlocutory application which was delivered by Justice Rimita in **NAKURU HCCC NO. 537 OF 2000 HON. AYUB CHEPKWONY VS ABRAHAM KIPTANUI.** Counsel submitted that the suit was not heard on merit as the Judge did not address the issue in the main suit by taking oral evidence. That no final judgment was delivered on the matter hence res judicata cannot apply.

Counsel relied on the case of **Philes Nyokabi Kamau v Industrial & Commercial Development Corporation [2017] eKLR** where the issue of res judicata was discussed

On the issue of limitation of Actions, Counsel submitted that the plaintiff is not aware of the agreement that the 1st defendant is referring to and hinging the application on. That the objection on limitation must be pleaded in the defence and that the 1st defendant is yet to file a defence.

Counsel relied on the case of **Lulu Drycleaners Ltd & another v Kenya Industrial Estates & another [2005] eKLR** where the Court of Appeal held that

*'We note from the defence that the respondents failed to specifically plead the issue of limitation. As such they were not entitled to rely on that defence during the trial of the suit unless they amended their defence which they did not. We agree, therefore, with Mr. Odunga that the learned Judge erred in allowing the issue of limitation to be raised in the final submission when it had not been pleaded at all. See **ACHOLA & ANOTHER V. HONGO & ANOTHER [2004] IKLR 462'.***

Counsel therefore urged the court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

The first issue for determination is whether the suit is res judicata and if the answer is in the affirmative then there will be no need of dealing with the application for joinder of an interested party and for setting aside the ex parte orders issued on 3rd December 2019. The Court of Appeal in the case of Uhuru **Highway Development Limited** that:

"..I would be content to follow the following dictum of Wilgram V-C, in Henderson vs Henderson (1843) 67 E R 313, 319, which the Privy Council described as the locus classicus of this aspect of res judicata, in Yat Tung Investment Co. Ltd. Vs Dao Heng Bank Ltd. (1975) AC 581, 590:

'Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not(except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'."

From the annexed copy of plaint of **NAKURU HCCC NO. 537 OF 2000 HON. AYUB CHEPKWONY VS ABRAHAM KIPTANUI,** copy of defence dated 19th January 2001, ruling date 23rd March 2001 and a **copy** of decree dated 25th January 2005, it shows that there is similarities of the current suit with the above mentioned suit which was struck off by the court.

It is not in dispute that the plaintiff in this case is a legal representative of the estate of the Late Hon. Ayub Chepkwony. It is also not in dispute that the defendant in this suit is Abraham Kiptanui and that the suit land in question is **LR. PLOT NO. 133 BAHARINI SETTLEMENT SCHEME** which is similar to the previous suit. The current suit has an additional one party as the 2nd defendant which does not change the application of the doctrine of res judicata.

Courts are vigilant with a keen eye on parties and counsels who would want to circumvent the doctrine of res judicata. Introduction of a new party for camouflage does not sanitize the claim if it had been filed before a competent court and heard and determined.

Section 7 of the Civil Procedure Act codifies the law on res judicata and there are many cases dealing with res judicata which enumerates the the essential ingredients of the doctrine for example, **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR**; **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263 and John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. The four ingredients are:

a) Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?

b) Are the parties in the present suit the same as those who litigated the original claim?

c) Did the Court which determined the original claim have jurisdiction to determine the claim?

d) Did the original action receive a final judgment on the merits?

In response to the four ingredients of res judicata in this case, the previous litigation had identical claims to the current one, the parties to the suit are similar except the additional party who is the 2nd defendant and the plaintiff being the legal representative of the estate of the late Hon. Ayub Chepkwony. This does not change the parties. Further the claim is in respect of the same suit of land namely **LR. PLOT NO. 133 BAHARINI SETTLEMENT SCHEME.**

On the issue as to whether the original action received a final judgment on merits, the application was heard inter partes in the presence of both counsel for the plaintiff and the defendant whereby a ruling and decree issued striking out the suit with costs to the defendant. A decree was issued and the same was not appealed against to date.

What is the effect of a suit that has been struck out after a hearing of an application? If a court hears a preliminary objection and strikes out a suit, does it amount to a final determination of the suit? There are certain cases which when struck out amounts to a final determination of the suit but others can be struck out for lack of jurisdiction which essentially can be allowed to be filed in the right court or forum. This is not the case in the current suit.

On the need for litigation to come to an end at some point the Court of Appeal held in the case of in ***Kivanga Estates v. National Bank of Kenya, CA No 217 of 2015, that*** :

"We entertain no doubt whatsoever that by engaging nearly all levels of the court system for the last 27 years, filing one suit in one court after the other, moving from Embu, Meru, to Nairobi, amounts to gross abuse of the process of the court.

The learned judge properly balanced the two competing interests: the public interest in ensuring that there is finality in litigation (and that a party should not be „stung? twice in the same matter), and the private interest of a party guaranteed by the Constitution to access the courts. He kept in mind the fact that in all the circumstances, the appellant was misusing or abusing the court process by seeking to raise before it the issue which it had raised before in previous suits, some of which may still be pending. The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it. There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations."

This is exactly what the plaintiff wants to have a second bite at the cherry by filing this case. Litigation must come to an end at some point. If the plaintiff was aggrieved by the ruling which was delivered in 2001, then he should have taken the necessary steps. This is more than 19 years after the fact, what was the plaintiff doing all this time or the plaintiff was not aware that courts keep records. This would not pass as it amounts to abuse of court process.

Having found that the suit is res judicata, there would be no need to enjoin the interested party to a non-existent suit, if he has a claim against

any party, then he knows what to do. This also applies to the application to set aside the ex parte orders issued on 3rd December 2019 by both the proposed interested party and the 1st defendant.

I find that the preliminary objection on the ground that the suit is res judicata has merit and is therefore upheld. The suit is struck out with costs to the 1st defendant.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY, 2020

M. A. ODENY

JUDGE