



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 13 OF 2017**

**DANIEL KARANJA MUTITU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SMART SHOP LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. Vide a ruling delivered on the 17<sup>th</sup> January 2019, the Court found that there was no valid suit before it in the absence of a Board of Directors' Resolution to commence the suit, following which the suit which had been commenced by Smart Shop Limited, (Plaintiff), against Daniel Karanja Mutitu (Defendant), vide the Originating Summons dated 11<sup>th</sup> July 2011 and amended on the 19<sup>th</sup> December 2014 was struck out with costs.
2. The said ruling contained no directions on the Defendant's counter claim to which the present Application dated the 4<sup>th</sup> November 2019 was filed pursuant to the provisions of Section 1A, 1B, 3A and 7 of the Civil Procedure Code, Order 50 Rule 1 of the Civil Procedure Rules as well as all enabling provisions of the law wherein the Applicant sought for the counter-claim filed by Daniel Karanja Muttu on the 10<sup>th</sup> February 2016 be struck out with costs for being Res Judicata. They also sought for costs of the Application.
3. The Respondent on the other hand filed his Replying affidavit dated the 14<sup>th</sup> January 2020 in which they sought for the Application to be dismissed as the same was inept, bad in law, brought in bad faith and was an abuse of the Court process.
4. The matter was disposed of by way of written submissions wherein the Applicants submitted that the Application was brought under Section 7 of the Civil Procedure Act. That prior to the filing of the present suit, the Plaintiff's father Mutitu Ruraya had filed two suits being Nakuru HCC C No. 188 of 1974 and Nakuru HCCC No. 16 of 2009 against one Wilson Mugwe Weru which suits touched on LR No. Nyandarua/Kanyagia/13 which was later subdivided resulting to L R No Nyandarua/Kanyagia/596 and 567.
5. That on the 22<sup>nd</sup> January 1980, Nakuru HCCC No. 188 of 1974 was dismissed for want of prosecution while Nakuru HCCC No. 16 of 2009 was struck out for being time barred and Res Judicata, on the 5<sup>th</sup> February 2010.
6. A Suit was filed by Smart Shop Limited wherein Daniel Karanja Mutitu filed a counter claim in his capacity as the legal representative of the estate of Mutitu Ruraya. The orders he so sought were similar to the issues raised by the Plaintiff's father in Nakuru HCC C No. 188 of 1974 and Nakuru HCCC No. 16 of 2009 where no Appeal was lodged.
7. Their further submission was that the Application for reconstruction of Nakuru HCCC No. 188 of 1974 vide a Misc No. 221 of 2010 therefore could not be considered as an Appeal in the findings made in the two rulings in HCCC No. 16 of 2009. That further the said Application did not change the fact that the counterclaim was Res Judicata. While placing their reliance on the Court of Appeal decision in **Njue Ngai vs Ephantus Njuru & Another [2016] eKLR**, they submitted that the Respondent's Counter-claim in this suit be dismissed.
8. The Defendant's submission on the other hand was that the elements of the provisions of Section 7 of the Limitation of Actions Act, as held by superior Courts, were to be applied conjunctively rather than disjunctively and therefore they must all be present before a suit or an issue could be deemed as being Res Judicata on account of a former suit. Reliance was placed in the case of **Kenya Commercial Bank Ltd vs. Benjoh Aamalgamated Ltd (sic)**
9. That the grounds relied upon by the Applicant that the counterclaim had sought the same prayers which the Plaintiff had sought in Nakuru HCC C No. 188 of 1974 and Nakuru HCCC No. 16 of 2009 was not true for reasons that the ruling in Nakuru HCCC No. 188 of 1974, was made on the assumption that that there had been a final and valid judgment in Nakuru HCCC No. 188 of 1974.
10. That since the High Court in Misc No. 221 of 2010 made a determination that there be a reconstruction of the Court file in Nakuru

HCCC No. 16 of 2009, the Defendant's counterclaim in the present matter could only be termed as Res Judicata once the matter in Nakuru HCCC No. 188 of 1974 was heard, concluded and a judgment delivered.

11. In so submitting they stated that both the issues and the parties before the Court were different and as such the counterclaim could not be termed as Res Judicata.

12. Their further submission was that there be stay of the counterclaim hearing pending the hearing and determination of Nakuru HCCC No. 188 of 1974 and that the Application had no merit and the same was to be dismissed.

### **Determination**

13. On the onset, I must point out that the ruling of 17<sup>th</sup> Day of January 2019 purely addressed the issues raised in the Preliminary Objection dated 24<sup>th</sup> September 2018, which was basically to strike out the suit, on the ground that it was incurably defective for lack of resolution by the Plaintiff Company to institute the same and therefore the Court had no jurisdiction to hear and determine it. There were no prayers affecting the Counter Claim, and therefore the Court addressed itself to the issues raised therein only.

14. Having considered the submissions herein submitted, the and authorities cited thereof, I find the matter for determination as being:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the present suit is Res Judicata.

15. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

*“So far as I am aware, 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.”*

16. In this Application, the Applicant has raised a Preliminary Objection seeking that the Respondent's Counter-claim in this suit be dismissed with costs as the same was Res Judicata and an abuse of the court process in lieu of the finding in Nakuru HCCC No. 188 of 1974 and Nakuru HCCC No. 16 of 2009 which suits had been filed by the Respondent's father and which suits had been dismissed for want of prosecution and struck out for being Res Judicata respectively. That the reliefs sought in the present Counter-claim were similar to the previous matters over the same subject matter, wherein the Plaintiff/Respondent in the counter claim was suing as a legal representative of the Plaintiff, Mutitu Ruraya, in the previous matters.

17. The Respondent in turn has sought for the Application to be dismissed for reason that the matter in Nakuru HCCC No. 188 of 1974 had not been concluded as there was no valid judgment thereto and therefore the decision in No. 16 of 2009 had been made under an assumption that a valid determination existed.

18. The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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”*

19. The test in determining whether a matter is *Res Judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

20. Looking at the circumstance of the present suit as well as the previous suit, this court finds that in the first suit being Nakuru HCCC No. 188 of 1974, the parties therein had been Mutitu Muraya vs Wilson Mugwe, where the Plaintiff had sought for the following prayers;

- i. That the Land Known as Nyandarua/Kanyagia/13 be transferred to him by the Defendant.

ii. That in the event of the Defendant refusing to transfer, the Executive Officer of the High Court be authorized to sign the transfer documents.

iii. That should the Court find that the Defendant is entitled to the suit land, the Defendant to be compelled to refund the full purchase price received by him plus interest accrued and or the improvements made on the suit land to be valued by an independent valuer.

iv. That the damages for the Defendant's failure to transfer plus the cost of this suit be provided for together with interest at court rate.

v. Any other or further relief this honorable court may deem just.

21. It is noted that vide a ruling of the 22<sup>nd</sup> November 1980, the said suit was dismissed for want of prosecution.

22. Therein after, the Plaintiff filed Nakuru HCCC No 16 of 2009 wherein the parties had been Mutitu Muraya vs Wilson Mugwe Weru wherein the Plaintiff sought for the following orders;

i. A declaration that the Defendant transfers the parcel of land known as Nyandarua/Kanyagia/13 to the Plaintiff and any other registration of interest in the name of any other party including the Defendant is null and void.

ii. An order directing that the parcel known as Nyandarua/Kanyagia/13 be transferred to the Plaintiff.

iii. A permanent injunction to restrain the Defendant either in person or through anyone litigating under these titles from entering upon the said land, selling parting with possession or in any other way interfering with the Plaintiff's quiet enjoyment of the land.

iv. Costs of the suit.

23. In the ruling delivered by Justice W. Ouko, as he then was, on the 5<sup>th</sup> February 2010, the Court had held that the suit filed in Nakuru HCCC No 188 of 1994 should have been dismissed for non- attendance and not for want of prosecution because on the day scheduled for hearing, only the Defendant and the Plaintiffs' Counsel were in Court. That in the circumstance, the Plaintiff, under Order 9B Rule 79(1)(2) of the Civil Procedure Rules was precluded from bringing a fresh suit, although the word used was 'may', after the dismissal of the initial suit.

24. That pursuant to the dismissal of the initial suit, the Plaintiff had filed suit in Nakuru SRMCC No. 563 of 1983 where the Defendant's tractor Registration No. KSC 854 had been attached and sold and the Plaintiff paid the decretal amount which in effect settled the Plaintiffs claim against the Defendant.

25. That subsequently after 29 years, the Plaintiff had yet again filed the present suit being No.16 of 2009 which was barred by the law of Limitations of Actions Act. The suit was then struck out with costs wherein parties had been directed to set down the Defendant's Counter claim for hearing.

26. Subsequently the Defendant sought for a summary judgment in terms of his Counter claim for reason that the Defendant in the Counter claim (Plaintiff in the main suit) had no defence. In a ruling delivered on the 28<sup>th</sup> October 2010 by Justice W. Ouko, as he then was, the said Application was dismissed for reason that the issues raised in the counter claim were triable.

27. The Plaintiff then filed a miscellaneous Application No. 221 of 2010 where he sought for the reconstruction of Nakuru HCCC No 188 of 1974 which file had disappeared.

28. In her ruling of 28<sup>th</sup> February 2017, Lady Justice J N Mulwa had held that the copies in possession of both parties in regard to a ruling that was delivered in Nakuru HCCC 188 of 1974 were different in that whereas the copy held by the Plaintiff indicated that the Plaintiff's suit was allowed as against the Defendant, the copy held by the Defendant's Advocate was to the effect that the Plaintiff's case had been dismissed with costs for want of prosecution.

29. Her lady ship considered other submissions by Counsel before giving parties leave to reconstruct Nakuru HCCC No 188 of 1994.

30. I have painstakingly perused the Pleadings herein as well as the impugned rulings and I wish to make the following Notes;

31. At paragraph 7 and 8 of the Plaintiff's Supporting affidavit dated 20<sup>th</sup> January 2009 in Nakuru HCCC No 16 of 2009, the Plaintiff deponed as follows:

*'....This was High Court case number 188 of 1974, the case was subsequently dismissed for want of prosecution.*

*'after the dismissal of the suit the Defendant/Respondents never filed any suit to have me declared me (sic) a trespasser and I continued to occupy the said land together with members of my family'*

32. I also find that the in the ruling of the 5<sup>th</sup> February 2010 in Nakuru HCCC No 16 of 2009 the Honorable judge of the High Court as he

then was , made the following finding.

*“in this matter it was the Defendant who was before the court (although the Plaintiffs’ counsel was present) Mead, J found that there was no sufficient ground to grant an adjournment sought by the Plaintiffs’ counsel ( as the Plaintiff was not in court) The judge then proceeded to dismiss the suit for want of prosecution (should have been for non attendance) in the circumstance and in terms of sub rule (2) aforesaid the Plaintiff was precluded from bringing a fresh suit although the word used in this subsection is “may”*

*It is not in dispute that the right of action accrued to the Plaintiff in 1974 when it is alleged that the Defendant reneged on the sale agreement. Once Nakuru HCCC No.188 of 1974 was dismissed, the date of the cause of Action remained 1974.*

*The Plaintiff has waited for thirty five (35) years to bring this action.....*

*“.....Like Mead J Koome J, the hearing, letter was dismissed for want of prosecution I have already stated that it was dismissed for non attendance of the Plaintiff that of significance is that the Plaintiff had been warned in that ruling that his suit was a nonstarter. For reasons and stated this suit is clearly an abuse of the process of the court brought after the claim had been settled out of the limitation period and without leave.*

*The objection is sustained on the suit is struck out with costs the Defendants, the name may be listed for hearing on the registry on priority basis’.*

33. In yet another ruling of 28<sup>th</sup> October 2010 in Nakuru HCCC No. 16 of 2009, the High Court Judge had reiterated the finding in his earlier ruling to the effect that;

*“The respondent’s claim having been satisfied by attachment of the sale and the present suit having been satisfied by attachment and sale and the present suit having been brought outside the statutory period of limitation.....’*

34. A Counter-claim is a claim by a Defendant opposing the claim of the Plaintiff and seeking some relief or orders from the Plaintiff for the Defendant. It contains assertions that the Defendant could have made, by starting a suit, if the Plaintiff had not already began the action. It is governed by the same rules that regulate the same claims made by a Plaintiff; save that it is a part of the answer that the Defendant produces in response to the Plaintiff’s claim.

35. Having considered the contents in the averments at paragraph 7 and 8 of the Plaintiff’s Supporting affidavit dated 20<sup>th</sup> January 2009 in Nakuru HCCC No 16 of 2009 and the rulings that followed thereafter dated the 5<sup>th</sup> February 2010 and 28<sup>th</sup> October 2010 in Nakuru HCCC No 16 of 2009, there is no doubt in my mind that indeed the Plaintiff’s original suit being Nakuru 188 of 1974 was dismissed for want of prosecution and/ or as held in the ruling of 5<sup>th</sup> February 2010, for non-attendance, wherein the Plaintiff did not file any Appeal to challenge the decision.

36. I also find that matter in issue in the previous suit was identical in the present suit and that the Plaintiff in the Counterclaim in the subsequent suit was a son of the Plaintiff suing in his capacity as the Administrator or the Plaintiff in the previous suits.

37. I also find that the issues in the subsequent case were covered by the decision of the earlier case where there was concurrence of jurisdiction which brought finality of the previous decision. Litigation has to come to an end and disappointed parties are barred from camouflaging already decided cases in new garment, or giving them **some cosmetic face lift on every occasion they come to court.**

38. Indeed looking at the circumstance of the present suit, as well as the previous suit, what this Court is tasked to determine is whether the dismissal for **want of prosecution of the matter in Nakuru HCCC No. 188 of 1974 was a final determination of the Court and therefore constituted Res Judicata in the present suit.**

39. The Court of Appeal in **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR** held as follows;

*As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of Res Judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was Res Judicata and cannot stand. The 1<sup>st</sup> Respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1<sup>st</sup> Respondent could do was to invoke the appellate process and not filling a fresh suit.*

*Accordingly we find this appeal has merit and it is hereby allowed with costs against the Respondents.*

40. The Court of Appeal herein above having pronounced itself that a matter once dismissed for want of prosecution could not be resuscitated through a fresh suit as doing so would offend the doctrine of Res Judicata, I find that decision binding to his Court, and I therefore find that the present counter claim is Res Judicata Nakuru HCCC No. 188 of 1974 and Nakuru HCCC No. 16 of 2009 and proceed to strike it out with costs to the Applicant/ Defendant in the Counterclaim.

**Dated and delivered at Nyahururu this 17<sup>th</sup> day of June 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**