



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 160 OF 2019

1. PANGAEA HOLDINGS LLC

2. PANGEA DEVELOPMENT HOLDINGS LTD..... PLAINTIFFS

VERSUS

1. HACIENDA DEVELOPMENT LTD

2. ADAM TULLER

3. REGISTRAR OF TITLES, MOMBASADEFENDANTS

RULING

1. The 1st and 2nd defendants filed a preliminary objection dated 8th October, 2019 that the court has no jurisdiction to hear and determine the suit on the grounds that the suit is time barred, res judicata, incompetent and that the plaintiffs have no capacity to sue. The 1st and 2nd defendants also filed the Notice of Motion dated 9th October, 2019 seeking to have the plaintiffs' suit dismissed or struck out with costs to be paid by the plaintiffs and their advocates, Kiptiness & Odhiambo Associates jointly and severally. In the alternative, the 1st and 2nd defendants want plaintiffs to provide security in the sum of Kshs.68,385,866.00 (amended to Kshs.33,972, 448.00 in submissions) to be deposited into an interest earning account to be opened by the plaintiffs' and the 1st and 2nd defendants' advocates within 21 days after the order for security is made and in default of such deposit the suit to stand dismissed with costs to be paid jointly and severally by the plaintiffs and their advocates. The 1st and 2nd defendants also seek to be excused from filing a list of witnesses, witness statements and list of bundle of documents until this application and the preliminary objection are heard and determined.

2. The application and preliminary objection are supported by the grounds thereon and the affidavits of Adam Tuller. Some of the grounds in the preliminary objection are duplicated in the motion.

3. When the matter came up for hearing on 12th March, 2020, both Mr. Kinyua, advocate for the 1st and 2nd defendants and Mr. Kimaru, advocate for the plaintiffs agreed that the 1st plaintiff should be removed from the suit, save on the issue of costs. Consequently, the 1st plaintiff's name was ordered struck out from the suit, save for the issue of costs which is to be determined in this ruling.

4. On the issue of costs Mr. Kinyua submitted that since the 1st plaintiff did not exist, the plaintiffs' advocate who filed the suit should be responsible for the payment of costs. It was further submitted that the issues raised by the 2nd plaintiff before this court have been resolved in arbitration and in the High Court at Milimani, Miscellaneous Application No. 230 of 2017. Further, that the suit is res judicata as it seeks to overcome the decision of this court delivered by Lady Justice Omollo in ELC Case No. 105 of 2018. It was submitted that HCCC No.800 of 2009 between the 2nd plaintiff and the 1st defendant and others was stayed pending arbitration, and therefore the parties were required to return to the same court and not to file fresh suits as the 2nd plaintiff has attempted to do. Mr. Kinyua argued that any arbitral award and the recognition and enforcement of an arbitral award are matters reserved for the jurisdiction of the High Court under the Arbitration Act, 1995, and therefore urged this court to decline the invitation to deal with the matters already dealt with in the arbitration commenced by the 2nd plaintiff. That if the 2nd plaintiff was dissatisfied with the final award, it should have gone to the High Court within the timelines specified in the Arbitration Act. Mr. Kinyua submitted that there is a serious mischief on the part of the plaintiffs demonstrated by the fact that when the 2nd plaintiff filed Nairobi HCCC NO. 800 of 2009, Winding Up Cause No. 23 of 2011, the Arbitration Reference and Mombasa ELC Case NO. 105 of 2018, it must have known of the alleged assignment, and its introduction at this late stage is an abuse of the court process. It was his submission that access to justice and the right to be heard is not an opportunity for vexatious litigants to file and maintain multiple suits against the same defendants over the same subject matter in courts in Nairobi and in Mombasa with varying jurisdictions. He stated that the Plaintiffs' suit should be dismissed or struck out with costs to be paid by the plaintiffs and their advocates jointly and severally.

5. In opposing the 1st and 2nd defendants' Notice of Preliminary Objection and Notice of Motion Application, the plaintiffs filed statements of Grounds of Opposition dated 7th November, 2019 and 15th November, 2019 and Replying affidavits dated 3rd December, 2019. It was submitted by the plaintiffs' counsel, inter alia, that beneficial interest, being a component of constructive trusts is an overriding interest by dint of Section 28 (b) of the Land Registration Act, Section 38 (2) of the Land Act as well as years of case law in recognition of trusts. That there were illegalities in the transfer of property, and hence the court should apply the law to resolve the same, even if brought to its attention by a side wind. That where novel issues are apparent from the face of the pleadings, the courts should adopt and err on the generous side to shun technicalities so as to afford those issues a day in court. It was the plaintiffs' submission that this suit is not res judicata and urged the court to dismiss both the defendants' application and preliminary objection.

6. Mr. Kimaru, learned counsel for the plaintiffs further submitted that the plaintiffs' advocates should not be held liable for costs as they relied on instructions from the client who is a lay person. He submitted that though the case by the 1st plaintiff has been abandoned, the case by the 2nd plaintiff is still competent as there is a resolution filed. He argued that the Preliminary objection is convoluted with issues of facts that will require the court to peruse documents that are contested. That ELC NO.105 of 2018 was dismissed on a technicality and that the substratum of the suit now before court is the interest in the land. Mr. Kimaru submitted that given the contested facts, the preliminary objection herein is not proper and relied on the case of *Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (1969) EA 696*. He further submitted that the suit is not res judicata as defined under Section 7 of the Civil Procedure Act. Counsel asked the court not to order for security for costs arguing that the 2nd plaintiff is a going concern that will meet its obligation on costs. He urged the court to allow the case to go to full hearing.

7. I have considered the submissions made. The application and preliminary objection by the 1st and 2nd defendants are mainly on the grounds that the suit is res judicata. In the case of *Garden Square Ltd –v- Kogo & Another (2003) eKLR*, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decision of the then court of Appeal for East Africa in the case of *Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (supra)* in which Sir Charles Newbold, the president of that court stated:

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued 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.....”

8. I have perused the pleadings herein. In the plaint, the plaintiffs in paragraph 25 have pleaded that there were previous litigations between the plaintiffs and the 1st and 2nd defendants. The plaintiffs however, plead that those previous litigations did not determine the issues disclosed herein. The previous cases are listed as Winding Up Cause No. 23 of 2011 which was an application requesting the court to appoint an investigator into the affairs of the company; Arbitration between Pangaea Development Holdings Limited as the claimant, Hacienda Development Limited, Mr. Adam Tuller and Mr. David Muniu, as Respondents, in which the Arbitrator eschewed determining the question of the title to the property for want of jurisdiction; and Mombasa ELC No.105 of 2018, which was a derivative suit that was determined at a preliminary stage and that the merits of the case were never adjudicated upon.

9. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act which states:

“No court shall try any suit 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 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. Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

11. The doctrine of res judicata 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.”

13. In my understanding the res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the 1st and 2nd defendants in the application and objection raised have satisfied the conditions for the principle of res judicata in view of the facts of this case.

14. From the pleadings and submissions it is not in dispute that the subject matter in the previous litigation and the current suit is the same. Both the former suits and the present suit are between the same parties. The plaintiffs’ argument, however, is that the issues in the instant suit were not adjudicated and/or determined in the previous litigation.

15. In the case 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. ”

16. In **Gurbachau –v- Yowani Ekori (1958)EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the **Vice Chancellor in Henderson –v- Henderson (1) 67 ER 313** at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that 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 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 plea 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”

17. Applying the stated law to the facts before me, it is clear that the plaintiffs seek to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the plaintiff is trying to litigate a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suits.

18. In the result I find and hold that the 1st and 2nd defendants’ motion and preliminary objection have merit and the same are allowed. This suit is struck out. The 1st and 2nd defendants shall have costs to be borne by the 2nd plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 22ND day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE