



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 83 OF 2019

MARY NYAMVULA LENGA..... PLAINTIFF

VERSUS

SAVINGS AND LOAN (K) LIMITED

(Now known as KCB BANK (K) LTD)..... DEFENDANTS

RULING

1. Before me for determination is the defendant/applicant's Notice of Motion dated 4th July, 2019 which seeks to strike out the plaintiff's suit for being time barred and res judicata. The application is brought under Sections 4(1) (a) & 7 of the Limitation of Actions Act Cap 22 Laws of Kenya, Section 7 of the Civil Procedure Act Cap 21 and Order 2 Rule 15 of the Civil Procedure Rules.
2. The application is supported by the affidavit of Fredrick Mung'atha sworn on 4th July 2019 and is premised on the grounds that the plaintiff's suit seeks to nullify a contract for the charge of land entered into on 30th September, 1998. Further, that the plaintiff filed Mombasa HCCC NO. 161 of 2006 seeking to nullify that contract and that suit has since been dismissed for want of prosecution. The applicant has annexed a copy of the charge dated 30th September, 1998 and a ruling delivered on 26th June, 2007 in Mombasa HCCC No. 161 of 2006, **Mary Nyamvula Lengha –v- Savings and Loan (K) Ltd** and Estate of George Amon Were.
3. In their submission dated 18th December 2019, the advocates for the applicant distinguished the equity of redemption from the right to set aside the charge instrument. That the equity of redemption is the right of a chargor, such as the plaintiff, to repay the loan in exchange for the discharge of the charge and that as long as the loan has not been repaid and the charge discharged, the equity of redemption remains no matter the passage of time.
4. It was further submitted that the right to set aside the charge on the other hand is quite different. That it presumes that a charge has in fact never been registered to necessitate the chargor's exercise of the equity of redemption. That in the absence of a charge, there is no equity of redemption that can be exercised. The applicant's submission is that from the facts of this case, the plaintiff's contention is that what is held as a charge is in fact a fraud on her and ought to be set aside. That this is a dispute as to the existence of the charge. That the plaintiff is not saying that she wants to repay the loan but that the defendant is frustrating or fettering her right to do so, hence this would be a dispute on the equity of redemption.
5. The applicant's submission is that a charge is merely a contract between two parties, the chargor and the chargee. That as with any other contract, it can be set aside on the known grounds. That the plaintiff herein has chosen fraud as the ground for setting aside and is admitted that the fraud came to the plaintiff's knowledge on or around 22nd May, 2006 and actually filed Mombasa HCCC NO. 161 of 2006 to complain about the fraud.
6. The applicants' counsel cited Section 4(1) (a) of the Limitation of Actions Act and submitted that any suit founded on contract must be brought within six (6) years from when the cause of action accrued. That in the instant case, time started running from 22nd May 2006 when the alleged fraud was known and the six (6) years lapsed on 21st May, 2012. The applicant's counsel relied on the case **of Attorney General & Another –v- Andrew Maina Githinji & Another (2016) eKLR**. It was further submitted that the subsequent change in the defendant's name is of no moment. The applicant's counsel cited Section 20 (4) of the repealed Companies Act and Section 66 of the Companies Act No. 17 of 2015 which are similar in their working and which states:

“A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.”

The applicant's counsel relied on the case of **John Kahiato Bari & 3 Others –v- New Kenya Cooperative Creameries Limited & Another (2017)eKLR** and submitted that there is no fresh cause of action that accrues by the change of name. It is submitted that when a suit is filed outside the limitation period, the court has no discretion in the matter, other than to down its tools.

7. It is further submitted that given the commonality of issues, the similarity of parties and the dismissal of Mombasa HCCC No. 161 of 2006, the present suit is an epitome of res judicata. The applicant's advocates relied on the case of **Philes Nyokabi Kamau –v- Industrial & Commercial Development Corporation (2017)eKLR** and Co-operative **Bank of Kenya Limited –v- Cosmas Mrombo Moka & Legacy Auctioneering Services (2019)eKLR**.

8. In opposing the application, the plaintiff respondent filed a replying affidavit sworn by herself on 20th November, 2019 in which it is deposed that the application is totally misconceived, bad in law and amounts to an abuse of the court process. That the charge document created on TITLE LR NO 1209 SECTION VI MAINLAND NORTH is an ongoing and active contract and therefore the provisions of the Limitation of Actions Act cannot apply to the suit filed herein. The plaintiff argues that if one was to buy the applicant's argument that the suit is time barred, then the respondent's right to redeem her property which is still in existence will be extinguished which will be an absurdity as the respondent will have lost her property to the applicant through dubious means. The respondent added that the charge document that was created in favour of Savings & Loan (K) Ltd has since been allegedly transferred and endorsed in the name of a new entity i.e. KCB Bank (K) Ltd as the chargee without the respondent's consent and without any notification to her. The respondent deposed that the reasons for the dismissal of HCCC No. 161 of 2006 are in the court file and that counsel who was acting on behalf of the respondent is now deceased. The respondent contends that she has a good case on merits against the defendant and that if the suit is dismissed, then she will lose her property which will be in contravention of her constitutional right to ownership of property. The respondent argues that the application lacks merit and should be dismissed with costs.

9. The respondent's advocate submitted that the provision of Section 4 (1) (1) of the Limitation of Action Act is not mandatory nor absolute as it uses the word "may" as opposed to "shall". It is submitted that suit herein by the plaintiff against the defendant is on a charge which is still in situ and therefore operative and that the issue of limitation of time in recovery of the respondent's title does not arise. The respondent's counsel further submitted that no judgment nor decision of HCCC No. 161 of 2006 has been presented by the applicant. Further, it was submitted that the elements of res judicata as stated by the court of appeal in **the Independent Electoral & Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR** have not been met.

10. I have considered the application and the submissions made. The issues to decide are whether the plaintiff's suit is time barred and whether it is res judicata.

11. I have perused the pleadings herein. In the amended plaint, the plaintiff pleaded in paragraph 6 inter alia, that "on or about 22nd May, 2006 came to discover that the said George Amon Were now deceased and the defendant had duped the plaintiff in 1998 into signing a charge over her property namely PLOT NO. 1209/VI/MN in the stead of a Guarantee and have continued to dupe her to date". It is clear, and as rightly submitted by the applicant, that from the facts of this case, the plaintiff's contention is that what is held by the defendant as charge is in fact a fraud on her and ought to be set aside. This is clearly a dispute to the existence of the charge which is a contract between two parties, the chargor and chargee. From the pleadings it is clearly admitted that the alleged fraud came to the plaintiff's knowledge on or about 22nd May 2006. Section 4 (1) (a) of the Limitation of Actions Act provides as follows:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

a) Actions founded on contract;"

This provision is plain enough. Any suit founded on contract must be brought within six (6) years from the date when the cause of action accrued. In this case, the alleged fraud was known as far back as 22nd May 2006. Time started running from then and six years lapsed on 21st May, 2012. This suit was filed on 14th May, 2019. It is clear therefore that the suit was filed outside the limitation period and is therefore time barred, and must fail.

The other issue to determine is whether the suit herein is res judicata. The doctrine of res judicata has been sufficiently decided upon by courts of law. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act 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 issue has been subsequently raised, and has been heard and finally decided by such court."

12. The doctrine of res judicata is important in adjudication of cases and serves two important purposes; 1) it prevents multiplicity of suits which would ordinarily clog the courts and cause parties to incur unnecessary costs to litigate and defend two suits which ought to have been determined in a single suit; and 2) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

13. The test in determining whether a matter is res judicata was stated and is summarized in **Bernard Mugo Ndegwa –v- James Nderitu Githae & 2 Others (2010)eKLR** as follows: 1) that the matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.

14. In the case of **Nancy Mwangi T/a Worthlin Marketers –v- Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR** it was stated.

“Unless it is abundantly clear, when res judicata is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleading – of the previous case and the instant case – ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under same title and that the previous case was determined by a court of competent jurisdiction.”

15. In the recent case of **Cooperative Bank of Kenya Limited –v- Cosmas Mrombo Moka & Legacy Auctioneering Services (2019)eKLR**, the Court of Appeal held:

“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 1st 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 1st respondent could do was to invoke the appellate process and not filling a fresh suit.”

16. In this case, it is not disputed that the plaintiff had filed Mombasa HCCC NO. 161 of 2006 which is said was dismissed for want of prosecution. I have perused the ruling in HCCC NO. 161 of 2006 attached to the application herein. The facts in dispute are neatly captured and they are the very same facts that the plaintiff has raised in the present suit. The reliefs sought in both suits are the same. The parties in the two cases are also the same, save that there was a 2nd defendant in Mombasa HCCC NO. 161 of 2006. I do agree with the applicant’s submission that the subsequent change of the defendant’s name cannot assist the plaintiff. Section 20 (4) of the repealed Companies Act and Section 66 of the Companies Act No. 17 of 2015 are quite clear on this. The filing of this suit was in breach of Section 7 of the Civil Procedure Act and is a matter that satisfied the tests for a defence of res judicata.

17. The upshot of this is that the defendant’s Notice of Motion dated 4th July, 2019 is merited and is allowed. The plaintiff’s suit is time barred and res judicata. The same is struck out with costs to the defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 13TH day of July 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE