



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 204 OF 2014

NAKURU AUTOMOBILE HOUSE LTD.....PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI.....1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....2ND DEFENDANT

RULING

1. Oftentimes, contested litigation is akin to a sports encounter. There are twists and turns, moves and counter moves. However thrilling the encounter be to the participants and even to the spectators, a point is reached when time runs out, the final whistle is sounded and the duel is over. The hour of reckoning comes when the contestants assemble to face the outcome.

2. This matter has had its fair share of twists and turns. I find it necessary to give an overview of its milestones so far. The plaintiff's case was heard and closed on 30th March 2017. Defence hearing was scheduled for 31st May 2017 on which date the first defendant sought an adjournment on the basis that he had sought summons to witness against the Land Registrar but the summons had not been signed. Although the plaintiff strongly opposed the application, the court granted adjournment and scheduled defence hearing for 28th September 2017. Shortly thereafter, the plaintiff filed an application seeking to re-open its case. I considered the application and dismissed it in a ruling delivered on 20th December 2017. Defence case was later heard and closed on 6th March 2018. Directions for filing and exchange of final written submissions were given. In the meantime, the second defendant also filed an application seeking to be allowed to file a defence, witness statements and list of documents and to generally defend the suit. Upon considering the application, I delivered a ruling on 12th June 2019 in which I allowed the application on condition that the second defendant files and serves statement of defence and generally complies with **Order 11** of the **Civil Procedure Rules** within 14 days of the date of delivery of the ruling. In default, the application was to stand dismissed with costs to the first defendant. As it turned out, the second defendant did not comply. Consequently, I made an order on 7th October 2019 confirming that the application stood dismissed owing to the non-compliance. Parties then sought and were granted time to file final written submissions in respect of the suit. The matter was scheduled for mention on 3rd December 2019 to fix date of judgment. Shortly thereafter, the plaintiff filed an application dated 20th October 2019, seeking review or setting aside of the orders of 7th October 2019. The application was scheduled for inter parte hearing on 4th November 2019, on which date it was dismissed for non-attendance by counsel for the applicant. The second defendant also filed an application dated 24th October 2019, seeking setting aside of the orders of 7th October 2019. Upon considering it, I delivered a ruling on 18th June 2020 in which I set aside the orders of 7th October 2019 on condition that the second defendant files and serves statement of defence and generally complies with **Order 11** of the **Civil Procedure Rules** within 21 days of the date of delivery of the ruling. In default, the application was to stand dismissed with costs to the first defendant. Once again, there was non-compliance and the default clause became operational. I scheduled the matter for mention on 5th November 2020 to fix date of judgment and once again gave directions that parties file and exchange final submissions.

3. The plaintiff is now back with Notice of Motion dated 18th September 2020, seeking the following orders:

1. *(Spent)*

2. *This Honourable Court be pleased to grant leave to the Applicant to introduce additional evidence, namely a report by the 2nd Defendant/Respondent, an excerpt from the Land Registrar's Presentation book, a forensic document examination report from the Directorate of Criminal Investigation and the charge sheet against the 1st Defendant/ Respondent.*

3. *This Honourable Court be pleased to grant leave to the Plaintiff/Applicant to reopen its case and issue witness summons to the 2nd Defendant/Respondent, the Investigating officer, one Lawson Shuma and Chief Inspector Chania Geoffrey.*

4. *Costs of and incidental to this application abide the outcome of the suit.*

4. The application is supported by an affidavit sworn by Vijay Morjaria, a director of the plaintiff company. He deposed that the plaintiff wishes to rely on the evidence that was to be produced by the second defendant to shed light on the dispute. The evidence includes the second defendant's witness statement, an excerpt from the second defendant's presentation book, a green card, a forensic document examination report and a charge sheet. He added that the dispute revolves around two competing titles to the suit property and the evidence is key in determining validity of the titles. He further stated that the documents have only come to the attention of the applicant at this stage and that it is in the interest of justice that the application be allowed. The applicant also filed a supplementary affidavit whose contents I have noted.

5. The first defendant opposed the application through his replying affidavit in which he deposed that the court's ruling delivered on 20th December 2017 has not been set aside and that the application is therefore *res judicata*. The affidavit is top-heavy with legal arguments as opposed to facts, contrary to **Order 19 Rule 3** of the **Civil Procedure Rules**.

6. The second defendant did not file any response to the application and state counsel appearing for him indicated that he "leaves it to the court". The application was canvassed through written submissions. Both the applicant and the first defendant filed written submissions. Additionally, counsels for the applicant and the first defendant did brief oral highlighting. I have considered the application, the affidavits and the submissions. The issues that arise for determination are whether the application is *res judicata* and whether the orders sought should issue. I will deal with the issue of *res judicata* first.

7. The first defendant has argued that the application is *res judicata* in view of the plaintiff's application dated 21st June 2017 which sought re-opening of the plaintiff's case and the ruling delivered in respect thereof on 20th December 2017. On its part, the applicant has argued that the application dated 21st June 2017 revolved around the issue of introducing a witness who was not within the plaintiff's knowledge while the present application seeks leave for the second defendant to testify and that *res judicata* is not therefore applicable.

8. The doctrine of *res judicata* is codified 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.

9. The Court of Appeal had the following to say in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR as regards the ingredients of *res judicata*:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

10. Since we are dealing with an application, it is important to point out that for purposes of *res judicata*, an application is also deemed to be a suit since "suit" is defined at **section 2** of the **Civil Procedure Act** to mean "**all civil proceedings commenced in any manner prescribed**".

11. *Res judicata* is a jurisdictional issue. It follows therefore that if I come to the conclusion that the application is *res judicata* then I will not have any leeway in the matter and the application will have come to its end. Where there is no jurisdiction, the court cannot do anything else, it cannot confer jurisdiction on itself by judicial craft, even for the noble intention of doing justice. The Court of Appeal recently stated in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** [2019] eKLR as follows:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself....

... The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. ...

12. A perusal of the record herein shows that in the application dated 21st June 2017, the plaintiff sought to reopen its case to call a "most important witness to the case who was not within the plaintiff's knowledge when prosecuting its case". The deponent of the affidavit in support of the application stated that after the plaintiff's case was closed, he discovered that the Director of CID had very important information and documentary evidence that is important for the determination of this case. As already noted, the application was dismissed in a ruling delivered on 20th December 2017 and the plaintiff's case remains closed. In the present application, the applicant seeks to introduce additional evidence and for that purpose it once again seeks to reopen its case. Obviously, it cannot adduce additional evidence without its case being reopened. Ultimately, the main issue before the court once again is whether the plaintiff can reopen its case. All other issues are corollary to the reopening. The plaintiff's counsel's argument that the present application seeks leave for the second defendant to testify as opposed to reopening the plaintiff's case does not create any distinction. The court having rendered itself on whether the plaintiff could reopen its case, the issue is *res judicata*. The plaintiff's counsel also argued passionately about the need to allow the reopening so as to do justice. The simple answer to that plea is that *res judicata* deprives this court of jurisdiction. Such jurisdiction cannot be restored by the pursuit of justice, as lofty as such an undertaking may be. If I were to accede to the plaintiff's request ostensibly on account of the need to do justice, I would be guilty of attempting to confer jurisdiction through judicial craft, an absolutely futile pursuit. See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR.

13. In view of the foregoing discourse, Notice of Motion dated 18th September 2020 is *res judicata*. To borrow the words of the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** (supra), the application was dead on arrival and cannot be remedied. I strike it out with costs to the first defendant.

Dated, signed and delivered at Nakuru this 29th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mutubwa and Ms Ashioya for the plaintiff/applicant

Mr Mwangi for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Beatrice Jelimo & Julius Lotkomoi