



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 57 OF 2019

AMOS MOSES KOMBE.....PLAINTIFF

VERSUS

OMAR AHMED OMAR.....DEFENDANT

RULING

1. By a Notice of Motion application dated 24th July 2019 and filed contemporaneously with this suit on the same day, Amos Moses Kombe (the Plaintiff) prays for orders as follows:

3. That the Defendant by himself, his servants, agents, employees, tenants or any other person acting through them be restrained from building, selling, sub-letting, leasing or in any other manner dealing with Plot Number Kilifi/Ngerenyi/859 situated at Kakanjuni Kilifi pending the hearing and determination of the suit;

4. That the exparte Judgment obtained vide SRMCC No. 277 (of 2012) including all consequential orders granted exparte including the revocation and transfer of the title deed in the names of the Defendant/Respondent be set aside; and

5. That the costs of this application be borne by the Defendant.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised inter alia on the grounds that:

a. The Plaintiff is the Administrator of the Estate of Lawrence Ngari Yaa who was his father and the bonafide owner of the said parcel of land;

b. That the Defendant allegedly bought the land secretly from the deceased without involving his two wives or his children who were all adults;

c. That the agreement of sale is suspect as it was not witnessed on the part of the Purchaser and the consideration agreed was never paid in full;

d. That the Defendant filed SPMCC No. 277 of 2012 knowing that the deceased was sick and no notice of the same or the Judgment emanating therefrom was served upon the deceased who passed away on 19th April 2013;

e. That the orders issued in the said suit were again varied vide an application dated 26th June 2014 long after the deceased had died;

f. The order revoking the deceased's title was irregularly granted ex-parte as the deceased had only agreed to sell six acres and not the 12 acres transferred to the Defendant.

3. The application is opposed. In a Replying Affidavit sworn on 6th September 2019 and filed herein on 11th September 2019, Omar Ahmed Omar (the Defendant) avers that he entered into a Sale Agreement with the deceased on 18th May 2012 wherein the deceased sold to him some six acres out of the suit property at a consideration of KShs 540,000/- with the full knowledge of his family.

4. The Defendants avers that pursuant to the agreement, he paid a sum of KShs 210,000/- as a deposit to the deceased upon which he was granted and he took vacant possession of the six acres of land and commenced development thereon. The Defendant avers that the deceased was to hand over the completion documents after 90 days but he was unable to do so as the title was charged to the Settlement Fund

Trustees. As the deceased could not pay for the discharge, the two agreed that the Defendant pays for the same and deducts the amount paid from the balance of the purchase price.

5. The Defendant avers further that he paid for the discharge as agreed but the deceased breached the agreement thereby compelling him to institute **Kilifi PMCC No. 277 of 2012; Omar Ahmed Omar –vs- Lawrence Ngari Yaa** in which he sought an order of specific performance of the agreement among other reliefs.

6. The Defendant further asserts that he properly did obtain Judgment which he executed in the said suit. He further avers that he incurred expenses in the sum of Kshs 132,865/- in payments made to the Settlement Fund Trustees and asserts that he stands to suffer loss and damage if the orders are granted as he has been occupying the suit property since the year 2012.

7. In addition to the Replying Affidavit, the Defendant has also taken out a Notice of Preliminary Objection dated 6th September 2019 in which he objects to the suit on the grounds:

1. That this Court has no jurisdiction to entertain this suit in view of the provisions of Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya on account of the fact this suit is res judicata Kilifi PMCC No. 277 of 2012; Omar Ahmed Omar –vs- Lawrence Ngari Yaa.

2. That the Judgment in Kilifi PMCC No. 277 of 2012; Omar Ahmed Omar –vs- Lawrence Ngari Yaa which decreed the suit property to the Defendant has not been set aside on appeal or review.

3. That the present suit amounts to an appeal in disguise and is to that extent incompetent and bad in law.

8. I have considered both the Plaintiffs Motion dated 24th July 2019 and the response thereto as well as the Defendant's Notice of Preliminary Objection. I have also perused and considered the submissions and authorities as placed before me by the Learned Advocates for the parties.

9. The Preliminary Objection raised by the Defendant questions the jurisdiction of this Court to delve into this matter and the same must therefore be dealt with in the first instance. The doctrine of res judicata on which the objection is premised is captured under Section 7 of the Civil Procedure Act 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.”

10. In support of the objection, the Defendant submits that the parties to both this suit and **Kilifi PMCC No. 277 of 2012** are the same given that the Defendant herein was the Plaintiff in the Kilifi suit while the Defendant therein was the father of the Plaintiff herein. The Defendant further submits that the issues involved herein were the same ones that were substantially in issue in the former suit.

11. The Plaintiff however responds that the doctrine of res judicata is inapplicable herein since the Plaintiff's father who is now deceased was never heard in the former suit. It is further the Plaintiff's case that the orders obtained together with the decree are illegal since by the time some of the orders were issued on 30th June 2015 the Plaintiff's father had long passed away on 19th April 2013.

12. It is further the Plaintiff's case that the Preliminary Objection must fail as this is a Court with original and competent jurisdiction to hear the matter. The Plaintiff insists that where fraud is raised as in the suit herein, the Court cannot just wish a way such a serious issue without resolving the same.

13. A casual reading of the Plaintiff's Motion reveals that the Plaintiff was aware of the existence of the former suit. He refers liberally to the said suit at paragraph 6, 7, 8, 9, 10 and 11 of the Plaintiff's Motion. At prayer No. 4 of the Notice of Motion dated 24th July 2019, the Plaintiff indeed urges this Court to set aside the Judgment obtained in the former suit including all consequential orders emanating therefrom.

14. At annexure AMK5 of the Supporting Affidavit sworn by the Plaintiff in support of the application, he exhibits a copy of the decree emanating from the Principal Magistrates Court at Kilifi in the said **civil suit No. 272 of 2012**. The decree issued by the Court on 4th November 2013 reads in part as follows: -

“DECREE

Case coming for determination before Hon. EM Kagoni Ag. Senior Resident Magistrate on the 4th day of November 2013 AND UPON reading the entire pleadings herein and hearing the evidence of the Plaintiff ex-parte after the defendant was duly served with the pleadings but failed to enter appearance and or file defence AND UPON considering the Plaintiff's written submissions:

IT IS HEREBY ORDERED AND DECREED

1. That the Defendant do execute a transfer to vest the suit property to the Plaintiff in the next 30 days.

2. That in default the Court Executive Officer do execute the said transfer.

3. That upon execution and vesting of the property to the Plaintiff, the Plaintiff pays the balance of the purchasing price as stipulated in the agreement for sale executed on 18th May 2012.

4. The Plaintiff to have the costs of this suit.

15. A perusal of the pleadings in the former suit reveal that the Plaintiff's father was the Defendant referred to in the above decree and that the parcel of land referred to as the suit property was the very same Plot No. Kilifi/Ngerenyi/859 whose transfer the Plaintiff herein terms irregular and fraudulent. It is also evident that in the said suit, the Defendant herein had sued the Plaintiff's father for a breach of the sale agreement between them dated 18th May 2012 and that subsequently the Plaintiff's father passed away on 19th April 2013. The Plaintiff has brought this suit in his capacity as the Administrator of the estate of his father Lawrence Ngari Yaa who was the Defendant in that former suit.

16. From the material placed before me it is clear that the former suit was heard and that Judgment was delivered in favour of the Plaintiff. The Defendant has exhibited a Copy of the Judgment in the Replying Affidavit to the Plaintiff's application. The Plaintiff has neither claimed that the Court that heard the matter had no jurisdiction to hear the same nor explained why they did not approach the Court in Kilifi to challenge the decision.

17. As a result, the Judgment and decree in the former suit has not been set aside either on appeal or review. In my mind the purpose of Section 7 of the Civil Procedure Act is to stop parties such as the Plaintiff before me from instituting a multiplicity of suits between the same parties or those claiming under them over the same subject matter in different Courts. It is meant to avoid the abuse of the Court process and prevent Courts with competent jurisdiction from passing conflicting Judgments over the same dispute. It would be a waste of the Court's valuable time if there was no tool for arresting such mischief.

18. The present suit is not an appeal against the Judgment in the former suit which remains binding upon the Plaintiff. While the Plaintiff has shown that he has a number of grievances with that decision, he has not come to this Court on appeal and this Court therefore has no jurisdiction to set aside the Judgment and decree as sought in his pleadings herein.

19. It therefore goes without saying that I have found substance and merit in the Defendant's Preliminary Objection dated 6th September 2019. The suit as filed by the Plaintiff is incompetent and res judicata. I strike it out with costs to the Defendants.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE