



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 468 of 2011

MWAMBEJA RANCHING COMPANY LTD.....APPLICANT

-VERSUS-

KENYA NATIONAL CAPITAL CORPORATION LTD.....RESPONDENT

RULING

1. This Ruling relates to the Respondent's Preliminary Objection of *res judicata* raised in paragraphs 8 and 12 of the Replying affidavit sworn on its behalf by **Zipporah Kinanga Mogaka** on 19th January 2012 in opposition to the Originating Summons dated 18th October 2011.
2. The background of the matter is that the Parties herein have been involved in a protracted dispute over a parcel of land. According to the Respondent, the Applicant first filed **HCCC No. 693 of 1996 (O.S)** which it subsequently withdrew and later filed **HCCC No. 225 of 1998**. The latter suit was purportedly withdrawn through a Notice filed on **9th September 2011**. The Respondent alleges that the said suit was settled by a consent order given on **22nd July 1998** which compromised the whole suit.
3. The Respondent avers that in the foregoing suits, the issues now being raised by the Applicant in the current suit, to wit limitation, the validity of the charge executed by the Applicant and the Respondent's right to sell the suit property by public auction were also the main issues. It is further averred by the Respondent that the Court has in the past made decisions and findings in the aforesaid cases with regard to the issues raised in the current suit.
4. In summary, on **22nd July 1998**, a consent order was recorded in **HCCC No. 225 of 1998**, in which the Applicant agreed to pay a sum of **Kshs. 22,083,908/=** on or before 31st December 1998 failing which the Respondent would be at liberty to pursue legal action. The Respondent contends that the Applicant only paid a sum of **Kshs. 500,000/=** and they revived legal action to sell the charged property. Consequently, the Applicant on 4th February 1999 filed an injunction application in which the Court in a Ruling dated **26th July 1999** held that the Respondent had a valid charge over the suit property and was entitled to exercise its statutory power of sale.
5. It is further contended by the Respondent that after the ruling of **26th July 1999**, the Applicant filed several new injunction applications seeking to review the said ruling. Eventually, a ruling delivered on 29th February 2008 in HCCC No. 225 of 1998 by Honourable Justice Okwengu (as she then was) dismissed the applicant's application which sought, among others, an order to restrain the Respondent from selling the suit property and dismissed the Applicant's plea of limitation, holding that

the plea of limitation did not arise because the Respondent was simply exercising its Statutory power of sale.

6. The Applicant appealed to the Court of Appeal from that decision in Civil Application No. NAI 40 of 2008 Appeal. The appeal was dismissed with costs.

7. It is the Respondent's case that the present suit is not only *res judicata* but a further abuse of the Court process, and ought to be struck off.

8. The Respondent submits that the objection is a pure preliminary point of law which if upheld by the Court is capable of determining the whole suit in *limine*. It is further submitted by the Respondent that the entire suit serves no other useful purpose other than a continuation of a flagrant abuse of the process of the court by the applicant.

9. It is also the Respondent's submission that the Applicant is statutorily barred by the doctrine of estoppel by record and issue estoppel from challenging the legal validity of the charge, its consideration and the Defendant's statutory power of sale. See **section 7** of the **Civil Procedure Act**. Order 3 rule 4 of the Civil Procedure Rules. In this regard, the Respondent relied on the authority of, *inter alia*, **Civil Appeal No. 239 of 2004, Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank Ltd**.

10. It is submitted by the Respondent that the current application seeks similar reliefs premised on materially similar grounds which have been previously declined by this Court on merits in **HCCC No. 693 of 1996 (O.S)** and **HCCC No. 225 of 1998**.

11. The Applicant filed their submissions on **17th July 2012**. It is submitted on behalf of the Applicant that **Section 19** of the **Limitations of Actions Act** provides that monies secured by charges may not be recovered at the end of twelve years from the date the right to receive the money accrued. Therefore, it is the Applicant's case that since the right accrued on 30th August 1992 or latest on 13th September 1994, the Respondent is now time barred from recovering any monies whatsoever.

12. **On issues of limitation, when does time start running? The matter was under active litigation since 1998, with numerous applications including the current one. The said applications were instituted by the Applicant.**

13. It is also the Applicant's case that when **High Court Civil Case No. 225 of 1998** was filed the issue of limitation did not apply and consequently the issue of limitation has never been heard and finally determined. It is therefore submitted for the Applicant that the doctrine of *res judicata* does not apply and the filing of the Originating Summons is a fresh suit based on limitation in respect of the unenforceability of Court orders and charges over 12 years old. Counsel for the Applicant cited the case of **Malakwen Arap Maswai vs Paul Kosgei, Civil Appeal No. 230 of 2001** in support of their submissions.

14. I have carefully considered the pleadings herein, the submissions by counsel as well as the authorities relied on. Having done so, I take the following view of the matter.

15. Res Judicata is aptly put in 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.”

16. A reading of the above indicates that a Court is barred from hearing a matter or issue which is considered to be *res judicata*. The doctrine of res judicata applies to applications as well as suits. See: **UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA & 2**

OTHERS, CIV. APPEAL NO. 36 OF 1996.

17. The Originating Summons filed by the Applicant on 19th October 2011 seeks for the following orders:-

- 1) **A declaration that the applicant is entitled to redeem the property known as Land Reference Number 16659 that is C.R 22939.**
- 2) **A declaration that the Charge executed on the 10th July, 1992 and registered in the Registry of Titles Mombasa as C.R 22939/2 dated 15th July 1992 is now time barred under and by virtue of the Limitations of Actions Act Chapter 22 Laws of Kenya.**
- 3) **The Respondent be ordered to release and hand over to the Applicant the title documents in respect of Land Reference Number 16659 together with a duly executed discharge of the said charge immediately or in the alternative the Registrar of this Honourable Court be empowered to execute all necessary documents including the said discharge to give effect to the foregoing.**
- 4) **Such other necessary orders that this honourable court be pleased to issue to give effect to the foregoing and to safeguard the Applicant's land from unlawful sale or alienation.**
- 5) **The costs of this Originating Summons be provided for.**

18. With regard to Prayer No. 1, it is plain from the Court record and the previous decisions that the Applicant had the opportunity to redeem the property but failed to do so. On **22nd July 1998**, a consent order was recorded in **HCCC No. 225 of 1998**, in which the Applicant agreed to pay a sum of **Kshs. 22,083,908/=** on or before 31st December 1998 failing which the Respondent would be at liberty to pursue legal action. The Applicant did not abide by the said order and the Respondent revived legal action to sell the charged property.

19. In addition, a ruling delivered on **29th February 2008** in **HCCC No. 225 of 1998** by **Honourable Justice Okwengu** (as she then was) dismissed the applicant's application which sought, among others, an order to restrain the Respondent from selling the suit property. The declaration the Applicant is seeking for in prayer No. 1 is tantamount to restraining the Respondent from selling the suit property, an issue already determined by the Court.

20. As regards prayer No. 2, it is the Applicant's contention that when **High Court Civil Case No. 225 of 1998** was filed the issue of limitation did not apply and consequently the issue of limitation has never been heard and finally determined. It was submitted on behalf of the Applicant that the doctrine of *res judicata* does not apply and the filing of the Originating Summons is a fresh suit based on limitation in respect of the unenforceability of Court orders and charges over 12 years old.

21. In his ruling of **26th July 1999**, Ransley J. (as he then was) ruled that the consent order had lapsed due to non-compliance on the part of the Applicant. In the circumstances, the Applicant cannot be heard to say that the Consent order of 22nd July 1998 is time barred. Even on merit, the Applicant is not deserving of any equitable remedy having been in default of the consent order for almost over fifteen (15) years now.

22. As for the charge executed on **10th July 1992**, I agree that the issue of limitation did not apply when the Applicant filed **HCCC No. 225 of 1998**. However, on the said issue of limitation, the Court addressed itself as follows vide the ruling of Lady Justice Okwengu (as she then was) dated **29th February 2008 at page 11:-**

“In support of this application, the Plaintiff maintained that the debt subject of the charge was not

recoverable as the same was barred by the Statute of Limitation. Again, this has not been pleaded in the Plaintiff and cannot support the Plaintiff's intended suit. Moreover, the 1st defendant has not brought any counterclaim against the Plaintiff but is simply exercising its statutory power of sale. Limitation in respect of an action for recovery of a debt cannot therefore, apply." (Emphasis Supplied)

23. From the foregoing, it is clear that the Applicant cannot plead the issue of limitation as regards the Charge executed on 10th July 1992. The Respondent herein has not filed an action against the defendant for recovery of the debt under the said Charge. Instead, it has been trying to exercise its statutory power of sale for over fifteen years with no success, because of the numerous applications raised by the Applicant including the current suit.

24. It is not necessary to deal with prayers No. 3 to 5 as they are a consequence of Prayers No. 1 and 2 and therefore inter-related.

25. In the upshot, I uphold the Respondent's Preliminary Objection with costs to the Respondent.

**DATED, READ AND DELIVERED AT NAIROBI
THIS 7TH DAY OF MARCH 2013**

**E.K.O OGOLA
JUDGE**

Present

Odhiambo for the Respondent

Teresia – court clerk