



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 102 OF 2018**

**HASSAN IDDI MALAMBU and DR. ALI KOLELA MONTET**

**(Suing as the administrators of the Estate of Amina Naanyu Malambu)**

**VERSUS**

**BESTEL AGENCIES COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**AZELIA INVESTMENTS LTD.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO NORTH.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 2<sup>nd</sup> Defendant's Notice of Motion Application dated the 20<sup>th</sup> July, 2018 which is brought pursuant to the provisions of Section 7 of the Civil Procedure Act and Order 2 Rule 15 (1) (d) of the Civil Procedure Rules. The 2<sup>nd</sup> Defendant prays for the following orders:

1. That the Plaintiff filed herein on 22<sup>nd</sup> June, 2018 be struck out and dismissed for being res judicata.
2. That the costs of this application and the suit be borne by the Plaintiff/ Respondent.

The Application is premised on the grounds that the matters in this suit were directly and substantially in issue in a previously concluded suit namely High Court Miscellaneous 87 of 2013 ( Kajiado ELC Miscellaneous Application No. 98 of 2017) which the court made a final determination of , vide its ruling dated the 5<sup>th</sup> December, 2017. The Plaintiffs' did not appeal against the said ruling.

The application is supported by the affidavit of VIRGINIA WANGUI SHAW where she confirms being a director to the 2<sup>nd</sup> Defendant where she has reiterated her claim.

The 1<sup>st</sup> Defendant through an affidavit sworn by one of its directors Dr. Daniel Kairu Kiaraho supports the instant application and contends that it is meritorious. He avers that the current proceedings are an academic abuse of the court process.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by HASSAN IDDI MALAMBU where they deny selling the suit land. He insists the title used to transact the suit land is fake as they have the original one in their custody. He avers that the 1<sup>st</sup> Defendant has never produced the seller to appear before the Land Registrar or enjoin him in any proceedings. He states that after thorough investigation, the Land Registrar in Ngong Sub county filed a report confirming that the 1<sup>st</sup> Defendant's title was not valid and the 2<sup>nd</sup> Defendant who purchased the suit land from the 1<sup>st</sup> Defendant should surrender its title for cancellation.

The 2<sup>nd</sup> Defendant, 1<sup>st</sup> Defendant as well as the Plaintiffs filed their respective submissions that I have considered.

**Analysis and Determination**

Upon consideration of this instant application including the supporting and replying affidavits as well as the parties submissions, the only issue for determination is whether this suit is res judicata.

It is not in dispute that the subject suit land NGONG/NGONG/ 5048 was the same subject in the Milimani ELC No. 87of 2013 and Kajiado ELC Misc. No. 98 of 2017. It is also not in dispute that the suit land was initially owned by the deceased AMINA NAANYU MALAAMBU

but transferred to the 1<sup>st</sup> Defendant that in turn disposed of it, to the 2<sup>nd</sup> Defendant. What is in dispute is the 2<sup>nd</sup> Defendant's allegation that the issues herein had already been dealt with in the Kajiado ELC Miscellaneous Application No. 98 of 2017 which ruling was delivered on December, 2017 and not appealed from. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the suit herein is res judicata, a fact which is opposed by the Plaintiff who insists that issue of the fraudulent transfer of the suit land from the deceased to the 1<sup>st</sup> Defendant has never been heard and determined since the Milimani ELC No. 87of 2013 was struck out on a technicality.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata: **' 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.'**

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Anothebr (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

**' in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'**

In the current scenario, I note that in the Milimani ELC No. 87of 2013 the parties were HASSAN IDDI MALAMBU ( suing as an administrator of the estate of AMINA NAANYU MALAMBU) Vs BESTEL AGENCIES COMPANY LIMITED & AZELIA INVESTMENTS LIMITED. Further, the issue is dispute concerned land parcel number NGONG/ NGONG/ 5048. I note **Justice Gitumbi dismissed the suit in 2014. As for the Kajiado ELC Miscellaneous Application No. 98 of 2017, the parties were Azelia Investments Limited; Land Registrar Ngong District and Hassan Iddi Malambu. The issue in dispute was the removal of a caution registered against land parcel number Ngong/ Ngong/ 5048 and not for determination of ownership. This Court allowed the removal of the caution vide its ruling dated the 5<sup>th</sup> December, 2017. In so far as I note that in the Milimani ELC 87of 2013, the Plaintiffs sought more or less the same prayers as in the instant suit, on perusal of the ruling by Justice Gitumbi, it is clear the said suit was not determined on merit but was dismissed on the question of locus. I opine that section 7 of the Civil Procedure Act envisaged a situation where the suit was heard on its merit and determined and not merely dismissed on account of locus. In the Court of Appeal of Tanzania at Dar Es Salaam CIVIL APPEAL NO. 27 OF 2003 the learned Judges of Appeal Lubuva; Msoffe; and Mbarouk, while determining the distinction between striking out or dismissal states thus: ' In the case of Ngoni Matengo Cooperative Marketing Union Ltd. Vs Alimahomed Osman (1959) EA 577 at page 580 the Court of Appeal for Eastern Africa had occasion to discuss the distinction between "striking out" and "dismissing" an appeal. The court stated:- "...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used..." (Emphasis supplied)'**

Further in the case of **MWK Vs AMW (2016) eKLR**, Justice Ngugi held as follows: **' Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata.'**

It is against the foregoing and relying on the above cited legal provisions as well as judicial authorities that I hold that even if the Milimani ELC 87 of 2013 was dismissed it was not determined on merit. I opine that in the interest of justice it is pertinent if this suit was heard and determined on its merit.

It is in that regard that I find the instant application is umerited and will dismiss it. I urge the parties to comply with Order 11 to enable the suit be heard and determined expeditiously.

**Date signed and delivered in open court at Kajiado this 27<sup>th</sup> day of February, 2019**

**CHRISTINE OCHIENG**

**JUDGE**