REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 15 OF 2018

JOSHUA NGATU.....PLAINTIFF

VERSUS

JANE MPINDA.....1ST DEFENDANT

REHEMA RAIBUNI..... 2ND DEFENDANT

MARY ALIMA RAIBUNI .....3RD DEFENDANT

SALPRO KENYA LTD .....4TH DEFENDANT

RULING

Background

1. The original suit land was initially known as Ntima/Igoki/3117 which was registered in the name of the present plaintiff as at 6.7.1977. This land was subsequently alienated and subdivided into two parcels, Ntima/Igoki/7321 and 7322 (suit parcels) which parcels are currently in the hands of the defendants through litigation in **Meru ELC No. 132/07 (OS).**

2. The present plaintiff had applied to be enjoined as an interested party in that suit **ELC No. 132/07**, but in a ruling delivered on 18.4.2018, his application failed triggering the filing of the present suit. The brief history of the dispute is captured in paragraph 6-9 of the said ruling which has been availed as annexure JMX, where I stated as follows;

> **"In 1976, Josy Said Ngatu who happens to be the applicant herein was the registered owner of parcel of land No. Ntima/Igoki/3117. He apparently transferred the land to the defendants through sale. The plaintiffs stayed put and refused to move away from the portions of the land they were occupying. The plaintiff's then filed this suit vide an Originating Summons dated 28.11.2007 (filed on 30.11.2007) claiming entitlement to a portion of the suit land (1.7 acres) by way of adverse possession. Down the line, the suit land 3117 appears to have been subdivided with resultant portions being NTIMA IGOKI 7322 registered in the name of 1st – 3rd plaintiffs and NTIMA/IGOKI/7321 registered in the name of Salpro Kenya Ltd who had been enjoined as 5th defendant on 3.7.2012. The subdivisions appear to have occurred in 2009".**

3. In the suit **ELC NO.132 of 2007**, the present 1-3 defendants were identified as sisters of the present plaintiff.

4. Plaintiff had filed this suit on 4.5.2018 averring that his land was fraudulently transferred and he desired inter-alia to have the current titles cancelled in order for the land to revert back to him. Contemporaneously, he had also filed an application dated 4.5.2018 seeking for orders of inhibition and injunction in respect of the current titles to the suit land. Few days thereafter the 4th defendant filed a preliminary objection dated 15.5.2018 averring that the suit is statute barred and that the case is res-Judicata.

5. The 1st – 3rd defendants were also not to be left behind and they filed their own preliminary objection dated 8.10.2018 averring that the suit is res-judicata and that the same is an abuse of the court's process.

6. On 16.5.2018, plaintiff urged the court to give him one week to get an advocate. He was granted his wish but he never engaged any advocate even up to 28.11.2019, the day a ruling date was set.

7. On 23.5.2018, the court gave directions for the application dated 4.5.2018 and preliminary objection dated 15.5.2018 to be canvassed simultaneously by way of written submissions. These directions were re-affirmed on 9.10.2018 to accommodate the preliminary objection of 1st to 3rd defendant.

8. I have seen the submissions of defendants but not those of the plaintiff. Instead, plaintiff has filed a document headed "***Further affidavit in support"*** on 5.10.2018 and another one titled ***"Supplementary affidavit"*** filed on 26.11.2018. None of the other parties (defendants) have raised an issue regarding these two documents. I will therefore proceed to consider the contents thereof.

Analysis and determination

9. I find it necessary to determine the preliminary objection first since in the event it is found to be successful it would not be necessary to consider the application.

10. I Frame the issues for determination in respect of the preliminary objections as follows:

(i) Whether the suit is Res Judicata

(ii) Whether the suit is statute barred

(iii) Whether the suit is an abuse of the courts process

(iv) Whether the doctrine of laches is applicable

Res Judicata

11. The arguments by 4th defendant on this point is that this suit is Res Judicata as issues have already been adjudicated upon in **ELC 132/07**. It is averred that plaintiff had tried to be a party in the earlier suit without success and that he is now "***making an attempt to have a second bite at the cherry".*** It is also argued that the subject matter herein was the same as in the earlier suit. The 4th defendant avers that the essence of the principles of res-judicata is to not only protect the courts from disrepute, but also to protect litigants from unending litigation, that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsels.

12. To buttress his case, 4th defendant relied on the cases of **Nguruman Ltd vs Jan Bande Nielsen & another (2017) eKLR**; **DSV Silo vs the Owners of Sennar (1985) 2 All ER 104 as cited in Bernard Mugi Ndegwa vs James Nderitu Githae & 2 others (2010) eKLR.** The case of **Henderson vs Henderson (1843) 67 ER 313** has also been cited where res-judicata was described as follows;

> ***"….where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time".***

13. Reference has also been made to an incomplete citation of the case of **Attorney General & another ET vs (2012) eKLR** where it was held that;

> ***"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata…..".***

14. 4th defendant has concluded this point by stating that everything pertaining to the suit land in this very suit ought to have been addressed in **Meru ELC 132** of **2007** and hence raising the issue here automatically makes this suit res judicata.

15. The arguments of 1st – 3rd defendant on issue of res judicata buttress what has been submitted by 4th defendant. The 1st -3rd defendants add that a party must be deemed to have raised all and any matters which they could have raised in the original claim (**read ELC132 of 2007**), whether they raised it or not. On this point, the 1st -3rd defendants have cited the cases of **John Christopher Kamau vs. Co-operative Bank of Kenya (2014)eKLR** which upheld the case of **Mburu Kinyua vs. Gachiri Tuti (1998) KLR 69**, where the court found that an issue which ought to have been made a ground of attack or defence in a former suit shall be deemed to have been a matter directly and substantially in issue in such a suit. The cases of **DSV Silo vs The Owners of Sennar (1985) 2 ALL ER 104** cited in **Bernard Mugi Ndegwa vs James Nderitu Githae and 2 Others (2010) Eklr**, **Henderson VS Henderson (1843) 67 ER 313** and the case of **Bernard Mugo Ndegwa vs James Githae & 2 others (2010) eKLR** have also been cited to buttress the point that plaintiff ought to have brought all his issues in the suit **ELC 132 of 2007**.

16. In his document titled *"Supplementary affidavit"*, plaintiff avers that the suit is not res-judicata since plaintiffs in Meru **ELC 132/07** are the 1st – 3rd defendants. He also avers that the plaintiffs in **ELC 132/07** were claiming for the suit land through adverse possession whereas

his claim is based on fraud.

17. As pointed out by all the defendants, the guiding law on the issue of res judicata is **section 7 of the Civil Procedure Act** which provides 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".***

18. A look at the **ELC case no. 132/07** reveals that plaintiff herein was not a party to that suit. The 1st to 3rd defendants herein are the ones who had filed the case seeking entitlement to the suit land by way of adverse possession. Considering that the issue for determination herein is FRAUD and since plaintiff was not a party in **ELC 132/07**, it can **hastily** be concluded that res judicata would not apply herein. I say hastily because a deeper and a keener analysis of the issue at hand reveals that the issues raised by plaintiff ought to have been raised in **ELC no.132/07.**

19. Plaintiff's undoing is an application he filed in ELC 132/07 on 30.4.2008 and dated 29.4.2008. The prayers sought in that application were:

> **(i) The honourable court be pleased to join the applicant Joshua Ngatu as a plaintiff in this suit.**
>
> **(ii) Costs be provided for**

20. The grounds in support of that application were interalia that **"the defendants stealthily and fraudulently obtained title to this land from the applicant".** By then defendants were Mohamed Iqbal Abdul Karim, Ramji Devji Patel, Mehboob Sale, Mohamed Haji and Velji Hirji Sengali.

21. The plaintiff is hence not candid when he states in his affidavits that **"I uncovered the fraud recently"**. The plaintiff failed to prosecute his application and hence the issue of fraud was not determined by the court.

22. I am therefore in agreement with the authorities cited by the defendants in support of the principle of res-judicata. In particular the case of **Herderson vs Herderson (1843) 67 ER 313** is applicable herein where it was stated that ***"Where a given matter becomes subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case…".***

23. A look at plaintiff's annexure 1 (the transfer of land), the purported transfer of the suit land from him to other entities occurred in 6.7.1977. This is the fraud the plaintiff was making reference to in his **Application of 2008**. Having failed to prosecute that application, he now wants the court to relook at the transaction of 1977 a transaction that occurred 42 years ago as a guise, that his issue is with **titles no. 7321** and **7322!** Litigation must come to an end at some point. In the instant, I am inclined to find that plaintiff is indeed evading the doctrine of res judicata. Both Preliminary Objections are upheld on the ground that this suit is Res judicata.

Whether the suit is statute barred

24. On this issue 4th defendant has submitted that fraud is a tort hence the claim falls under section 4 (2) of the Limitation of Actions Act which provides that:

> ***"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued".***

25. 4th defendant contends that plaintiff has mischievously misrepresented the allegation of fraud and has also been economical with the truth. It has been submitted that plaintiff has put in as part of his list of documents, abstract copies of police O.B numbers which he got after he reported the alleged fraud at the police station this year. However, upon a keen look at his pleadings, specifically his supporting affidavit dated 4th May, 2018, the averments from paragraphs 2 -8 expound on an event that took place in 1977 when he allegedly intended to subdivide "his" land and he clearly states that the named persons therein with the assistance o f a law firm defrauded him of his land. He clearly confesses of his knowledge of the alleged fraud and thus time started running from 1977 and not in 201*8.*

26. The 4th defendant has cited the case of ***Peter Kimani Njenga vs Mugo Kamabuni Mugo & 3 others (2018) eKLR*** where Justice M.C Oundo stated thus stated ***"….. In the case of Bosire Ongero vs Royal media services (2015) eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same…..".***

27. The 4th defendant contends that without a doubt or second guessing, the instant application and the entire suit are stale ab initio and the only effect is to clog the justice system thereby amputating the efficiency and the efficacy of the administration justice and hence only a dismissal with costs would save the situation.

28. Section 26 of the Limitation of Actions Act provides that;

> ***"Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of***

the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it…." .

29. As pointed out by 4th defendant, plaintiff appears to have a detailed account of the 1977 transaction as is captured in his affidavit of 4.5.2018 paragraph 2-8 thereof. He mentions the RAHEMTULAS as the persons who defrauded him. 42 years down the line, he wants this court to unravel the mystery of that fraud!

30. Further, plaintiff is mute on his application of April 2008 where he was claiming that fraud had been carried out on his land.

31. I have no doubts that plaintiff was well aware of the transaction of 1977 whereby the suit land was transferred from his name to other entities.

32. The claim of fraud can be considered as a tort; In this case, it would be time barred under section 4 (2) of Limitations of Actions Act. The claim would still be time barred if the 1977 contract was to be taken as the basis of the fraud, pursuant to provisions of section 4 (1) (a) of Limitations of Actions Act.

33. The rationale of the statute of limitation was aptly captured in the **East African Court of Justice appeal case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013)Eklr** where it was stated as follows;

"Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of disruption of settled expectations, and reducing uncertainty about the future)".

34. The logical conclusion to make of plaintiff's claim is that the same is stale and is time barred by the statute of limitation. Again the Preliminary Objection of 4th defendant succeeds on this ground.

Whether the suit is an abuse of the court's process.

35. The Defendants have submitted that this is a case where by plaintiff has mischievously concealed the truth. This is aptly captured in minute details in the submissions of the 4th defendant. For instance, plaintiff would want this court to believe that he only discovered what happened to the suit land recently, particularly the subdivision of the suit land into two other parcels, yet he has all along been aware of the existence of the older suit **ELC NO.132 of 2007**.

36. The 1-3rd defendants have invited this court to see the definition of **ABUSE** in **The Black's law Dictionary Sixth edition** where such definition is outlined as follows; "***everything which is contrary to good order established by usage that is a complete departure from reasonable use …."***. Further, the 1-3rd defendants have submitted that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. I cannot agree more. Taking into totality the nature and extent of litigation in **ELC 132 of 2007**, I do not hesitate to state that this suit is an abuse of the courts processes.

Doctrine of Laches

37. Is this a suitable case to invoke the doctrine of laches; ***"equity aids the vigilant and not those who slumber on their rights".*** In the case of **Abigael Barma Vs. Mwangi Theuri ELC No.393 of 2013,** the court made reference to "**Snell's *Equity*, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in *Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n)* where it was asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."**

38. In the **Court of Appeal Case No.16 of 2012 Nairobi (Civil Application**), reference was made to **Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221** , where at page 240 it was stated thus:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material…."

39. Thus one of the legal basis of the doctrine of laches **is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found.** As pointed out earlier on, the transaction that culminated in alienation of the suit land from the plaintiff to other parties occurred sometime in 1977. Going by plaintiff's application of 2008 in **ELC 132 of 2007**, and taking into account the contents of his supporting affidavit of 4.5.2018, plaintiff was aware of this aged transaction. No plausible explanation has been advanced as to why he is lodging the claim at this time.

40. The other point of consideration is **acquiescence on the part of the claimant**. Plaintiff has averred that he has always lived on the suit

land. How is it that he just sat there on his land while buildings and go-downs were coming up on that land and he took no action at all? Again there is not the slightest plausible explanation given by the plaintiff as to why he did not ventilate his claim in the suit number **ELC 132/07** by prosecuting his application of 2008. He is therefore the one who has acquiesced his status and he should not be allowed to drag the present litigants on an endless litigation odyssey.

41. Finally, the court has considered that "**circumstances have changed"**. For instance 4th defendant bought his share of the land from MEHBOOB SALEH, VALJI SENGHAI, MOHAMED IQBAL and RAMJI D. PATEL. But the people who allegedly bought the land in 1977 are the RAHEMTULLAS.

42. When circumstances change and time passes, witness go their ways, evidence disappears, even memories falters. The plaintiff is questioning the 1977 transaction. 40 plus years down the line, how are the present defendants expected to look for those RAHEMTULLA'S?, Yet it appears that plaintiff is the one who knew them well. Plaintiff even remembers such finer details like who amongst the RAHEMTULLAS was an alien. He even remembers the alien card number!!. It would be unfair and unjust to subject the defendants to litigation all over again in respect of this transfer which occurred decades ago with the knowledge of the plaintiff.

Conclusion

43. This is a case where plaintiff apparently sold the family land decades ago leaving his sisters to fight it out with the persons who bought the land (litigation in **ELC 132 of 2007**), and now he wants the land back!. That is not justice and it is not fair. I am in agreement with the submissions of defendants that plaintiff wants to have a second bite of the cherry.

44. This is a court of law as well as a court of equity and the court will not hesitate to stop the plaintiff in his tracks because he is guilty of laches. Plaintiff is a dishonest litigant, who has abused the court's processes and the court will exercise its discretion to ensure that this abuse is brought to an end. In light of the foregoing findings, it is unnecessary to consider the application of 4.5.2018. I find that the preliminary Objections filed herein by defendants are merited. This suit is hereby dismissed with costs to defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Munga for 1st, 2nd and 3rd defendants

Mutegi for 4th defendant

Plaintiff

3rd defendant

4th defendant represented by Justus Kathurima

HON. LUCY. N. MBUGUA

ELC JUDGE