



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 233 OF 2017

ALKA ROSHANLAL HARBANSLAL SHARMA

MAMTA ROSHANLAL SHARMA.....PLAINTIFFS/APPLICANTS

AND

THERESA COSTABIR

THE LAND REGISTRAR, MOMBASA

THE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

RULING

1. By a Complaint dated 23rd November 2017 and filed herein on 24th November 2017, the two Plaintiffs Alka Roshanlal Harbanslal Sharma and Mamta Roshanlal Sharma pray for Judgment to be entered against the three Defendants jointly and severally as follows:-

a) A permanent injunction restraining the Defendants, their agents, employees, servants and/or any other persons acting on the Defendants behalf from sub-dividing, alienating, disposing off and/or transferring the suit premises, being Plot Nos 848/III/MN (CR No. 18142), 849/III/MN (CR. No 18143), 850/III/MN(CR. No. 18144), 851/III/MN(CR No. 18145) and 852/III/MN (CR 18146) situate at Vipingo within Kilifi County and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interests of the Plaintiffs herein;

b) An order for the surrender and/or delivery of the provisional certificates of titles issued on 22nd November 2016 to the 1st Defendant by the 2nd Defendant in respect of the said suit premises to the Plaintiffs to continue holding as security till redemption of the same through re-payment of the loan sums plus interest and/or money's worth;

c) Costs of this suit.

2. The Plaintiffs prayers are based on their contention that they are the legal representatives of the Estate of the late Kulta Hanspal (the deceased). It is their case that on 15th March 1988, and 2nd August 1999, the deceased had through a company known as Alcon International Ltd advanced two loans of Kshs 500,000/- and Kshs 300,000/- respectively to the 1st Defendant for the purchase of the five parcels of land comprising the suit premises herein.

3. It is the Plaintiff's case that as security for the aforesaid loans advanced, the 1st Defendant deposited the original title deeds and/or certificates of titles for the suit premises with duly executed transfers with the deceased. Upon the deceased's death in 2012, the Plaintiffs in the sincere belief that the sum of Kshs 800,000/- was for the purchase of the suit premises proceeded to register the transfer instruments in respect of the suit premises and were thereafter issued with title deeds and a Certificate of Title.

4. Thereafter however, the 1st Defendant Theresa Costabir sued the Plaintiffs claiming that she had never sold and/or transferred the suit premises to the Plaintiff. On or about 25th November 2013, Judgment was delivered in Malindi ELC No. 39 of 2013 in favour of the 1st Defendant and the Plaintiffs were consequently ordered to surrender the Certificate of Titles.

5. It is now the Plaintiffs position that no specific orders were made in the Judgment for the 1st Defendant to get back the provisional certificates and that in spite of that fact, the 1st and 2nd Defendants have proceeded to procure and issue provisional certificates for the suit premises to the 1st Defendant on 22nd November 2016 as a result whereof there are now essentially two titles for each of the five parcels of land comprised in the suit premises.

6. The Plaintiffs aver that they are now apprehensive that the 1st Defendant being possessed of the provisional certificates for the suit premises may now proceed to dispose of the same without the repayment of the loan earlier on advanced by the deceased and hence the prayers sought herein.

7. Filed contemporaneously with the suit herein is a Notice of Motion application dated 23rd November 2017 seeking a temporary injunction to restrain the Defendants from sub-dividing, alienating, disposing off and/or transferring the suit premises pending the hearing and determination of the suit.

8. The 1st Defendant filed a Written Statement of Defence herein on 3rd May 2018 in which she inter alia sought the dismissal of the suit for being vexatious and res judicata. On the same date the 1st Defendant filed a Preliminary Objection dated 2nd May 2018 giving notice that she shall raise a Preliminary Objection on jurisdiction on the basis that the suit is vexatious, an abuse of the Court Process and res judicata by dint of final determination by competent Courts made in:

i) Malindi ELC No. 39 of 2013; Theresa Costabir –vs- Alka Roshamlal Harbanslal Sharma & Another; and

ii) Malindi Civil Appeal No. 44 of 2014; Theresa Costabir –vs- Alka Roshamlal Harbanslal Sharma & Another.

9. On 9th May 2018 when the Plaintiffs' application dated 23rd November 2017 aforesaid came up for hearing, it was agreed that the 1st Defendant's Preliminary Objection be disposed of first. Accordingly the parties were granted time to file their respective submissions thereon.

10. I have considered the Preliminary Objection dated 2nd May 2018 and the pleadings and other evidence placed before me. I have equally perused and considered the written submissions placed before me by the Learned Advocates for the parties.

11. The doctrine of res judicata is anchored at Section 7 of the Civil Procedure Act as follows:-

“7. 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.”

12. The Plaintiffs in the matter before me are legal representatives of the estate of the late Hansapal Kular (the deceased). As I understood it, it was not in dispute that the suit before me is the third one filed in this Court that touches on the issue of a loan of Kshs 800,000/- advanced by the deceased in relation to the suit premises.

13. According to the Plaintiffs however the issues raised herein could not have been raised and/or determined in the previous suits as it was not an issue at the time when the previous suits were determined. It is the Plaintiff's case that this suit was occasioned by an event which could not have been within their contemplation in the course of the hearing and disposal of the previous suits.

14. The Plaintiffs explain that prior to the filing of the said two suits, the certificates of title in respect of the suit premises were in the possession of the Plaintiffs. All along, the Plaintiffs held the titles as security for the repayment of the loan which was admitted by the 1st Defendant.

15. It is the Plaintiff's case that after the hearing of Malindi ELC No. 39 of 2013, the Court issued orders for the surrender of the Original Certificate of Titles held by the Plaintiffs to the Land Registrar Mombasa for cancellations of the entries made in regard to the Plaintiff's company by the name Timesharing Ltd. While the Plaintiffs complied with the orders, the said Land Registrar (the 2nd Defendant herein) went ahead on 22nd November 2016, to issue provisional certificates in respect of the suit premises in favour of the 1st Defendant.

16. The Plaintiffs contend that the matter of the issuance of the provisional certificates to the 1st Defendant was neither a matter in issue in the previous suits nor was it prayed for by the 1st Defendant. It is further their case that by that very act of issuing the certificates in the name of the 1st Defendant, the 2nd Defendant has changed the contractual relationship between the parties by giving back the 1st Defendant her titles while she is yet to redeem the loans advanced to her to enable her purchase the suit premises.

17. In light of the disagreements as to the import of the actions complained about vis-à-vis the position in the previous suits, this Court found it necessary to peruse the record in order to ascertain the position herein.

18. From the said record, it is apparent that the deceased advanced two friendly loans in the year 1988 totaling Kshs 800,000/- to the 1st Defendant for the purchase of the five parcels of land referred to herein as the suit premises. Those premises were purchased and registered in the name of the 1st Defendant. The said title documents were then deposited with the deceased who was to hold them as security pending the repayment of the loan.

19. As fate would have it, the late Hansapal Kular passed away on 5th March 2012 before the loan was repaid. In their belief that the loan had been used to pay for the suit premises, the Plaintiffs who are the deceased's widow and daughter respectively proceeded to transfer the suit premises to a company by the name Timesharing Company Ltd without the 1st Defendant's knowledge and/or concurrence.

20. When the 1st Defendant came to learn of what had transpired, she filed the first suit being Mombasa HCCC No. 222 of 2012 which was later transferred to Malindi and registered as ELC No. 39 of 2013. The said suit was filed against one Jeremiah M. Maroro a purported Advocate said to have drawn up the transfers leading to the registration, the said Timesharing Company Ltd and the Land Registrar Mombasa.

21. In that first suit the 1st Defendant sought orders of permanent injunction forbidding those sued from dealing in any manner with the suit premises. She also sought the surrender of the original title deeds and deed plans, rectification by cancellation of all entries in the register regarding the transfer and the issuance of provisional certificates of title as well as general damages.

22. By a Judgment delivered on 25th October, 2013, the Honourable Angote J., then seized of the matter ruled in favour of the 1st Defendant, holding that the transfer of ownership of the suit premises to the company was irregular, null and void. The Learned Judge further held that the documents used in the transfer were forgeries drawn by an unqualified person the said Jeremiah Maroro who was masquerading as an advocate. Further and in addition to the foregoing, the Learned Judge found and held that a loan agreement existed between the deceased and the 1st Defendant in the form on an informal charge.

23. On the strength of that last finding the Plaintiffs herein filed an Originating Summons on 4th August 2014 (the second suit) vide Malindi ELC Miscellaneous Application No. 24 of 2014 against the 1st Defendant wherein they sought inter alia vesting orders in their favour in respect of the suit premises by virtue of an informal charge created out of the advancement of the loans in 1988 upon the deposit of the Certificate of Title in line with Section 79 of the Land Act. This second suit was opposed by the 1st Defendant on the very similar grounds as raised herein, that the suit was res judicata and that the issue of proprietorship of the suit premises ought to have been dealt with in the first suit.

24. On 27th February 2015, Angote J. having heard the respective arguments, struck out the Originating Summons on the basis that the suit was premature as the Plaintiffs had not issued Statutory Notices to the 1st Defendant as required under Sections 90 and 96 of the Land Act. The Learned Judge however determined that the Plaintiffs could move the Court as appropriate once the 1st Defendant was served with the relevant Statutory Notices.

25. Aggrieved by the said decision, the 1st Defendant lodged an appeal to the Court of Appeal at Malindi in Civil Appeal No. 44 of 2014. A perusal of the decision of the Court of Appeal delivered on 11th December 2015 reveals that the Court's decision turned on the question of whether or not the second suit was res judicata, given the proceedings in the first suit.

26. Explaining the doctrine of res judicata in their Judgment, the Court of Appeal observed and concluded as follows:-

“For avoidance of doubt, the explanation to Section 7 of the Civil Procedure Act gives a wide interpretation of what constitutes a “matter substantially in issue” and states that:

“Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.” (Emphasis added).

Given that the appellant had sued on the basis of the loan arrangement, seeking restoration of her titles, it would have served the respondents well to seek to be enjoined in that suit and counterclaim for declaratory orders if at all they felt equally entitled to ownership of the said suit premises as chargees. This would have prevented a multiplicity of suits based on the same issues and subject matter. The Learned trial Judge thus erred in not holding as much. On a matter to determine the question of title to the suit premises, the fact that the respondents chose to pursue the rights of the deceased as a purchaser and not as chargee did not change the fact that, the proprietary interests in the suit premises were determined. This is what informed the decision in the primary suit. Any subsequent proceedings touching on the ownership of the suit premises on account of the same facts were res judicata.”

27. Granted the above findings of the Court of Appeal, I must confess I was rather taken aback by the temerity of the Plaintiffs in filing this third suit against the Defendants herein. Those very claims they make herein in respect of the ownership of the suit premises on account of the loan advanced by the deceased were long declared by the Appellate Court as res judicata. This Court as it were does not have the wherewithal to annul and/or even modify those findings.

28. As the Learned Judges of Appeal stated in ***John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others(2015)eKLR:-***

“...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 to open the same subject of litigation 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 plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by 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...”

29. As it were, the rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.

30. From the material placed before me, the inescapable conclusion is that the proceedings before me offend the doctrine of res judicata as embodied in Section 7 of the Civil Procedure Act. This suit and the application filed therewith have been brought in gross abuse of the Court Process.

31. Accordingly, I uphold the Preliminary Objection dated 2nd May 2018. The Plaintiffs suit is hereby struck out with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE