



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC CASE NO. 96 OF 2018

SAMUEL BEDE OGEMBO.....PLAINTIFF

VERSUS

ANN KARURA KIBATI..... 1 ST DEFENDANT

KELVIN MOGENI t/a MOGENI ADVOCATES.....2 ND DEFENDANT

REGISTRAR OF LANDS, NAIROBI COUNTY..... 3 RD DEFENDANT

RULING

1. The 1st defendant brought a notice of motion dated 16/7/2018 seeking the following orders:

1) Spent

2) That this honourable court be pleased to strike out the plaintiff's suit against the 1st defendant as the matter in issue with regard to transfer and ownership of Plot No. 4 out of LR No. 2259/141(now LR No. 2259/660) have been fully heard and determined by this court in Nairobi ELC No. 31 of 2009, Anne Karura Kibati v Samuel Bede Ogembo.

3) THAT the interim orders barring the 1st defendant from dealing with LR No.2259/660 be set aside.

4) THAT the 1st defendant be granted the costs of this application and the suit.

2. The application was supported by an affidavit sworn by Anne Kirura Kibati. The case of the 1st defendant was that this suit arose from a judgment delivered by Honourable Justice Mbogholi Msagha on 22/7/2011 against the plaintiff (respondent) where an order for specific performance was issued. The 1st defendant averred that she entered into a sale agreement with the respondent on 8/9/2004 for a consideration of Kshs. 5,000,000. The terms of the agreement were that the plaintiff would avail completion documents to enable the applicant cause the land to be transferred into her name. The plaintiff defaulted and hence a suit was instituted against him. In the present suit, the plaintiff sued the defendants through a plaint dated 5/3/2013 and prayed for judgment for: (a) full disclosure of all transactions over LR No.2259 or portions thereof; (b) full disclosure of amounts received by the 2nd defendant from whom and for what; and (c) cancellation and reversal of all the transactions procured by fraud or indemnity and costs of the suit. The applicant contended that this court lacked jurisdiction to hear this matter as the issue had been heard and fully determined.

3. The plaintiff filed a replying affidavit and a supplementary affidavit on 20/11/2018. He deposed that he had never instructed any other advocate apart from the 2nd defendant. He denied ever instructing the advocates who purported to have executed the sale agreement which gave rise to the preceding suit. He stated that he entered into a sale agreement with the applicant on 8/9/2004 where a deposit of Kshs. 1,250,000/= was paid by the applicant but he later wrote to the applicant's advocates indicating that he was no longer interested in selling the property and refunded the deposit. He further stated that this matter is not *res judicata* because the present suit is between the parties herein whereas the other suit was between him and the applicant alone.

4. The application was argued in court through oral submissions. Mr. Omino counsel for the plaintiff, submitted that the proceedings between the 1st applicant and the respondent in Nairobi ELC 31 of 2009 were carried out fraudulently and therefore the present suit cannot be said to be *res judicata*. He further submitted that the preceding judgment cannot be vacated in that particular suit because the suit does not exist. He argued that no party would be prejudiced if they are allowed to litigate in the present suit.

5. Mr. Munyu for the applicant submitted that the plaintiff was represented by counsel in the previous suit. He relied on four orders issued by different judges and submitted that the said orders were served on the plaintiff. He further submitted that no appeal was filed against the judgment in Nairobi ELC Case No. 31 of 2009. He added that the present dispute was fully determined and the court ordered that the plaintiff do surrender the documents in his possession to facilitate transfer of the suit property to the 1st defendant. He added that the court also directed that the plaintiff be paid balance of the full purchase price, which money was in the court's custody.

Determination

6. I have considered the application together with the parties' rival submissions. I have also considered the relevant statutory provisions and jurisprudential principles. The broad question falling for determination in this application is whether the suit herein is *res judicata*. In other words, the single question falling for determination is whether this suit offends Section 7 of the Civil Procedure Act. The said section provides thus:

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.

7. For *res judicata* to apply, there must have been a previous suit in which the same issue was heard and determined and the previous matter must have been heard and determined by a competent court or tribunal.

8. The rationale behind *res judicata* was outlined in **Henderson v Henderson (1843) 67ER 313** was outlined as follows:-

“the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

9. There is no gainsaying that *res judicata* is a principle that goes to the core of the rule of law as far as litigation is concerned. Any suit that runs afoul of this principle has zero chance of survival.

10. Counsel for the plaintiff conceded in his submissions that the issues in this suit have been the subject of litigation and determination by the High Court in Nairobi ELC Case Number 31 of 2009. He however contended that the proceedings in the preceding suit were fraudulent. In my view, the plaintiff should have raised the issue of “fraudulent proceedings” in the suit where a determination on the issues was rendered or in the appellate court. To bring fresh proceedings and make allegations of fraudulent court proceedings in a court of equal status is, to say the least, a flagrant abuse of the process of the court. This court is certainly not the forum for making those allegations.

11. The totality of the foregoing is that it is clear from the materials before this court that this suit is *res judicata*. This court therefore has no jurisdiction to entertain this suit or purport to hear and make a determination on the issues herein. I accordingly allow the 1st defendant's notice of motion dated 16/7/2018 in terms of prayers 2 and 3. The plaintiff shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Chacha holding brief for Ms Makori for the 2nd defendant and holding brief for Mr Munyu for the 1st defendant

Ms Mwinzi holding brief for Ms Omino for the Plaintiff

June Nafula - Court Clerk