



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1505 of 2013

**FLORENCE WAIRIMU MBUGUA (suing as an administrator of the
estate of Joseph Kiarie Mbugua).....PLAINTIFF**

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

SATYA INVESTMENTS LIMITED.....3RD DEFENDANT

RULING

What is before the court is the 3rd defendant's application dated 14th July, 2014 seeking the striking out of this suit as against the 3rd defendant on the ground that the suit is *res judicata*. The application was brought on the grounds that the issues raised herein by the plaintiff for determination were raised and determined with finality by the Court of Appeal in Nairobi Court of Appeal C.A No. 164 of 2004, Satya Investments Limited v J.K. Mbugua and the plaintiff's application for leave to appeal against the decision of the Court of Appeal to the Supreme Court was denied.

In the affidavit that was sworn by its director, Dipak Kumar Anand on 14th July, 2014 in support of the application, the 3rd defendant averred that it was the legal and indefeasible owner of all that parcel of land known as L.R No. 209/12132 (hereinafter referred to as "the suit property"). The 3rd defendant averred that it instituted a suit namely, Nairobi HCCC No. 762 of 1995 seeking eviction orders against one, Joseph K. Mbugua (deceased) (hereinafter referred to as "the deceased") who was in unlawful occupation of the suit property. The 3rd defendant averred further that the deceased also filed two suits over the suit property namely, HCCC No. 587 of 1995 and HCCC No. 2716 of 1995 against the 3rd defendant and the Attorney General which suits were later consolidated with HCCC No. 762 of 1995. The 3rd defendant averred that the three suits were heard and determined together by the High Court. The 3rd defendant averred that the High Court dismissed its claim against the deceased and allowed the deceased's claim against it in respect of the suit property. The 3rd defendant averred that pursuant to that judgment by the High Court, it was prohibited from taking possession of the suit property.

The 3rd defendant averred further that it was aggrieved by the said judgment of the High Court and preferred an appeal against the same in Nairobi Court of Appeal C.A No. 164 of 2004, Satya Investments Limited v J.K. Mbugua. The 3rd defendant averred that the deceased passed on while the appeal was pending and he was substituted in the said appeal by his legal representatives one of whom was the plaintiff herein. It averred that the Court of Appeal in its judgment made on 22nd March, 2013 reversed the findings of the High Court and declared the 3rd defendant the legal and indefeasible owner of the suit property. The 3rd defendant averred that the application by the administrators of the estate of the deceased for leave to appeal against the said decision of the Court of Appeal to the Supreme Court was dismissed on 20th September, 2013.

The 3rd defendant averred further that following the said decision of the Court of Appeal, the High Court issued an order on 24th June, 2013 for the eviction of the administrators of the estate of the deceased who included the plaintiff from the suit property. It averred that the said administrators of the estate of the deceased had refused to vacate the suit property even after the decision of the Court of Appeal. The 3rd defendant averred that this suit was an abuse of the process of the court as the issues raised in the suit were conclusively determined by the Court of Appeal. It averred that it was not open for the plaintiff to re-litigate the same issues through a fresh suit.

The application was not opposed. During the hearing of the application on 24th September 2018, Mr. Nyawara advocate for the 3rd defendant submitted that the issues raised in this suit had been raised and determined by the Court of Appeal in Nairobi Court of Appeal C.A No. 164 of 2004, Satya Investments Limited v J.K. Mbugua. He argued that the Court of Appeal conclusively determined the issue of the 3rd defendant's interest in the suit property. He reiterated that after the decision of the Court of Appeal, the High Court issued an eviction order against the plaintiff and it was when the eviction of the plaintiff commenced, that she instituted this suit.

Mr. Nyawara submitted further that the plaintiff derived her cause of action from the deceased and as such she could not claim that she had a new cause of action against the 3rd defendant. He submitted that this suit which was brought against the same parties who were before the High Court and the Court of Appeal in the cases referred to earlier is *res judicata*. In support of his submission, Mr. Nyawara relied on the case of Kenya Commercial Bank Ltd. v Benjoh Amalgamated Ltd (2017)eKLR.

I have considered the 3rd defendant's application together with the affidavit filed in support thereof. As I have stated earlier, the application was not opposed. It follows therefore that all the averments contained in the affidavit in support of the application were not controverted. In her plaint dated 10th December, 2013, the plaintiff sought among others the following reliefs:

- a) A declaration that the transfer of L.R No. 1870/IX/54 now known as L.R No. 209/12132 by the 2nd defendant to the 3rd defendant was null and void.
- b) A declaration that the acquisition of L.R No. 1870/IX/54 now known as L.R No. 209/12132 by the 2nd defendant from the 1st defendant was null and void.
- c) An order that the registration of the 3rd defendant as the proprietor of L.R No. 209/12132 IR 62591 be cancelled.
- d) An order that the certificate of title IR No. 62591 in respect to L.R No. 209/12132 IR 62591 be rectified to reflect the plaintiff as the owner and the said certificate be delivered to the plaintiff.
- e) A temporary and/or permanent injunction do issue restraining the 3rd defendant from evicting the plaintiff or in any manner whatsoever interfering with the plaintiff's occupation of L.R No. 209/12132 IR 62591

Section 7 of the Civil Procedure Act prohibits a court from entertaining a suit which has been heard on merit by a court of competent jurisdiction in the following terms:

“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.”

The elements of *res judicata* were set out by the Court of Appeal in Kenya Commercial Bank Limited v Benjoh Amalgamated Limited (2017) eKLR that was cited by the 3rd defendant as follows:

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- (a) The suit or issue was directly and substantially in issue in the former suit.*
- (b) That former suit was between the same parties or parties under whom they or any of them claim.*
- (c) Those parties were litigating under the same title.*
- (d) The issue was heard and finally determined in the former suit.*
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

I am in agreement with the 3rd defendant that the question regarding the ownership of the suit property was litigated in the High Court and was the subject of an appeal to the Court of Appeal in Nairobi Court of Appeal C.A No. 164 of 2004. The plaintiff and the 3rd defendant were parties in the said cases. The Court of Appeal made a finding that the 3rd defendant was the legal and indefeasible owner of the suit property. In the ruling which I delivered in this matter on 31st March, 2017, I had expressed my view on the plaintiff's claim as follows:

“I am in agreement with the submissions by the 1st and 3rd Defendants that the Plaintiff has not demonstrated the interest which she has in the suit property which should be protected by the injunction sought. In its decision rendered in Nairobi Civil Appeal No. 164 of 2004, Satya Investments Ltd. –vs- J. K. Mbugua, on 22nd March 2013, the Court of Appeal held that the 1st Defendant herein had no valid title over the suit property which it could lawfully transfer to the deceased on behalf of whose estate this suit has been brought. The court ordered the deceased to vacate the suit property within 45 days from the date of the Court of Appeal decision in default of which the deceased was to be evicted.

The deceased did not vacate the suit property as ordered by the Court of Appeal and there is already an order for the police to assist the auctioneers to evict the deceased, his agents or anyone residing on the suit property. The said decision of the Court of Appeal has not been stayed. An application by the plaintiff for leave to appeal against the same to the Supreme Court was dismissed by the Court of Appeal on 20th September 2013. In the face of the Court of Appeal decision aforesaid in which the deceased was found to have no valid title over the suit property, I am not persuaded that the Plaintiff has a prima facie case against the Defendants with a

probability of success., I am of the view that the issues raised herein are the same as the issues which were raised in the Court of Appeal which were determined in favour of the 3rd Defendant. The argument by the 1st and 3rd defendants that the suit herein is res judicata is therefore not far fetched.”

I still hold the same view. I am satisfied that the 3rd defendant has demonstrated that this suit is *res judicata*. In my view the suit is not only *res judicata* but is also an abuse of the process of the court. Due to the foregoing, I find merit in the 3rd defendant's Notice of Motion application dated 14th July, 2014. The application is allowed with the consequence that the plaintiff's suit as against all the defendants is struck out as an abuse of the process of the court. The 3rd defendant shall have the costs of the application and the suit. It is so ordered.

Delivered and Dated at Nairobi this 7th day of March 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Ms.Mburu h/b for Mr.Nyawara for the 3rd Defendant

Catherine- Court Assistant