



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 67 OF 2018

MUGUMOINI FARMERS COMPANY LIMITED - PLAINTIFF

VS

INSHWIL BUILDERS & ENGINEERS LIMITED - DEFENDANT

RULING

1. The Plaintiff moved the Court vide a Notice of Motion filed on 17/8/18 seeking orders inter alia of temporary injunction to issue against the Defendant over the suit lands named as KAKUZI/KIRIMIRI/BLOCK7/381, 382, 383, 250,445 and any other subdivisions including but not limited to KAKUZI/KIRIMIRI/BLOCK7/33, caveat be placed on the suit land and that the titles for the said lands be cancelled and reverted to the Plaintiff.

2. In a swift rejoinder the Defendant filed a Preliminary Objection dated the 13/9/2018 on the following grounds; the suit is resjudicata; the Plaintiff suit be struck out as it offends Order 4 Rule 1(1)(f) (2) & (4); the Plaintiff failed to disclose previous cases in respect to the parties and the subject matter of this case to wit; **ELC 1643 of 2007 (formerly HCCC No 1171 of 2005); HCCC No 1159 of 2005; HCCC No 3086 of 1994 and ELC No 245 of 2017**; application is bad in law, frivolous and incompetent and an abuse of the process of the Court.

3. In a replying affidavit sworn by Joseph Kamande Ngone, the Plaintiff opposed the application. He deponed that the cause of action in the instant suit is anchored on fraud and determination of title of the suit lands and therefore different from the other suits. Further, that he is a Chairman and Director of the Plaintiff Company and therefore has capacity and authority to swear the verifying affidavit and therefore has not violated Order 4 Rules 2 & 4 of the Civil Procedure Rules.

4. On the 13/2/19, the parties with the direction of the Court agreed to file written submissions which I have read and considered. I have also read and considered the authorities cited by each of the parties.

5. The key issue for determination is whether the Preliminary Objection is a pure point of law.

6. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the question in reference to;

- a. Matters directly and substantially in issue in the former suit.
- b. Whether the parties are the same or parties under whom they are or any of them claim
- c. Litigating under the same title
- d. Competence of the Court that handled the previous cases.
- e. Matter has been heard and finally decided.

7. The essence of the doctrine of res judicata is further explicated by Wigram, V-C in **Henderson v. Henderson (1843) 67 E.R. 313**, 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 litigation in respect of the 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 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” .

8. I have carefully perused the cases cited to have formed the basis of this Preliminary Objection and I make the following findings;

9. **ELC 1643 of 2007(formerly HCCC No 1171 of 2005)**; the Plaintiff in this case was Mugumoini Framers Co Limited and the Defendant is the Defendant in the current case. The cause of action was illegal trespass allegedly by the Defendant on the suit land. This case was dismissed on the 27/1/12 for want of prosecution vide the orders issued by Lady Justice P Nyamweya. It was therefore not heard and determined on its merits.

10. **HCCC No 1159 OF 2005**; The Plaintiff was the current Defendant and the 1st and 2nd Defendants were Mugumoini Framers Company Limited and Erastus G Nduhiu respectively. The subject matter was the original suit land. The Plaintiff then sought specific performance pursuant to an agreement entered between the parties inter alia in 2003. The case was dismissed on 19/5/17 for want of prosecution vide the orders of the Hon Lady Justice Njuguna. Again this suit was not heard and determined on its merits.

11. **CMCC NO 68 OF 2018 -Murang'a**. The parties herein are similar in the current suit. The cause of action as well as the subject matter is similar. This suit was dismissed vide the orders of the Hon A K Mwicigi PM on grounds of want of jurisdiction to entertain the matter.

12. **HCCC No 3086 of 1994**; From the scanty and otherwise patchy pleadings on record, I can glean that this suit was between Erastus G Nduhiu (Plaintiff) and the Plaintiff (then the Defendant) in which the Plaintiff in that case prayed for the payment of Kshs 3,060,522/- by the Defendant company being an outstanding amount in respect of goods sold and delivered to the Defendant company. This suit was therefore in respect to the recovery of a debt therefore it was a civil suit. On the 17/5/1995 Justice Hayanga (as he was then) struck out the Defendants defence for being mere denials and accordingly entered judgement in favour of the Plaintiff (Erastus G Nduhiu). A decree was executed on the 24/5/1995 in the following terms;

“ that the Defendant (Mugumoini) to pay the Plaintiff (Erastus Nduhiu) the sum of Kshs 3,336,066/- as more particularly set forth hereunder with interest thereon at Court rates at 12% from the 18/5/1995 till payment in full.

That the Defendant do pay to the Plaintiff the cost of the suit to be taxed and certified by the taxing master of this honorable Court.”

A prohibitory order was issued in 1998 against the suit land in satisfaction of the debt in favour of Erastus Nduhiu. It is at the execution that Erastus Nduhiu sought to satisfy the decree by seeking to be allowed to sell the suit land. The said prohibition orders were vacated vide the orders of Lady Justice R Sitati on the 17/12/2009.

13. An attempt by the current Plaintiff to revive this suit vide **ELC No 245 of 2017 Thika** was dismissed for being frivolous, incompetent and bad in law. This is because the original suit HCCC No. **HCCC No 3086 of 1994** had effectively been determined by the Judgement of Hon Justice Hayanga in 1995 and the Court correctly found that there was no existing suit upon which the Plaintiff could move the Court by way of Notice of Motion.

14. I have read the ruling and am satisfied that no cause of action such as pleaded herein in terms of fraud and misrepresentation was heard and determined. The Court held that there was no pending case on which an application for injunction could be based since the original suit vide HCCC No 3086 of 1994 was heard and determined. It was further held that HCCC No 3086 of 1994 was in respect to an execution of a civil claim between the parties herein. It is the finding of the Court that the Defendant was not a party to this suit. The issues raised in this suit are based on fraud and illegalities in respect to the transfer of the suit to the Defendant. These issues were not raised in HCCC No 3086 of 1994. It therefore follows that the principles of resjudicata have not been ousted.

15. From the forgoing this Court finds that the current suit is not resjudicata.

16. I have examined the verifying affidavit deponed by Joseph Kamande Ngone dated the 17/8/18 and annexed to the plaint filed on even date and my findings are that no evidence that of authorization under seal of the company was provided as required by Order 4 Rule 2(4). The said rule states as follows;

“where the Plaintiff is a Corporation the verifying affidavit shall be sworn by an officer of the Company duly authorized under the seal of the Company to do so”.

17. This provision is intended inter alia to ensure that the Plaintiff has demonstrated that the suit is properly filed and not brought by a busy body or an officer who has no authority. Such authority should be exhibited.

18. There is adequate case law militating against the striking out of verifying affidavits which are not compliant with Order 4 Rule 2(4). In the case of **Microsoft Corporation v. Mitsumi Computer Garage Ltd [2001] 2 EA 460**, it was held that failure by a deponent on behalf of a corporation to state that he or she makes the affidavit with the authority of the corporation renders the affidavit defective and incompetent and therefore liable to be struck out. This view was approved and followed in the subsequent case of **Jovenna East Africa Ltd. v. Sylvester Onyango & Others Milimani HCCC No. 1086 of 2002 (unreported)**. In both cases, however, the suits were not struck out. Instead the Court granted the liberty to the Plaintiffs to file and serve the Defendants with fresh and compliant affidavits within a specified period.

19. I shall take the cue from the above decisions and decline to strike out the suit as doing so will be drastic at its infancy. I direct the Plaintiff to file and serve the appropriate compliant affidavit within a period of 30 days from the date of this Ruling.

20. On the issue whether the suit should be dismissed for material non-disclosure of other formers suits between the same parties, it was the Defendants objection that the Plaintiff failed to comply with Order 4 Rule 1(1) (f). this order states as follows;

“ an averment that there is no other suit pending, and that there have been no previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint.”

21. The above provision is a precaution against the doctrines of resjudicata and subjudice. To that end, the plaint must contain an averment that there is no pending suit nor has there been one before between the same parties in respect to the same substantial issues.This rule is meant to address a cause of action that could result to a suit being said to be resjudicata or subjudice or both.

22. It is on record that there have been previous cases as set out in Para 9-13 between the parties and it is the finding of the Court that although the suits were dismissed, some were in respect to the existing parties in this suit. In view of my holding in Para 15 and taking the circumstances of this case, it is the finding of this Court that failure of the Plaintiff to plead to the previous suits does not go to the substance of the suit.

23. In the end the Preliminary Objection is not merited and is dismissed with costs to the Plaintiffs.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF SEPTEMBER, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mrs Beaco for the Plaintiff/Respondent

Ndumo for the Defendant/Applicant

Irene and Njeri, Court Assistants