



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO.484 OF 2018**

**ROSE NJOKI KING'AU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CHEF REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**SHABA TRUSTEES LIMITED.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is the Notice of Motion dated 16<sup>th</sup> June 2019 brought under order 2 rule 15(b) and (c) order 51 rule 1, section 1A, 1B, 3A and all other enabling provisions of the law.

2. It seeks orders

*(1) Spent.*

*(2) That the plaintiff's pleadings and notice of motion all dated 12<sup>th</sup> November 2018 and filed in court on 13<sup>th</sup> November 2018 as against the 4<sup>th</sup> defendant be struck out.*

*(3) That the 4<sup>th</sup> defendant be awarded costs of the suit and of this application.*

3. The grounds are on the face of the application and are set out in paragraphs (a) to (e).

4. The application is supported by the affidavit of Brian Kiptoo Kiplagat, a director of the 4<sup>th</sup> defendant sworn on the 16<sup>th</sup> April 2019.

5. The application is opposed there is a replying affidavit sworn by Rose Njoki King'au the plaintiff/respondent herein sworn on the 17<sup>th</sup> June 2018, and a further affidavit sworn on the 2<sup>nd</sup> July 2019. The 1<sup>st</sup> defendant/respondent did not file any response to the notice of motion dated 16<sup>th</sup> April 2019. The 2<sup>nd</sup>, 3<sup>rd</sup> and the interested party told the court they were in support of the 4<sup>th</sup> defendant's application.

6. On the 20<sup>th</sup> June 2019 the court directed that the application be canvassed by way of written submissions. I noted that only the plaintiff and the 4<sup>th</sup> defendant have filed written submissions.

**The 4<sup>th</sup> defendant's/applicant's submissions**

7. The plaintiff's suit is res judicata as the plaintiff has filed a previous suit against the 3<sup>rd</sup> and 4<sup>th</sup> defendants being ELC 2002 of 2007. The suit has been heard and determined in the 4<sup>th</sup> defendant's favour and the resultant judgment was also a subject of the appeal. Civil Appeal No. 230 of 2016 lodged by the plaintiff and which was likewise heard and determined.

8. The prayers or reliefs now being sought in the present suit all revolve along the claim for ownership of LR No. 209/9968 which the court

has already decreed in favour of the 4<sup>th</sup> defendant. The current suit is res judicata and is expressly barred by the law. The plaintiff has the option to pursue a claim for damages against the 3<sup>rd</sup> defendant in the said former suit since the suit against them was not dismissed. She also has the opportunity to join the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the former suit and seek the same reliefs. The 4<sup>th</sup> defendant urges the court to allow the application.

#### **The plaintiff/respondent's submissions.**

9. She has put forward the cases of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 2 Others [2015] eKLR; Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR**. The parties in the previous suit are not the same as the ones in the current suit which has two more necessary parties who were not in the previous suit namely the 1<sup>st</sup>, 2<sup>nd</sup> defendants. The original action did not receive a final judgment on the merits.

10. She has also put forward the cases of **Enock Kirao Muhangi vs Hamid Abdalla Mbarak [2013] eKLR; Tee Gee Electrical & Plastics Co. Ltd vs Kenya Industrial Estates Kisumu CACA No. 333 of 2001; Nancy Mwangi t/a Worthlink Marketers vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2017] eKLR; M W K vs A M W [2016] eKLR**.

11. The principle of res judicata aims to protect the policy of relitigation but does not aim at depriving the litigant of his right to have a matter determined on merit. She has put forward the cases of **Philip Kipkoech Mutai vs Benjamini Milgo & Another [2017] eKLR**.

Striking out a suit does not trigger the plea of res judicata. Once a suit has been struck out the plaintiff can file a fresh suit to remedy the already struck out case.

12. Article 50 of the constitution guarantees every person a fair hearing, which is a critical ingredient to natural justice. Striking out the present suit would be tantamount to condemning the plaintiff unheard. A mistake or blunder by the advocate should not be visited upon an innocent litigant. She has put forward the cases of **Samuel Njenga vs Augustino Onanda & another [2015] eKLR; Mercy Karimi Njeru & Another vs Kisima Real Estate Limited [2015] eKLR; Republic vs A.G & 2 Others Ex parte Samuel Kazungu Kambi [2012] eKLR**.

13. This suit is not res judicata. She prays that the 4<sup>th</sup> defendant's notice of motion be dismissed with costs.

14. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

15. **Section 7** of the Civil Procedure Act, provides that:-

“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”.

16. It is the 4<sup>th</sup> defendant's/applicant's contention that there is a previous suit being ELC 2002 of 2007 where the plaintiff had sued the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaint in that suit is marked as annexure “BKK2”. The same is admitted by the plaintiff. I have seen the prayers in that suit. They are the same as in the instant suit. The only difference is that the 1<sup>st</sup>, 2<sup>nd</sup> defendants are the additional parties in this suit.

17. It is also not in doubt that by a ruling dated 29<sup>th</sup> April 2010 Judge R N Sitati struck out the plaintiff's suit as against the 4<sup>th</sup> defendant (1<sup>st</sup> defendant then) and entered judgement in its favour. The plaintiff appealed against the said ruling and by a judgment of the Court of Appeal dated 26<sup>th</sup> October 2018, found no merit in the appeal and dismissed it with costs.

18. In my view, the plaintiff has exhausted all avenues to have her claim against the 4<sup>th</sup> defendant litigated upon. Her contention that she could not be barred for filing a fresh suit because the previous suit was struck out cannot stand. If this was the case, why did she appeal instead of filing a fresh suit then?

19. I have gone through the judgment by the Court of Appeal and I find that the issue of ownership of the suit property has been dealt with at length. In my view the issue of ownership of the suit property has been determined both in the ruling dated 28<sup>th</sup> April 2010 and the judgment dated 26<sup>th</sup> October 2018. In the case of **Lawi Duda & Others vs Bamburi Cement Ltd [2006] eKLR** the court cited with approval the case of **Anaj Warehousing Ltd vs National Bank of Kenya Ltd & Another MSA HCCC No. 311 of 2000** where the court held that:-

**“A matter is res judicata when it has been heard and finally decided. And a matter is heard and finally decided when the court which heard it has exercised its judicial mind on the matter in co**

20. Summary judgment is one of the avenues of disposing of a suit.

According to Black's Law Dictionary, 10<sup>th</sup> Edition summary judgment is defined as **“A judgment granted in a claim or defence about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law. The court considers the contents of the pleadings, the motions and additional evidence adduced by the parties to determine whether there is a genuine issue of material facts rather than one of law. This procedural device allows the speedy dispensation of a**

*controversy without the need for trial”.*

21. The issue of ownership in this suit property has been dealt with by the High Court and the Court of Appeal. Just because the plaintiff was not put on the witness stand does not mean she has not been offered an opportunity to ventilate her claim. The principles of the doctrine of res judicata are now well settled:-

- (i) a previous suit in which the matter was in issue;*
- (ii) the parties were the same or litigating under the same title;*
- (iii) a competent court determined the matter in issue on merit and*
- (iv) that the issue has been raised once again in a fresh suit”.*

22. I agree with the 4<sup>th</sup> defendant’s/applicant’s submissions that the issue of ownership of the suit property has been dealt with in ELC 2002 OF 2007 and Civil Appeal No. 230 of 2016. This submission has not been rebutted by the plaintiff.

23. It is not in doubt that ELC 2002 of 2007 is still pending as against the 3<sup>rd</sup> defendant herein. Nothing could have been easier for the plaintiff than to enjoin the 1<sup>st</sup> and 2<sup>nd</sup> defendant herein in that suit. I find that the suit herein is res judicata.

24. In conclusion, I find merit in this application and the same is allowed in the following terms:-

*(a) That the plaintiff’s notice of motion dated 12<sup>th</sup> November 2018 and the suit as against the 4<sup>th</sup> defendant is hereby struck out with costs to the 4<sup>th</sup> defendant.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 16<sup>th</sup> day of October 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant