REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C NO 6 OF 2014

CHRISTINE ANDREE JOSHI.....1ST PLAINTIFF

STEPHEN ELKINGTON.....2ND PLAINTIFF

BARRY JAMES JOSHI.....3RD PLAINTIFF

VERSUS

SALLY CHEBWOGEN KIRUI.....DEFENDANT

RULING

1. This ruling is on a preliminary objection first pleaded and/or intimated in a defence to counter-claim dated 26th June, 2014 and subsequently followed up vide a notice of preliminary objection dated 28th May, 2019. The objection is as follows:

> *The issues raised by the defendant in the present suit are RES JUDICATA as the same are directly or substantially in issue in former suits between the parties herein being HCC NO.3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002) and such have been heard and finally determined by a court of competent jurisdiction.*

2. The subject matter of the suit herein is Land parcel NO KERICHO/CHEMAGEL/1401 and the registered owners of the land are the plaintiffs – **CHRISTINE ANDREE JOSHI**, **STEPHEN ELKINGTON** and **BARRY JAMES JOSHI** – who are said to have purchased it through an auction conducted pursuant to a court order issued in HCC NO 3154 of 1989 – **BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED VS SUN PRODUCE EXPORTERS LTD, PHILIP ARAP KIRUI & 2 OTHERS**. It is apparent however that the defendant – **SALLY CHEPWOGEN KIRUI** – is the one in occupation of the land.

3. Records show that the defendant is the wife of the late **PHILIP ARAP KIRUI** who was one of the defendants in HCC NO 3154 of 1989. It is also clear that the defendant and her late husband were the plaintiffs in HCC NO 1550 of 2002- **PHILIP ARAP KIRUI** and **SALLY CHEPWOGEN KIRUI VS DELPHIS BANK LIMITED (IN LIQUIDATION)**, **MOSES K. KORIR t/a DWANING AGENCIES, STEVE ELIKINGOTN & JIMMY JOSHI**.

4. It is necessary to have a synoptic view of this current and past suits in order to appreciate why the objection is raised. In the current suit, the plaintiffs seek, in the main, vacant possession of the land and/or eviction of the defendant. But the defendant would have none of that and she filed a defence on 12th June, 2014 justifying her occupation and possession of the land. Her defence came with a counter-claim in which she pleaded, interalia, that the land in dispute is her matrimonial home and that she has all along been living there together with her children and co-wife. She denied that the disputed land was ever auctioned. She prayed that the plaintiffs title be cancelled and that the plaintiffs be restrained from trespassing onto the land or dealing with it in any manner.

5. HCC NO. 3154 of 1989 was the first suit relating to the disputed land. In the suit, the plaintiff, a bank, filed the case against four defendants praying, interalia, that they be ordered to pay monies arising from an overdraft facility accorded to 1st defendant who was guaranteed by the other three defendants. The late husband of the defendant in this case was one of the guarantors and was named as 2nd defendant in the matter. The plaintiff won the case and the defendants were ordered to pay the money. Which they failed to do, thus impelling the plaintiff to resort to sale of the securities offered by the defendants. The defendant's husband had offered the disputed land as security and it appears clear from the records available that the land was sold.

6. The outcome of the first suit gave rise to the filing of the second suit – HCC NO 1550 of 2002. This one was filed by the defendant in this case together with her late husband. Both of them were the plaintiffs and they sued the plaintiff in the 1st case, the auctioneer who sold the land, and the purchasers of the land. Although the defendant is now denying that the disputed land was auctioned, it is clear from the second suit that she and her late husband were proceeding on the basis that the land had already been auctioned. In fact their first prayer was that a declaratory order be issued declaring the auction held as null and void. They wanted also to be allowed to continue to be in possession of the land. They desired too that the court grant an order directing that the Land Register be corrected so that the name of the defendants late

husband could be recorded as proprietor. This 2nd suit was dismissed for want of prosecution and it appears clear that the plaintiffs in it did not challenge the dismissal.

7. In sum therefore, it appears clear that the disputed land was sold but the purchasers never got vacant possession. Instead, the then registered owner – the defendant's late husband – and his family – which included the defendant in this case – continued in possession and/or occupation and the situation remains so to date except that the defendant's husband is now late. This, in a nutshell, is why the current suit was filed.

8. As pointed out earlier, the defendant filed a defence which came with a counter-claim seeking, interalia, that the plaintiffs title be cancelled and that the plaintiffs be restrained from trespassing into the land or dealing with it in any manner. It is this counter-claim that provoked the raising of the objection now under consideration.

9. According to the plaintiffs, it is too late in the day for the defendant to lodge the claim she is making. It is a claim she made or ought to have made in the past decided suits. In this regard, she is seen as a pertinacious litigant intent on whipping "*this old donkey again*". But the defendant herself accuses the plaintiffs of being "*on a fishing expedition*" and "*trying to test the waters of this court*". We need to establish who is right.

10. The application was canvassed by way of written submissions. The plaintiffs submissions were filed on 25th June, 2019. The defendant filed hers on 7th August, 2019. Probably to even out scores, the plaintiff filed another set of submissions. In the first set of submissions the issues for determination are delineated, with the first issue being whether the pleadings by the defendant are RES JUDICATA while he second is whether the defence and counter-claim filed by the defendant raise issues already determined in the previous suits. The plaintiffs then submitted, interalia, that as the defendant has not replied to their defence to counter-claim, the objection raised should be deemed unopposed.

11. There was then explication of the law, with various cases, notably **OMONDI VS NATIONAL BANK OF KENYA LTD (2001) KLR 549**, **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION VS MAINA KIAI & 5 OTHERS (2017) eKLR**, **WILLIAM KORROSS VS HEZEKIAH KIPTOO KOMEN & 4 OTHERS (2015) eKLR**, **CHRISTOPHER ORINA KENYARIRI t/a KENYARIRI & ASSOCIATES ADVOCATES VS SALAMA BEACH HOTEL LTD & 3 OTHERS (2017) eKLR** and **E.T. VS ATTORNEY GENERAL & ANOTHER (2012) eKLR**, all cited and quoted to show the definition and scope of RES JUDICATA. According to the plaintiffs, given the definition and scope as captured, and considering the relevant details highlighted by them relating to this and past cases, it is axiomatic that the issue of RES JUDICATA as raised by them should hold and the defendant's defence and/or counter-claim therefore should be struck out.

12. But the defendant holds a totally different view. According to her "*the doctrine of RES JUDICATA has been wrongly interpreted*" and "*the issues in the suit had not been determined conclusively and … therefore the preliminary objection herein ought to be dismissed with costs as the same is a mere wastage of courts time and a delaying tactic*".

13. The defendant submitted that a suit dismissed for want of prosecution – such as was the case in HCC NO 1550 of 2002 – cannot be a basis for raising the defence of RES JUDICATA as such a suit can be re-filed. The defendant placed reliance on the case of **COSMAS MROMBO MOKA VS CO-OPERATIVE BANK OF KENYA LIMITED & LEGACY AUCTIONEERING SERVICES**: **HCC NO. 7 OF 2018, MOMBASA** where the learned judge handling the matter refused to uphold a plea of RESJ UDICATA on the ground that a case dismissed for want of prosecution is not one that has been heard and determined as envisaged by Section 7 of the Civil Procedure Act (Cap 21).

14. Additionally, the case of **ALBERT MAGU MUSA VS SAMUEL KAGUNDU MUCHIRA & 3 OTHERS: HCCA NO 10 OF 2016**, **KERUGOYA**, was cited to further buttress the point. It was also pointed out that the case that was dismissed for want of prosecution was also one that had abated as the 1st plaintiff, the defendant late husband, died during its pendency and was not replaced in time to keep the case alive. That, according to the defendant, points also to inconclusive determination of the suit.

15. As regards the first case, the litigating parties were said to be different from those litigating in this case and that being the position, res judicata cannot be said to apply. The prayers sought were also said to be different from those sought in this case.

16. As to whether the preliminary objection raised was correct and proper as envisaged in the case of **MUKISA BISCUIT COMPANY VS WEST END DISTRIBUTION LIMITED (1969) EA 696** and/or **REPUBLIC VS ELDORECT WATER & SANITATION COMPANY LIMITED EXPARTE BOOKER ONYANGO, & 2 OTHERS: HCC MISC. APPL. NO. 97 OF 2003, ELDORET**, the defendant averred that the objection herein is hinged on disputed facts and therefore does not qualify as a proper preliminary objection. This court was ultimately asked to dismiss the application.

17. As stated earlier, the plaintiffs filed a second set of submissions and these ones came after the defendant had filed her submissions. In the submissions, the plaintiffs sought to disabuse the defendant of the notion that a suit dismissed for want of prosecution cannot form a basis for raising the defence of RES JUDICATA. Noting that the defendant had sought to rely on **COSMOS MROMBOS** case (supra) for that position, the plaintiffs pointed out that that case was appealed against in Civil Appeal No. 122 of 2018 and the Learned Judges of Appeal clearly held that a case dismissed for want of prosecution can give rise to a plea of res judicata. The earlier decision of the High Court was therefore set aside. While reaching that decision the Court of Appeal cited with approval an earlier decision in the case of **NJUE NGAI VS EPHANTUS NJIRU NGAI & ANOTHER (2016) eKLR** where a similar position had been espoused.

18. The submissions further stretched the scope of RES JUDICATA by pointing out that even if the issue had not been canvassed in the earlier suits, RES JUDICATA would still apply as they ought to have been raised there. The tail end of the submissions was rendered in rather picturesque imagery: "*The horse has been flogged once too often by the defendant. It must now rest.*"

19. I have considered the objection as raised and the rival submissions. I have had a look into whatever else has been availed in this case itself and also the records availed in relation to the past cases. The test as to what constitutes RES JUDICATA was succinctly stated by **KULOBA RICHARD** in his book: **JUDICIAL HINTS on Civil Procedure**: **Law Africa Publishing (K) Ltd: 2nd Edition, at page 47** as follows:

> *"The test whether a suit is barred by res judicata is this: Is the plaintiff in the 2nd suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of res judicata applies not only to the points upon which the first court was actually required to adjudicate 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."*

20. As a legal concept, res judicata in underpinned partly by the following two legal maxims: **Interest reipublicae ut sit finis Litum** (it is in the interest of the state that there be a limit to litigation) and **Nemo debet bis vexari Pro una et eadem causa** (No one ought to be twice vexed for one and the same cause). To avoid running afoul of the doctrine of res judicata, it is required that when one sets out to bring a suit, one should put in it all that is reasonably possible for adjudication by the court, failing which one should forever hold one's peace. It is further required that once a competent court of law pronounces itself with finality regarding the suit, a litigant becomes barred from bringing another similar suit. And this is so even where a party employs ingenuinty, guile or guise to camouflage the second suit.

21. My understanding of the matter at hand is that the defendant's late husband guaranteed a party to obtain an overdraft facility from a bank. The guarantee involved offering the disputed land as security. The party defaulted in payment and the bank sued to recover the money. It is clear that the bank not only sued the party but the guarantors as well. The defendant's late husband was one such guarantor. The bank won the case but payment of money to it by those sued became a problem. It is for this reason that the bank resulted to selling the securities offered in order to recover its money. One of the securities sold was the disputed land.

22. But the defendant and her late husband filed a suit challenging the sale. The suit was HCC NO. 1550 OF 2002. They however failed to prosecute it and it was dismissed for want of prosecution. A look at the suit vis-a-vis the counter-claim filed herein show obvious broad similarities both in substance and the prayers sought. But the defendant would rather that the counter-claim is viewed as a totally different suit that merits its own independent consideration. With respect, this is not the position; it simply is not the case. It is difficult, nay, even impossible, not to find obvious similarities in the two cases.

23. The defendant would also like the court to take the position that the other case was not decided on merits and is therefore not one for consideration for RES JUDICATA. Again here, the defendant is wrong. The law is as stated by the plaintiffs. A case dismissed for want of prosecution can be a proper basis for raising a defence of RES JUDICATA. But even if one were to assume that the issues raised in HCC NO 1550 of 2002 are not the same as the issues raised in the counter-claim one would then be confronted by the obvious reality that the issues raised in the counter-claim should have been raised for consideration in HCC NO 1550 of 2002. And failure to do this would also give rise to the defence of RES JUDICATA.

24. I find it useful to point out that what I have said heretofore relates to the defendant's counter-claim only, not her defence. To hold otherwise seems to me to be perilously tantamount to telling the defendant not to defend the suit. The defence as filed should be allowed to stand. What is untenable is the defendant's counter-claim. In fact the defence is not a suit filed by the defendant. The suit filed by the defendant is the counter-claim and it is the one eligible for consideration and action on the basis of RES JUDICATA. As we have seen, that counter-claim is not defensible from a legal or factual perspective. It is a claim that is dead on arrival; it is a non-starter.

25. The upshot, when all is considered, is that the plaintiffs have sufficiently demonstrated that the defendant's counter-claim is RES JUDICATA. Allowing it to stand is not acceptable in law. I therefore agree with the plaintiffs that the counter claim is a horse *" flogged once too often by the defendant. It must now rest"*. The defendant's counter-claim is therefore hereby dismissed with costs.

Dated and signed at Kericho this 15th day of November, 2019.

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A. K. KANIARU

JUDGE