



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 91 OF 2019

DR. BENJAMIN AKENGA PLAINTIFF

VERSUS

SAMSON KEENGU NYAMWEYA DEEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 26th August 2019, an application seeking the following orders:

1. *Spent*

2. *Spent*

3. *That orders of ejection and eviction be issued forthwith for the removal of Samson Keengu Nyamweya himself and his agents, cronies, managers, proxies and servants howsoever known from the suit property Nakuru Municipality Block 16/102.*

4. *That orders of permanent injunction be issued forthwith restraining Samson Keengu Nyamweya himself his agents, cronies, managers, proxies and servants howsoever known and be refrained forthwith from intermeddling in trespassing into and/or occupying the suit property Nakuru Municipality Block 16/102.*

5. *That the Officer Commanding the Nakuru Police Division enjoined by the Officer Commanding Teachers Police Post be ordered to assist the court Bailiff of this trial court in the execution of the orders of eviction and ejection issued by this trial court.*

6. *That the cost of this application and the costs incidental to the execution of the orders given herein abide in the matter.*

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that the defendant and his agents have blocked, frustrated and denied him who is the registered proprietor of land parcel number Nakuru Municipality Block 16/102 and the sole shareholder of Olympia Hospital (K) Limited the freedom and right to complete construction of Olympia Hospital with effect from 1997. He annexed and referred the court *inter alia* to an order given on 8th December 2009 in **Nakuru High Court Miscellaneous Application Number 27 of 2009**, a ruling delivered on 3rd June 2011 in **Nakuru High Court Miscellaneous Application Number 27 of 2009**, judgment delivered on 4th March 2015 in **Nakuru High Court Civil Suit No. 265 of 2011** and ruling delivered on 31st July 2019 in **Nakuru High Court Civil Suit No. 265 of 2011**, Certificate of Lease in respect of land parcel known as Nakuru Municipality Block 16/102 and Certificate of Official Search for Nakuru Municipality Block 16/102 as at 28th June 2018.

3. The defendant responded to the application through Grounds of Opposition and through a replying affidavit sworn by himself. He deposed that the orders sought in the application are the same ones sought in the main suit and that granting them will have the effect of disposing off the entire suit. He added that this matter is *res judicata* in view of the judgment delivered on 4th March 2015 in **Nakuru High Court Civil Suit No. 265 of 2011** and ought therefore to be struck out.

4. The application was canvassed through written submissions. The applicant filed submissions on 25th September 2019 and further submissions on 24th October 2019. The respondent filed submissions on 17th October 2019. I have carefully considered the application, the affidavits, Grounds of Opposition and submissions.

5. I will deal with the issue of *res judicata* first since it goes to the jurisdiction of the court. The doctrine of *res judicata* has statutory expression at **Section 7** of the **Civil Procedure Act** which provides:

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.

6. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

7. This suit was filed on 31st July 2019 in the Chief Magistrate's Court at Nakuru. It was transferred to this court following this court's ruling delivered on 31st July 2019 in **Nakuru High Court Civil Suit No. 265 of 2011**, the reason for transfer being that the defendant filed a counterclaim that took the matter beyond the pecuniary jurisdiction of the subordinate court. A reading of the plaint herein shows that the plaintiff averred that he is the registered proprietor of land parcel number Nakuru Municipality Block 16/102 and that the defendant trespassed into the said property and committed acts of wanton destruction. He therefore sought judgment against the defendant for:

- a) *Eviction Orders against the defendant and the same be supervised by the officer commanding station (OCS) Nakuru.*
- b) *Costs of this suit and interest thereon at Court rates.*
- c) *Permanent injunction restraining the defendant from interfering with a private property of the plaintiff (Suit matter).*
- d) *Any other relief this honourable court may deem fit to grant.*

8. The defendant responded to the suit by filing a defence and counterclaim in which he averred that he injected KShs 40 million of his funds into a project of completing a hospital which had commenced on the suit property. He urged the court to dismiss the plaintiff's case and to enter judgment against the plaintiff for:

- (a) *the sum of Kshs.40,000,000/=*
- (b) *interest thereon at the prevailing commercial bank rates from June 1995 until payment in full;*
- (c) *costs of the counter-claim and interest thereon.*

9. There is no dispute that another suit being **Nakuru High Court Civil Suit No. 265 of 2011 Olympia Hospital (Kenya) Limited & Samson Keengu Nyamweya v Dr. Benjamin Akenga** existed and that judgment was delivered in the matter on 4th March 2015. Further, there is no dispute that the plaintiff herein was the defendant in **Nakuru High Court Civil Suit No. 265 of 2011** while the defendant herein was the 2nd plaintiff in the said matter. Thus, the parties herein were parties in **Nakuru High Court Civil Suit No. 265 of 2011**. A perusal of the judgment in the matter reveals that the suit also concerned land parcel number Nakuru Municipality Block 16/102 which was owned by the 1st plaintiff and on which the 1st plaintiff intended to construct a hospital. The 2nd plaintiff claimed to have spent his resources amounting to over KShs 45 million towards the project. The defendant re-transferred the suit property to himself on 26th October 1996. The plaintiffs therefore sought judgment against the defendant for:

- (i) *A declaration that the purported transfer of the suit property from the 1st plaintiff to the defendant was ultra vires, illegal and/or null and void;*
- (ii) *An order directing the District Land Registrar Nakuru to cancel the purported registration of the said transfer to the defendant from the register held in respect of the suit property;*
- (iii) *A permanent injunction restraining the defendant by himself, or his servants, agents or assigns from transferring, leasing, charging, mortgaging, disposing of, alienating or in any way dealing with the suit property;*
- (iv) *An order restraining the defendant from acting in a manner ultra vires and/or detrimental to the 1st plaintiff's interest in the suit property;*
- (v) *Costs of the suit;*
- (vi) *Interest on the costs of the suit;*
- (vii) *Any other relief that the court may deem fit to grant.*

10. It is further stated in the judgment that the defendant filed a defence and counterclaim in which he sought eviction of the 2nd plaintiff from the property. Thus, the issue of eviction of the defendant herein from the property was an issue in **Nakuru High Court Civil Suit No. 265 of 2011** and is once again an issue in the present suit. The same applies to the issue of the defendant herein having spent his resources which are put at over KShs 45 million in **Nakuru High Court Civil Suit No. 265 of 2011** and at over KShs 40 million in the defendant's counterclaim in this suit. Judgment having been delivered in **Nakuru High Court Civil Suit No. 265 of 2011** on 4th March 2015, the issues of eviction of the defendant herein from the property and the defendant's claim of being entitled to amounts he alleges to have spent, be it over KShs 40 million or over KShs 45 million, became *res judicata*. Neither of the parties can bring a fresh suit on those issues. If satisfied

with the outcome in **Nakuru High Court Civil Suit No. 265 of 2011**, they should have enforced it in that suit. If unsatisfied, they should have appealed or sought review within the rules. Litigants are expected to bring forth their entire claims for determination once and for all. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) the Court of Appeal stated:

... We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“.....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 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 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”

... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

11. The plaintiff herein has stated in his submissions:

I did not bring this matter to your Hon court as a suit for trial at all, as has been alleged by the defendant. I came to ‘harvest’ the fruits of the judgments, rulings and orders of the High Court judges.

I believe that he is referring to the order given on 8th December 2009 in **Nakuru High Court Miscellaneous Application Number 27 of 2009**, a ruling delivered on 3rd June 2011 in **Nakuru High Court Miscellaneous Application Number 27 of 2009**, judgment delivered on 4th March 2015 in **Nakuru High Court Civil Suit No. 265 of 2011**.

12. While every farmer is entitled to harvest the fruit of his labour, the plaintiff must be reminded that in this version of farming known as litigation harvesting can only be done from the particular tree that was planted. In other words, the plaintiff should enforce any orders in the particular proceedings where those orders were made. He cannot bring a new suit to enforce orders made in previous suits. It is precisely that kind of ‘harvesting’ that the doctrine of *res judicata* aims to curb.

13. I have said enough to demonstrate that both the plaintiff’s suit herein and the defendant’s counterclaim are *res judicata*. They are both hereby struck out. Each party shall bear own costs. In view of this outcome, I do not need to consider the prayers in Notice of Motion dated 26th August 2019.

Dated, signed and delivered in open court at Nakuru this 4th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Dr Benjamin Akenga the plaintiff/applicant present in person

Mr Ngware holding brief for Ms Cheloti for the defendant/ respondent

Court Assistants: Beatrice & Lotkomo