



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 195 OF 2016

KIPLAGAT KOTUT.....PLAINTIFF

VERSUS

ROSE JEBOR KIPNGOK.....1ST DEFENDANT

KIPCHIRCHIR CHUMBA.....2ND DEFENDANT

RULING

The application herein is dated 5.12.2016 wherein the defendants seeks orders that the plaint dated 29.11.2016 be struck out with costs and that the defendants be awarded punitive and exemplary costs. The application is based on grounds that the entire suit is an abuse of court process and that the suit has been filed 16 years after the alleged rights of the plaintiff have been extinguished and time barred. Moreover, that the suit is bad in law in view of existence of judgment in Eldoret Environment & Land Case No. 691 of 2012 which was challenged and appealed by plaintiff in Eldoret Court of Appeal – Civil Appeal No. 31 of 2015 and the same was dismissed with costs to the 1st defendant. The dispute in Eldoret Environment & Land Case No. 691 of 2012 was between the same parties before the court. That the matter directly and substantially in issue in Eldoret Environment & Land Case No. 691 of 2012 was proprietary rights over the suit land. The matter is therefore *res-judicata*.

The application is supported by the affidavit of Rose Jebor Kipngok who states that the plaintiff herein instituted similar suit vide Eldoret ELC No. 691 of 2012 and decision made in her favour. The plaintiff preferred an appeal against the judgment of this Honourable Court vide Eldoret Court of Appeal Civil Appeal No. 31 of 2015 and upon hearing and determination, the same was dismissed with costs. That her counsel on record informs her which advice she verily believes to be true and correct that the matter directly substantially in issue herein was proprietary rights over the suit land.

That she is informed by her counsel which information she verily believes to be true that it is improper for the plaintiff to open up issues that are *res-judicata* since there has to be an end to litigation. The plaintiff is a vexatious litigant just out to frustrate her from enjoying the fruits of her judgment. That it is obvious that the present suit is frivolous and total abuse of court process aimed at fostering further trespass and unlawful use of the suit land for free.

According to the applicant, the plaintiff should be stopped from infringing on her rights and when pressed he starts leaping frogging from one civil matter to another simultaneously with similar applications with clear intention of avoiding justice. That she is informed by her counsel on record which information she verily believes to be true and correct that the entire suit is an abuse of court process. That this suit has been filed 16 years after the alleged plaintiff's rights being extinguished by limitations of time and her counsel informs her that the same is time barred.

The applicant submits that the plaintiff is seeking to illegally and irregularly enforce the very agreement already nullified by the court in the judgment and decree in Eldoret Environment & Land Case No. 691 of 2012 and the suit is a process to circumvent the orders of this Honourable court. The applicant further argues that the issues raised herein are directly and substantially in issue in Eldoret Environment & Land Court No. 691 of 2012 and the same is therefore *res-judicata*.

The plaintiff submits that he is seeking to recover his investments which include a bungalow and seeks compensation for the loss of the land based on current market value. The plaintiff submits that the issues herein require close examination by the trial court and can only be resolved after careful examination of the evidence by both parties.

I have considered the application dated 5.12.2016 and the supporting affidavit of Rose Jebor Kipngok. I have also considered the grounds of opposition raised by the plaintiff and respondent and do find that it is an undisputed fact that the plaintiff herein filed in the High Court Civil Suit No. 45 of 2011 against the defendants. This suit was later given a new number of Eldoret Environment & Land Case No. 691 of 2012. The defendants filed defence and counterclaim and the plaintiff filed reply to defence and defence to counterclaim. This honourable court delivered judgment, and a decree was issued. The plaintiff appealed, which appeal was dismissed with costs.

The parties in the suit No. Eldoret Environment and Land Court No. 691 of 2012 are the same parties in this suit, that is Kiplagat Kotut as plaintiff, Rose Jebor Kipngok as the defendant.

The Suitland is the same, that is L.R. No. Plateau/Plateau Block 2(Uasin Gishu)/63.

The issue in suit No. 691 of 2012 was an order for specific performance compelling the defendant to execute transfer, personal PIN certificate, copy of Identity Card for purposes of transfer. Moreover, the plaintiff prayed for the Deputy Registrar to execute the transfer for purposes of transferring the suit land.

The defence and counterclaim raised issues of fraud and the fact that the plaintiff did not pay all the money and irregularly obtaining consent. The defendant prayed the nullification of the sale transaction and an eviction order.

The plaintiff did not file a reply to defence and defence to counterclaim.

In its judgment, this court found that the sale agreement dated 31.1.2000 between the plaintiff and defendant over the suit land would not be enforced for want of valid consent of the Land Control Board as the consent was applied for and obtained outright to 6 months stipulated by law and the sale agreement was null and void.

The court made a further finding that the plaintiff's remedy was to claim a refund of the money paid under the transaction but the court could not make a determination as no evidence was tabled on the exact amount of money paid under the transaction.

The court observed that the plaintiff was entitled to file a separate suit and claim the amount of money paid.

The plaintiff appealed to the Court of Appeal but the appeal was dismissed with a rider that the plaintiff has recourse under section 7 of the Land Control Act Cap 302 Laws of Kenya. The import of this section is that the purchaser is entitled to recover the purchase price as a debt. In the plaint filed on the 21.7.2016, the plaintiff's claim is a refund of the consideration at the current market rates paid to the defendant. He puts the rate of Kshs.80,000 per acre. He also prays for damages suffered.

The issue raised by the defendant herein is whether the suit is time barred. Section 4 of the Limitation of Actions Act, Cap 22, Laws of Kenya provides for the limitation period for the recovery of a debt as 6 years from the date of the cause of action. Whichever method we use in computation of time, the suit was filed more than six years after the cause of action. The suit herein is based on contract as the plaintiff seeks to recover consideration paid in a void land sale and therefore, the limitation period is 6 years. The agreement was entered into on the 31.1.2000. Consent of the Land Control Board was to be obtained within 6 months of the agreement and therefore, time started running after the expiry of the period of obtaining consent of the Land Control Board. This suit is brought more than six years after the expiry of the period of obtaining consent of the Land Control Board and therefore, it is filed out of time contrary to section 4 of Cap. 22 Laws of Kenya and hence it is time barred.

On *res-judicata*, I do find that the issue of refund of the purchase price should have been pleaded in the former suit and failure to plead the same cannot be visited on the defendant. The issue of the purchase price cannot be separated from the validity of the agreement and the consent of the Land Control Board. Section 7 of the Civil Procedure Act, Cap. 21, Laws of Kenya 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, on has been heard and finally decided by such court.”

Wingram V-C, in the case of *Henderson Vs Henderson (1843) 67 ER 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 the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the 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 applied, 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 property belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

I do find that the suit herein is *res-judicata* having been litigated between the same parties, same court of competent jurisdiction, issues are the same and was determined by courts of competent jurisdiction. Ultimately, the application is allowed with costs to the applicant.

Dated and delivered at Eldoret this 2nd day of March, 2018.

A. OMBWAYO

JUDGE