



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 60 OF 2015**

**LABH SINGH HARMAN SINGH LIMITED.....PLAINTIFF**

**VERSUS**

**DENANCY INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**SHARIFOW ABDI RASHID ABDUL.....2<sup>ND</sup> DEFENDANT**

**MOHAMED R. HUSSEIN.....3<sup>RD</sup> DEFENDANT**

**DAVID RONALD NGALA ODHOCH .....4<sup>TH</sup> DEFENDANT**

**STAVROULA ROUSALIS.....5<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF CRIMINAL INVESTIGATION**

**DEPARTMENT.....7<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 8<sup>th</sup> May, 2017, the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants are seeking for the following orders:

***a. That the suit herein against the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants respectively be and is hereby struck out and dismissed with costs.***

***b. That there be such other or further order as the Honourable Court deems fair and expedient to grant in the circumstances.***

2. The Application is premised on the grounds that the suit as against the Applicants is *res judicata* and that the Plaintiff herein is an Appellant in the Court of Appeal vide a Notice of Appeal filed on 26<sup>th</sup> February, 2016.

3. In the Supporting Affidavit, the 4<sup>th</sup> Applicant deponed that the suit does not disclose a cause of action as against them; that the court struck out Petition No. 210 of 2010 with costs and that the Plaintiff lodged an appeal in the Court of Appeal after Petition No. 210 of 2010 was struck out.

4. According to the Applicants, this suit is *res judicata* Petition No. 210 of 2010 and that the 5<sup>th</sup> Defendant ought to have been sued through his agent, the 4<sup>th</sup> Defendant.

5. The 2<sup>nd</sup> Defendant, who is also the 1<sup>st</sup> Defendant's director, filed an Affidavit in support of the Application. According to the 2<sup>nd</sup> Defendant, the Plaintiff had sued the 1<sup>st</sup> Defendant in Petition number 210 of 2010 which suit was struck out with costs; that the Plaintiff is out to frustrate them from using the suit land and that the suit should be dismissed.

6. The Plaintiff's advocate deponed that the Applicants were not parties to the Petition and that this matter should be consolidated with ELC.

No. 4 of 2016.

7. In response, the Plaintiff's advocate deponed that the issues raised against the Applicants by the Plaintiffs are of fraudulent sale of land; that Machakos Petition number 210 of 2010 was struck out on a technicality and that the Petition was not heard on merit.
8. The 4<sup>th</sup> Defendant filed a detailed Further Affidavit in which he has stated how the Plaintiff was defrauded by other people and that the advocate of the fraudster has been charged in court.
9. The Applicants' counsel submitted that the issues in this suit were the same issues raised in the Plaintiff's Petition No. 210 of 2010; that the said Petition involved the same suit property and that the Petition was struck out with costs.
10. Counsel submitted that the fresh suit against the same parties touching on the same issues is bad in law; that the filing of the Notice of Appeal means that both the Court of Appeal and this court are being asked to deliberate on the same issues and that there is a real danger of the two courts rendering contradictory Judgments.
11. Counsel submitted that the suit is vexatious and frivolous because the 5<sup>th</sup> Defendant has denied that he ever sold the suit land to the Plaintiff and that the 7<sup>th</sup> Defendant investigated the issue and charged the person who defrauded the Plaintiff.
12. According to the Applicants, the Plaintiff has admitted of being conned by a fraudster and that the suit should be dismissed.
13. The Plaintiff's advocate submitted that the principles of *res judicata* is founded on public policy; that under Section 7 of the Civil Procedure Act, the parties to the suit must be the same parties as the parties in the previous suit and that the Petition was not heard on merit.
14. The Applicants (4<sup>th</sup> and 5<sup>th</sup> Defendants) are seeking to dismiss the suit on the ground that it is *res judicata* and that the same is also frivolous, vexatious and an abuse of the court process.
15. The Applicants have averred that the dispute herein was determined by the court in Petition No. 210 of 2010 in which the court struck out with costs the Petition. According to the Applicants, the Plaintiff has challenged the said decision in the Court of Appeal.
16. The doctrine of *res judicata*, as captured under Section 7 of the Civil Procedure Act was discussed at great length in the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & others (2015) eKLR***. In the said case, the Court of Appeal held as follows:

***“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.”***
17. I have perused the Judgment in Petition No. 210 of 2010 that was delivered by the court on 20<sup>th</sup> February, 2015. In the said Judgment, the court struck out the Petition with costs on the ground that the Petitioner should have commenced the suit by way of a Plaint and not a Petition. The court did not delve into the issues of whether indeed the Respondents defrauded the Petitioner and whether the Petitioner was entitled to the suit land or not.
18. Indeed, the only issue that is before the Court of Appeal is whether the Petition was properly before the court or not, and not the merits of the Petition.
19. The court having not heard the Petition on merit, the current suit cannot be said to be *res judicata*.
20. Indeed, this suit cannot be said to be *res judicata* considering that the Applicants were not parties to Petition No. 210 of 2010.
21. The issue of whether the Defendants were involved in the fraudulent dealings enumerated in the Plaintiff's pleadings can only be determined by this court after trial. The mere fact that the police have investigated and charged someone else with the fraudulent dealings with the suit land cannot in itself be a basis of dismissing the suit. The proceedings and Judgment of the criminal case, once it is determined, can only form part of the evidence that shall be adduced by the parties in this matter.
22. It is for those reasons that I find that the Application dated 8<sup>th</sup> May, 2017 to be unmeritorious. I therefore dismiss the Application dated 8<sup>th</sup> May, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**