



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO 37 OF 2015

YOUNG TRADERS (TIGONI) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JULIUS NJOROGE KAMAU.....1ST DEFENDANT

DANIEL KIMANI CHEGE.....2ND DEFENDANT/RESPONDENT

RULING

1. By an Application dated 22nd July 2016, the Defendants herein pray for Orders:-

- a) That the Honourable Court be pleased to strike out this suit for otherwise being an abuse of the Court process and*
- b) That (the) costs of this application and of the entire suit be borne by the Plaintiff.*

2. The Application is premised on the following grounds that:-

- i) The Plaintiff filed Lamu PMCC No. 15 of 2014; (Young Traders(Tigoni) Ltd –vs- Julius Njoroge Kamau(the 1st Defendant) in which the Plaintiff sought the sum of Kshs 1,600,000/-;*
- ii) Prior to the hearing and determination of the said case filed in Lamu, the Plaintiff filed the present suit against the Defendants over the same subject matter;*
- iii) In a Ruling delivered in the Lamu case on 15th March 2016, the Court entered Judgement for the Plaintiff for the said Kshs 1,600,000/- plus costs and interests;*
- iv) Pursuant to a Court Order issued earlier on the Lamu Case on 2nd November 2015, the 1st Defendant deposited a sum of Kshs 2,000,000/- in Court as security;*
- v) This suit is an abuse of the Court Process as the Court in Lamu has already decided with finality the issues in controversy as between the parties herein;*
- vi) The Plaintiff has no surviving cause of action to be litigated herein;*
- vii) The suit is res judicata, incompetent, a non-starter in law and the same ought to be struck out with costs.*

3. In a Replying Affidavit sworn by Monica Wambui Kinuthia, a director of the Plaintiff Company on 8th September 2016, the Plaintiff admits that it did file the said Lamu PMCC No. 15 of 2014 but states that other than the prayer for the sum of Kshs 1,600,000/-, there were other prayers as follows:-

- b)An order of injunction restraining the defendant from selling, transferring, disposing, charging or in any other manner dealing whatsoever with his 1 /2 share interest in the property known as Lamu/Hindi/Magogoni/640 until the satisfaction of any decree that may be passed against him in the suit;*
- c) The defendant's 1 /2 share in the suit property be attached before Judgment in satisfaction of the decree that may be passed*

against him in the suit; and

d) Costs of the suit together with interest thereon at such rate and for such period of time as this Court may deem fit to grant.

4. It is accordingly the Plaintiff's contention that the two suits are different and that:-

a) The parties in Lamu PMCC No. 15 of 2014 and the parties in the present suit are different;

b) The relief sought in the two suits are different; and

c) The issues for determination in the two suits are completely different.

5. Accordingly the Plaintiff states that the determination of Lamu PMCC No. 15 of 2014 did not directly or substantially determine the matters in issue between the parties herein with finality or at all.

6. At any rate, the Plaintiff avers that the refund of Kshs 1,600,000/- by the 1st Defendant being the monies paid as deposit pursuant to the Agreement for sale between the Plaintiff and the 1st Defendant, does not preclude or disentitle the Plaintiff from claiming specific performance and the other reliefs sought herein, the failure to perform the Agreement for sale having been occasioned directly by the failure of the 1st Defendant to avail all the required completion documents.

7. In addition, the Plaintiff avers in the alternative that the Ruling delivered by Lamu Principal Magistrate on 15th March 2016 is null and void because at the date of the Ruling, the Principal Magistrate's Court did not have jurisdiction to hear or determine the matter in view of the orders given by the High Court in Malindi Petition No. 3 of 2016 on 14th March 2016.

8. I have considered the Application and the response thereto. I have equally studied in detail the submissions and the authorities placed before me by the respective Advocates for the Parties herein.

9. The gist of the Defendant's application herein is the contention that this suit as filed is res judicata. The doctrine of res judicata is captured at Section 7 of the Civil Procedure Act as follows:-

"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."

10. Dealing with the said doctrine in *John Florence Maritime Service Ltd & Another -vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR*, the Court of Appeal cited with approval the rendition of the doctrine in the case of *Henderson -vs- Henderson (1843) 67 ER 313* where the English Court observed that:-

".....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 to open the same subject of litigation in respect of a 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 the parties to form an opinion and pronounce a Judgement 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...."

11. The rationale behinds res judicata can be found in the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.

12. In the matter before me the Defendant's contend that before coming to this Court, the Plaintiff had filed a claim before the Lamu PMCC No. 15 of 2014 against the 1st Defendant seeking a refund of Kshs 1,600,000/-The said amount was apparently paid to the 1st Defendant as part of the purchase price for a parcel of land known as Lamu/Hindi Magogoni/640. That suit was determined on 5th March 2016 in favour of the Plaintiff.

13. The Plaintiff/Respondent does not deny that he filed the suit in Lamu as stated by the 1st Defendant. It is however their case that while the two suits relate to the same parcel of land, the parties in the two cases are different and the issues and the relief sought are equally different.

14. From the material placed before me, the Plaintiff filed the said suit in Lamu on 1st October 2014 while the present suit was filed some five months later on 10th March 2015. While the 2nd Defendant was not sued in the Lamu suit, the subject matter thereof was land parcel No. Lamu/Hindi Magogoni/640. This is the same subject parcel of land herein.

15. In the Lamu suit, the Plaintiff sought an order of injunction to restrain the 1st Defendant from selling the subject parcel of land and for the attachment of half a share of the parcel of land as security in the event the 1st Defendant failed to refund the deposit paid of Kshs 1,600,000/-

In the matter before me however, it would appear that the Plaintiff has changed its mind about the refund of the deposit paid and now seeks inter alia an extension of the period within which it can obtain Land Control Board Consent as well as an Order of Specific performance directing the 2nd Defendant to complete the sale of the subject parcel of land.

16. It is evident to me that the matter in issue in both suits relates to the contract of sale that was drawn between the Plaintiff and the 1st Defendant herein for the sale of the subject property. It is not clear to me why the issue raised in the present suit were not raised in the case that was filed before the Principal Magistrate's Court at Lamu. What is however clear is that when the Lamu case came up for hearing before the Honourable J.W Onchuru Principal Magistrate, the Plaintiff was absent and the 1st Defendant asked the Court to have Judgment entered against him in favour of the Plaintiff in terms of Prayer No. 1 of the orders sought in the Plaintiff.

17. In a considered Ruling delivered in Court on 5th March 2016, the Honourable Principal Magistrate entered Judgment in admission for the Plaintiff in terms of Prayer No.1 of the Plaintiff aforesaid with costs. It is also apparent from the record that the 1st Defendant deposited a sum of Kshs 2,000,000/- in the Lamu Court in satisfaction of the decree.

18. In my mind the Judgment delivered by the Lamu Court dealt with the subject matter of the dispute herein which is the failed contract of sale of the 1st Defendant's parcel of land known as Lamu/Hindi Magogoni/640. Evidently, other than joining the 2nd Defendant in the dispute and seeking Prayers other than those sought in the Lamu case, the issue in dispute herein is the same one that was directly and substantially in dispute between the parties in the Lamu case. That dispute was fully and finally determined by the Principal Magistrate Lamu and it would appear that no appeal was preferred therefrom.

19. In opposing the application, the Plaintiff submitted inter alia, that the Court in Lamu did not have the requisite jurisdiction to hear and determine land matters as at the time, there was pending before the High Court at Malindi a case in which the jurisdiction of the Lower Court to hear land matters had been challenged. I note that the Plaintiff did not withdraw the suit filed at Lamu on the basis of the said lack of jurisdiction. As it were, as the Court of Appeal decided in **Civil Appeal No. 287 of 2016; Law Society of Kenya –vs- Malindi Law Court Society & Others**, the Principal Magistrate's Court at Lamu was properly seized of the matter.

20. As was stated by the Court of Appeal in the John Florence Maritime Services Ltd Case(Supra):-

“Res judicata ensures the economic use of the Court's Limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.

.....it promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.....”

21. Arising from the foregoing, I am satisfied that the proceedings before me offend the doctrine of res judicata as embodied in Section 7 of the Civil Procedure Act. To proceed with the suit as filed would be abet in the abuse of the Court Process.

22. In the result, I allow the application dated 22nd July 2016 and strike out this suit with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE