



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 795 OF 2017

(formerly Milimani ELC 712 of 2014)

ERIC PETER WANJAU.....PLAINTIFF

VERSUS

MARGARET KASERA.....1ST DEFENDANT

TERESIA NASIEGU KINAIYA.....2ND DEFENDANT

SAMUEL KINAIYA.....3RD DEFENDANT

SAMSON MUTUNGEI.....4TH DEFENDANT

JOHN M. KINYUA.....5TH DEFENDANT

RICHARD KINYUA.....6TH DEFENDANT

AND

BETTY BATULI MONTET.....INTERESTED PARTY

(Administratrix of the Estate of George Montet alias Asman Ole Montet)

RULING

What is before Court for determination are two Notice of Motion applications dated the 11th September, 2017 and 13th December, 2017 respectively by the 1st, 2nd, 3rd, 4th, 6th Defendants' and Interested Party. The two applications both seek the suit to be struck out as being Res Judicata and are brought pursuant to Section 1A, 1B, 3A and section 7 of the Civil Procedure Act and all the other enabling provisions of the law.

The application is premised on the following grounds which in summary is that the late George Montet a.k.a Asman Montet had been sued by the Plaintiff in Civil Suit No. 3257 of 1978 in respect of LR No. NGONG/ NGONG/ 15933. The High Court adopted an award passed by an arbitration panel in favour of the Plaintiff on 6th July, 1982. The deceased was not aware of the said award and came to know about it on 23rd August, 1994 when the Plaintiff attempted to evict him from the suit land. The deceased filed an application for review of the said judgement, which was heard by Justice Effie Owuor, and a ruling delivered on 22nd August, 2000 setting aside the judgement. The issues in this matter have already been heard and determined and therefore this court is *functus officio*. The issue before this Honourable Court had been directly in issue in HCCC No. 3257 of 1978 and the Court having made its final determination therein, the instant suit is therefore res judicata. No summons to enter appearance were filed together with the plaint or at all as required by law. No summons to enter appearance has been issued to the Defendants as required by law for over a period of 4years since the suit herein was instituted vide the Plaintiff.

The Applications are supported by the affidavits of the Interested Party BETTY BATULI MONTET and the 1st Defendant MARGARET KASERA respectively. The Interested party who is the Administratrix of the Estate of George Montet reiterated her claim and averred that the Court of Appeal reviewed the judgement of Justice Nyarangi and annulled it, but the said decision was not appealed from. She contends that the Plaintiff seeks to rely on a judgement that was set aside and yet in the absence of an appeal, the legal proprietorship of the suit land continued to vest in the deceased until the time of transfer of title to the Defendants herein. She contends that legal ownership of the suit land reference number NGONG/ NGONG/ 15933 was never transferred from the deceased to the Plaintiff who cannot therefore lay claim on it. She states that the Plaintiff decided to pursue his alleged interests and rights over the suit land almost 14 years after the said ruling by Justice Effie Owuor was given and only did so after the death of George Montet, therefore raising a question of sincerity over his claim. She insists

the Plaintiff has failed to disclose to Court the aforesaid issues and the ownership of land parcel number NGONG/ NGONG/ 15933 was long determined and this suit is an attempt to bring back the matter to court by using different parties over the same subject matter and issues. She deems the suit an abuse of the court process and avers that litigation must end.

The 1st Defendant avers in her affidavit that she is aware that a dispute arose between the Plaintiff herein and George Montet alias Asman Ole Montet (deceased) over land parcel number NGONG/ NGONG/ 15933 prior to its subdivision which suit was referred to arbitration on 6th July, 1982 and on 26th March, 1993, the award was adopted as judgement. Further, that the said judgment was reviewed and the Plaintiff never appealed the said decision. She insists George Montet hence had an indefeasible title over the subject land and was therefore able to pass a good title to the Defendants herein in 2008 when the subject land was subdivided and subsequently transferred. She questions why the Plaintiff instituted the proceedings 14 years later after George Montet had died. She reiterates that in this instant suit, the Plaintiff seeks to relitigate a cause of action that has been directly in issue in a former suit and the suit therefore is res judicata and it amounts to an abuse of the process of the court as well as a waste of the court's time, which suit should be dismissed with costs to the Defendants. She contends that the Plaintiff's failure to serve Defendants with Summons to Enter Appearance for over 3 years is inordinate and inexcusable as it offends the provisions of the law in respect thereof. She avers that the suit is hence fatally defective.

The Plaintiff ERICK PETER WANJAU opposed the two application and filed a replying affidavit where he denied all the averments in the Interested Party's supporting affidavit. He insisted that the Interested Party has no interest in this suit as she is trying to confuse the issues herein and mislead the court so as to avoid the impending liability for the fraud orchestrated by the illegal subdivisions and transfer of the suit land to the Defendants. He confirms that though the suit property herein is the same as in Civil Suit Number 3257 of 1978, the parties herein and the cause of action are different. He insists the matter is not res judicata to Civil Suit Number 3257 of 1978 and as such the Court is not functus officio. He states that he has provided the history of this matter in his pleadings concluding that the suit land is his, having bought it from the late George Montet and the Defendants' have also indicated they bought their parcels of land from the said George Montet. Further, that the Interested Party confirms her father the late George Montet sold the suit land to the third parties but the same did not belong to him to sell to the third parties. He insists he is still the registered owner of the suit land and never sold it to the Defendants and that the only way the deceased including the Defendants could have subdivided as well as sold it was through fraud. He reiterates that he has been the registered proprietor of the suit land and filed this suit when the Defendants trespassed on his land and his borne of contention is not with the Interested Party. He challenges the applications and states that it is the 2nd Defendant and the Interested Party who orchestrated the fraud and states that the issue in dispute is ownership which cannot be determined summarily. He reiterates that the Interested Party wants to divert the courts attention and it is in the interest of justice if the application is dismissed.

The Plaintiff, 1st, 2nd, 3rd, 4th and 6th Defendants including the Interested Party filed submissions that I have considered.

Analysis and Determination

Upon perusal of the applications herein including the supporting affidavits as well as the submissions, the only issue for determination is whether the suit is res judicata.

It is not in dispute that the subject suit land NGONG/NGONG/ 15933 is the same subject in the Civil Suit Number 3257 of 1978. It is also not in dispute that the said parcel of land was initially owned by George Montet (deceased) who is the father to the Interested Party. It is further not disputed that the issues of the suit land had been determined vide Nairobi Civil Suit Number 3257 of 1978 which judgement was reviewed and set aside on appeal. It is not in dispute that the Interested party is the administratrix of the estate of George Montet, who sold the suit land to the Plaintiff as well as the Defendants. It is also not disputed that the Plaintiff did not serve summons to enter appearance upon the Defendants.

What is in dispute is that the suit herein is res judicata since it has already been heard and determined vide Nairobi HCCC No. 3257 of 1978 which judgment was set aside by the Court of Appeal Judge Effie Owuor. The Defendants and the Interested party contend that the suit herein is res judicata, a fact which is opposed by the Plaintiff who insists that though the suit land is the same, the parties herein and the cause of action are different. Both the 1st, 2nd, 3rd, 4th, and 6th Defendants as well as the Interested party state that the Plaintiff had initiated a suit against one George Montet alias Asman Ole Montet vide Nairobi HCCC No. 3257 of 1978 over land parcel number NGONG/NGONG/15933. After an arbitration by the Bul Bul Chief, there was an award which was adopted by Justice Nyarangi as a judgement of the Court in favour of the Plaintiff. However, the said George Montet appealed against the Judgement and on 22nd August, 2000 and the said Judgement was set aside. I note that as a result of the Court of Appeal decision George Montet proceed to subdivide the suit land which he later sold to the Defendants. The Plaintiff claims he bought the suit land from George Montet as he was its registered owner but the Defendants have encroached on it. I note that the Plaintiff never sought to review Justice Owuor's decision, which in effect granted the late George Montet an indefeasible title over the suit land, which he passed to the Defendants.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata: **' 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.'**

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

' in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'

Further in the case Nancy Mwangi T/A Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR, J Gikonyo states thus:

‘ The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others (2001)EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J.. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..’

It is against the foregoing and relying on the above cited legal provisions as well as judicial authorities that I find the suit land which was an issue Nairobi HCCC is still substantially the same issue in the instant suit. It is worth noting that the Plaintiff has not controverted the fact that the Court of Appeal through Justice Effie Owuor set aside the High Court Judgement that granted him the title to the suit land which in essence means the suit land reverted back to its original owner George Montet who sold it to the Defendants for value.. I further find that the Plaintiff’s claim is still the same but the only thing he has done is to cloth the cause of action in a different apparel but if the same is dissected it remains one and the same. I find that the Defendants’ who were purchasers for value from George Montet can be termed as parties who claim under him. The Plaintiff by suing the Defendants has merely added them to the same cause of action so as to keep his case against George Montet alive. I find that the issue of the suit land was already heard and determined by Courts of competent jurisdiction.

The Plaintiff cannot purport to bring forth another suit on the issues he as previously raised with vendor and direct his wrath upon the 1st, 2nd, 3rd, 4th and 6th Defendant. It is my observation that Litigation must come to an end. In the current suit the Plaintiff is trying to introduce cause of action against the Defendants so as to achieve the remedy against George Montet, yet the issue had already been resolved.

It is against the foregoing that I find that this instant suit indeed is res judicata and concur with Kuloba J that this is indeed a cosmetic facelift to give the suit a different face.

It is in that regard that I find that the two applications are merited and allow them as prayed. I proceed to strike out the suit with costs to the Defendants.

I will however directed the Interested party to bear her own costs as she voluntarily joined the suit..

Date signed and delivered in open court at Ngong this 21st day of June, 2018.

CHRISTINE OCHIENG

JUDGE