REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC NO. 33 OF 1998

DICK KAMAU NJUGUNA.....1ST PLAINTIFF

DAVASON GICHUKI.....2ND PLAINTIFF

DANIEL BARAGU.....3RD PLAINTIFF

JOHN MWANGI NJOROGE.....4TH PLAINTIFF

PASCAL KAMAU.....5TH PLAINTIFF

CHARLES MAINGI MACHARIA.....6TH PLAINTIFF

VERSUS

NAKURU KIAMUNYEKI CO. LTD.....1ST DEFENDANT

STEPHEN MBOTE.....2ND DEFENDANT

EVANS KIRIUNGI.....3RD DEFENDANT

PAUL CHIERA.....4TH DEFENDANT

MOSES KARANJA.....5TH DEFENDANT

MATHEW GITAHI .....6TH DEFENDANT

DAVID KARUGA ..... 7TH DEFENDANT

RULING

1. By Notice of Motion dated 8th December 2016, the 6th defendant seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, this honourable court be pleased to direct the Nakuru District Land Registrar not to effect any entries in the register and in the event that the register has been altered to rectify the register to reflect the entries that existed before the implementation of the directions in Kenya Gazette of 23rd September 2016.

4. That this honourable court be pleased to order and direct the District Land Registrar to comply with the ruling and order of Hon. Justice Alnashir Visram and Hon. Justice Kimaru that purported consent filed on 19th November 2002 was only binding on the parties to the consent being the plaintiffs and the 1st defendant.

5. That this honourable court be pleased to review its order vide the ruling dated 9th February 2015 by the Hon. A. Mshila to reflect the true position that:

(a) The application dated 7th February 2003 by the 2nd to 6th defendants seeking the following reliefs:

(i) Pending the inter partes hearing of this application this honourable court be pleased to stay the execution of the decree and order of 19th November 2002 and all consequential steps in execution.

(ii) This honourable court be pleased to set aside order by consent of the plaintiffs and the 1st defendant dated 19th November 2002 Was heard and determined vide a ruling delivered on 9th April 2003 by the Hon. Justice Alnashir Visram to the effect that, 'the judgment in question binds only the plaintiffs and the 1st defendant.

(b) The application dated 8th December 2003 by the 1st defendant sought to include other parcels of land and whose application sought to be compromised by the consent order that was filed in court dated 4th May 2004 which application was not prosecuted. The consent order was the subject matter of a ruling dated 1st October 2004 by the Hon. Justice L. Kimaru to the effect that:

(i) The order issued on 7th May 2004 and dated 11th May 2004 stands reviewed and set aside.

(ii) That the consent order between the plaintiffs and the 1st defendant dated 4th May 2004 is also set aside.

(iii) The 1st defendant is ordered to serve the application dated 8th December 2003 upon the 2nd to 6th defendants for hearing on a date to be fixed at the registry.

6. That upon review being done, this honourable court be pleased to allow the application dated 1st April 2014 by the 2nd to 6th defendants/applicants.

7. That this honourable court do find and direct that there is no decree in this case and the consent order having been reviewed and set aside by the Hon. Justice Kimaru on 1st October 2004 and this suit having been dismissed for want of prosecution on 10th June 2008 by the Hon. Justice Mugo capable of being enforced and/or executed.

8. That this honourable court do nullify the Gazette Notices Nos. 7685, 7686, 7687, 7688, 7689, 7690, 7691, 7692, 7693, 7694, 7695, 7696 and 7697 appearing on the Kenya Gazette of 23rd September 2016 for being premised on a non-existent decree.

9. That cost of this application be provided for.

2. The application is brought inter alia under Order 45 rule 1 of the Civil Procedure Rules and is supported by an affidavit sworn by the 6th defendant. The applicant contends that there is an error on the face of the record in respect of the ruling delivered on 9th February 2015 by A. Mshila J.

3. The application is opposed by the 1st defendant through a replying affidavit sworn by Alexander Ndungu Njoroge, its director. It is contended by the 1st defendant that the applicant herein filed Notice of Appeal in respect of the ruling dated 9th February 2015, that the application has been brought after inordinate delay, that no reasons have been given to warrant granting the orders sought and that the issues raised in the application are *res judicata*.

4. The application was heard by way of written submissions followed by oral highlighting. The applicant's submissions were filed on 13th March 2017 while the 1st defendant's submissions were filed on 3rd April 2017. Though the plaintiffs did not file any replying affidavit, counsel for the plaintiffs filed written submissions on 30th August 2017.

5. In his oral highlighting, Mr Kibet learned counsel for the applicant submitted that the matter is not *res judicata* since litigation so far and even the consent dated 4th May 2004 was between the plaintiffs and the 1st defendant. The order should therefore not affect the 6th defendant who was not a party to the consent.

6. Mr Muhia, learned counsel for the plaintiffs informed the court that the 2nd, 3rd, 4th and 7th defendants as well as the 1st, 4th and 6th plaintiffs have since passed away. There has been no substitution in respect of the said deceased parties. While associating himself with submissions made on behalf of the 1st defendant, Mr Muhia urged the court to dismiss the application.

7. On his part, Mr Waiganjo, learned counsel for the 1st defendant, submitted that following the consent between the plaintiffs and the 1st defendant a decree was issued and the plaintiffs were contented. The 2nd to 5th defendants as well as the 7th defendant successfully moved the court to have the case against them dismissed for want of prosecution. As such, the litigation herein between the 1st and 6th defendants is misplaced.

8. I have considered the application, the affidavits filed both the oral and written submissions and the authorities cited. The application is brought under Order 45 rule 1 which provides:

1. (1) Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(*b*) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

9. Principally, the applicant seeks review of the order made by A. Mshila J. on 9th February 2015. Before I go into the merits of the applicant, I must determine whether or not the issues raised in the application are *res judicata*. Section 7 of the Civil Procedure Act provides for *res judicata* 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. The Court of Appeal had the following to say as regards the provisions of Section 7 in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

…. 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 (see Karia & Another v the Attorney General and Others [2005] 1 EA 83.

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention 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….."

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. 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 applicant seeks review of the order made on 9th February 2015. That order was made in a ruling in respect of Notice of Motion dated 1st April 2014, an application which was also filed by the present applicant and in which the applicant sought an order that the court declares illegal and void any action taken by the "Chief Land Registrar and Director of Survey relying on the consent orders dated 14th November 2002, which had been adopted as a decree, in this matter, order issued on 7th May 2004 and 11th May 2001 all which reviewed and set aside by the order dated 21st October 2004". While dismissing the application, A. Mshila J. stated:

The applicant's case relates to orders issued by the court over several years of litigation between the parties herein and in particular three consent orders issued on 11th May 2001, 18th December 2002 and 11th May 2004. The consents are between the plaintiffs and the 1st defendant and their general effect was to cause cancellation of several title deeds issued by the Chief Land Registrar.

12. Among the prayers that the applicant is seeking in the present application are orders whose effects are that either upon the review being allowed or without the review being allowed the Land Registrar be stopped from implementing the consent between the plaintiffs and the 1st defendant. The consent resulted in judgment being entered in favour of the plaintiffs on 19th November 2002 and a decree being issued on 18th December 2002. The judgment remains in force. The issues that the applicant is now raising are matters which have been litigated herein and determined both in the ruling dated 9th April 2003 and in the ruling dated 9th February 2015. It must also be remembered that *res judicata* extends to all issues that ought to have been addressed in previous applications. That included whether or not review was available. The whole idea behind *res judicata* is that litigation should come to an end. If the applicant is not happy with the decisions that the court has made in the various applications then he ought to have appealed instead of engaging this court in endless litigation over the same issue. I have no hesitation in finding, as I now do, that Notice of Motion dated 8th December 2016 is *res judicata*. It is hereby struck out with costs to the plaintiffs and the 1st defendant.

13. Even if I had not found that the application is *res judicata* I would have had to consider the requirement under Order 45 rule 1 that an application for review be made without unreasonable delay. The order sought to be reviewed herein was made on 9th February 2015 while the application for review was filed on 8th December 2016, about one year and ten months after the ruling was made. Considering that the applicant had previously engaged the 1st defendant in litigation herein over the same issues or issues closely and directly related to the issues

now raised, the applicant had an obligation to file the application for review immediately the order of 9th February 2015 was made. In the circumstances of this case, I find that a delay of one year and ten months is unreasonable. I would in any event have dismissed the application on account of unreasonable delay.

14. In conclusion, Notice of Motion dated 8th December 2016 is struck out with costs to the plaintiffs and the 1st defendants.

Dated, signed and delivered in open court at Nakuru this 19th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gitau for 6th Defendant/Applicant.

Mr Waiganjo for 1st Defendant/Respondent

No appearance for Plaintiff/Respondents.

Court Assistant: Lotkomoi