



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC No. 77 OF 2011

ROSEBELLA JERONO MUDAVADI.....1ST PLAINTIFF
JOSEPH MOJONG.....2ND PLAINTIFF
ROBERT LANGAT.....3RD PLAINTIFF
RICHARD AMDANY.....4TH PLAINTIFF
JOSHUA CHEPSERGON.....5TH PLAINTIFF
JOSHUA SOI.....6TH PLAINTIFF
FRANCIS RUTO.....7TH PLAINTIFF
SAMMARY CHEPKEMOI.....8TH PLAINTIFF

VERSUS

DAVID KARIUKI WAIGANJO.....1ST DEFENDANT
JANE NJAMBI KARIUKI.....2ND DEFENDANT
GILLETTE AUCTIONEERS.....3RD DEFENDANT
THE OCS NAKURU POLICE STATION.....4TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. This is a ruling in respect of plaintiffs' Notice of Motion dated 20th December 2017, an application pursuant to which the plaintiffs pray that they be allowed to file their Further List of Documents out of time. The application is supported by an affidavit sworn by the 4th plaintiff. Before I go into the contents of the supporting affidavit, it is important to give some background information.

2. This is a fairly old matter. The plaint was filed on 5th April 2011. The hearing of the case has so far not taken off for various reasons. On 21st February 2017, the court ordered parties to file all compliance documents including Lists of Documents within 21 days from the said date. When the matter came up for hearing on 6th December 2017, counsel for the plaintiffs indicated that he was ready to proceed. Counsels on record for the 1st, 2nd and 3rd defendants however protested that counsel for the plaintiffs had served them with a List of Further Documents on 3rd October 2017 and 4th October 2017, way outside the period that was allowed by the court. They urged the court to expunge the List of Further Documents. Counsel for the plaintiffs admitted that the list was filed and served out of time. He therefore stated that he would not rely on the list. The said List of Further Documents was therefore expunged from the record. The matter was then placed aside so as to proceed later. However when the court called out the matter later in the day, counsel for the plaintiffs' sought an adjournment with a view to, among others, filing list of further documents. Upon considering the application and the submissions thereon, I delivered a ruling dated 6th December 2017 in which I stated as follows:

When this matter was called out this morning, Mr. Simiyu learned counsel for the plaintiff indicated that he was ready to proceed

with hearing of plaintiffs' case and that he had six witnesses. Upon the defendants objecting to "List of Further Documents" filed by the plaintiffs on 3rd October 2017, Mr. Simiyu stated that he would not rely on it. Consequently, the said "List of Further Documents" as well as the bundle of documents annexed to it were expunged from the record. The matter was then confirmed for hearing as the second hearing of the day.

The application for adjournment now made is a major departure from the position earlier taken by the plaintiffs. Having confirmed the matter for hearing, it is expected that a pretrial briefing had been done much earlier and that the plaintiffs and their counsel went through the pleadings and documents in the matter before confirming readiness for hearing. No adequate explanation has been offered as to how and why the sudden and monumental change of circumstances arose.

The reasons now advanced for adjournment are not minor ones. The plaintiffs say they want to further amend the plaint so as to change the description of some of the defendants and the capacities in which they are sued. The plaintiffs also wish to introduce further documents. These are major shifts in the plaintiffs' case and it is not easy to accept that the issues have cropped up suddenly. I do not accept that they have. It may very well be that it is a front for an adjournment. I appreciate the defendants' frustrations and difficulties in the circumstances. Trials should be orderly and predictable affairs.

If there was need to amend or introduce new documents, the plaintiffs' advocates should have communicated to the defendants' advocates well before today. As already noted, the plaintiffs' List of Further Documents was expunged earlier today. The plaintiffs cannot now go round that order by seeking to reintroduce those documents. Today's date was fixed by the plaintiffs' advocates who then served hearing notices on the other advocates.

For all these reasons, I see no merit in the application for adjournment. It is dismissed with costs to the defendants. Nevertheless, considering that it is now well after 3.15pm, the hearing cannot take off. The court has been pre-occupied for the better part of the day in another hearing. I will therefore give a new hearing date for the matter.

Hearing on 26th January 2018.

3. Now back to the affidavit in support of the present application. It is deposed therein that the plaintiffs were not able to comply with the time lines given on 21st February 2017 owing to logistical challenges and that the withdrawal of the List of Further Documents was done so as to ensure that the hearing that was scheduled for 6th December 2017 proceeds. The plaintiffs however realized later on that through the withdrawal they had done away with certain vital documents. They therefore pray that they be allowed to file a further list of documents comprising Sale Agreement, Allotment Letters and Mutation. Copies of these new proposed documents were not however annexed to the affidavit.

4. The application is opposed by the 3rd defendant through Grounds of Opposition filed on 26th January 2018 and by the 2nd defendant through her replying affidavit filed on 31st January 2018. The said defendants maintain that the application is *res judicata* in view of the orders made on 6th December 2017, that the plaintiffs have been indolent and that if granted, the orders sought in the application will cause prejudice since there will be a delay in the matter. The 4th and 5th defendants did not respond to the application or participated in its hearing.

5. The court ordered that the application be heard by way of written submissions. Consequently, the applicants filed submissions on 7th March 2018. The 1st, 2nd and 3rd defendants opted not to file any submissions.

6. I have anxiously considered the application, the affidavits filed, Grounds of Opposition and the submissions. The applicants seek enlargement of time to file further list of documents. As has already been noted, the applicants filed their List of Further Documents but the same was expunged from record when the applicants stated that they did not intend to rely on it. If allowed, the applicants or plaintiffs will have a chance to once again file a List of Further Documents.

7. Pursuant to the ruling of 6th December 2017, this court declined to grant the plaintiffs an adjournment. The adjournment was sought so as to enable the plaintiffs to file a list of further documents. The court instead ordered that the hearing proceeds. The hearing did not however proceed owing to constraints of time.

8. The defendants have argued that the present application is *res judicata*, a doctrine which is provided for under **Section 7** of the **Civil Procedure Act**. The said section provides:

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.

9. I need not go into any lengthy treatise on *res judicata* and its ingredients. The Court of Appeal had the following to say as regards the provisions of Section 7 of the **Civil Procedure Act** 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.

10. In the ruling of 6th December 2017, the court mainly considered whether or not the plaintiffs should be granted an adjournment so that they could file a list of further documents. The court concluded that the hearing ought to proceed and therefore declined to allow an adjournment for purposes of filing the said further list of documents. Were it not for constraints of time, the hearing could have proceeded on 6th December 2017 perhaps to conclusion. Nevertheless, it must be remembered that what was determined on that occasion was whether an adjournment could be granted. The issue of filing a list of further documents was just one of the reasons advanced to support the application for adjournment. As such, the question of whether or not the plaintiffs should be allowed to file a list of further documents has neither been heard on the merits nor determined. It is not *res judicata*. I have also considered whether allowing the present application will occasion any injustice to the defendants. I see no injustice which cannot be remedied by an award of costs.

11. In view of these circumstances, I make the following orders:

- a) Notice of Motion dated 20th December 2017 is allowed with costs to the 1st, 2nd and 3rd defendants.
- b) The plaintiffs to file and serve further list of documents within 14 (fourteen) days from the date of delivery of this ruling. In default, Notice of Motion dated 20th December 2017 shall stand dismissed with costs to the 1st, 2nd and 3rd defendants
- c) The defendants are at liberty to file and serve further list of documents within 14 (fourteen) days of service.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs

Ms Wangari holding brief for Mr Waiganjo for the 1st and 2nd defendants

No appearance for the 3rd defendant

No appearance for the 4th and 5th defendants

Court Assistants: Gichaba & Lotkomoi