



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 570 OF 2017

PETER KAMAU IKIGU.....PLAINTIFF

VERSUS

WESTLANDS RESIDENTIAL RESORT LIMITED.....1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

RULING

The 1st Defendant seeks an order to have this suit struck out on the basis that the subject matter of this suit is the same as that in **High Court Civil Case No. 49 of 2015- Kam Company Limited v Shelter Afrique & Westlands Residential Resort Limited**, and that the parties are the same. The 1st Defendant claims that its acquisition of the suit property is the subject matter in the latter suit which has been partly heard by the Commercial and Tax Division of the High Court at Milimani. At the time of filing the application, the matter was scheduled to be heard further on 15/2/2018.

The 1st Defendant avers that it is the lawful owner of L.R. No. 2/654 (“the Suit Property”) pursuant to a sale and transfer from Shelter Afrique as mortgagee. The Suit Property was previously owned by the Plaintiff whilst Kam Company Limited in which the Plaintiff is both shareholder and Director had leased the Suit Property. Kam Company Limited mortgaged the Suit Property to Shelter Afrique as security for repayment of a loan and when Kam Company Limited defaulted in the repayment of the loan, the Suit Property was bought by the 1st Defendant. The 1st Defendant claims that it paid the purchase price in full and was issued a freehold title over the Suit Property. Kam Company Limited filed **HCCC NO. 49 of 2005** against Shelter Afrique and the 1st Defendant over the sale of the Suit Property claiming the sale was illegal and that the 1st Defendant had obtained ownership and possession through a flawed registration process.

The Plaintiff filed Grounds of Opposition together with a Replying Affidavit. He contends that the two suits are between different parties and are over different causes of actions. He claims he leased the Suit Property to Kam Company Limited for 11 years from 6.5.1997 which in turn mortgaged the leasehold interest to Shelter Afrique to secure a loan facility to complete the construction of 27 apartments on the Suit Property. The Plaintiff admits that he supervised the construction of the apartments up to 80% completion.

The gist of the Plaintiff’s claim is that the 2nd Defendant wrongfully registered a conveyance over the leasehold interest in the Suit Property without differentiating between the freehold and leasehold interests in the Suit Property. The Plaintiff argued that the suits are between different parties and concern different issues. He further urged that the 1st Defendant had frustrated his attempts to join the other suit.

Parties filed written submissions which the court has considered. The 1st Defendant submits that the issue in this suit is substantially in issue in **HCCC No. 49 of 2005** and that the parties in the two suits are the same or are litigating under the same title. The 1st Defendant averred that the relief sought by the Plaintiff is a declaration that the 2nd Defendant’s issuance of a title to the 1st Defendant over the Suit Property was fraudulent and void. In **HCCC NO. 49 of 2005**, the Plaintiff seeks a declaration in the Re-amended Plaintiff that the transfer of the Suit Property by Shelter Afrique to Westlands Residential Resort Limited, the 1st Defendant, was null and should be cancelled. Kam Company Limited pleads at paragraph 3 of the Re-amended Plaintiff that it is the registered proprietor of the Suit Property. The Plaintiff in this case pleads in paragraphs 14, 15, 16 and 17 of the plaintiff that he leased the Suit Property to Kam Company Limited which mortgaged its interest to Shelter Afrique.

The Plaintiff did not exhibit any evidence to demonstrate that it applied to join HCCC NO. 49 of 2005 and the court declined this application.

Section 6 of the Civil Procedure Act bars the court from proceeding with the trial of any suit in which the matter in issue is also directly in issue in a previously instituted suit between the same parties, or between parties under whom they claim where such suit is pending in the same court.

The question the court has to determine is whether the issues in this suit are substantially in issue in HCCC No. 49 of 2005. The subject

matter in both suits is the challenge of the sale and transfer of L.R. No. 2/654 to Westlands Residential Resort Limited, the 1st Defendant. To avoid the multiplicity of suits over the same subject matter and obviate a situation where different courts may give conflicting decisions over the same subject matter, it is prudent to have disputes relating to the same land determined by one court. The decision the court will arrive at in HCCC NO. 49 of 2005 which has been heard will affect the claim in this suit.

The 1st Defendant's application dated 23/10/2017 has merit. It is allowed with costs to the 1st Defendant.

Dated and delivered at Nairobi this 30th day of August 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Njagi holding brief for Mr. Kinyanjui for the Plaintiff

Ms. Amollo holding brief for Mr. Havi for the 1st Defendant

No appearance for the 2nd Defendant

Mr. V. Owuor- Court