



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 284 OF 2017

SALIM MWALIMU SHEE.....PLAINTIFF

-VS-

1. MACHARIA KAMAU

2. MARTIN MONGWANJA

3. PAULINE MONGWANJA.....DEFENDANTS

RULING

1. The Plaintiff, Salim Mwalimu Shee sued the 3 defendants, Macharia Kamau, Martin Mongwanja and Pauline Mongwanja seeking the reliefs in the plaint dated 31st July 2017. At the time of filing the suit, the Plaintiff also filed the Notice of Motion application dated 31st July 2017 seeking orders restraining the defendants from entering, remaining, constructing, selling, transferring, mortgaging and/or in any manner dealing with Plaintiff's **PLOT NO. KWALE/GALU KINONDO/720** pending hearing and determination of this suit.

2. The defendants filed a Memorandum of Appearance on 3rd November, 2017 and filed a Replying Affidavit on 19th January 2018 in response to the Plaintiff's said Application. On 14th May, 2018, the Defendants filed a Notice of Preliminary Objection in which they raised objection to the hearing of the Plaintiff's Application for the reason that the suit herein is res judicata, the matters in question having been conclusively determined in **Mombasa Chief Magistrate's Court Civil Suit No.14 of 2012 – Salim Mwalimu Shee –v- Suleiman Magozi and Peter Macharia Kamau**, and that the Application is incurably defective, is fatal and should be struck out and/or dismissed with costs. This ruling therefore is in respect to that Preliminary Objection.

3. On 14th May, 2018, the parties agreed and the court directed that the Preliminary Objection be canvassed by way of Written Submission. The Defendants were directed to file and serve their written submissions within 14 days from 14th May, 2018 and the Plaintiff to file his within 14 days of service. The matter was then fixed for highlighting of submissions on 9th July, 2018. When the matter came up on 9th July, 2018, the Defendants had not filed their submissions as directed or at all and requested for 14 days to do so. The Plaintiff filed his submissions on 9th July, 2018. The Defendants were granted 7 days to file their submissions from 9th July, 2018 but have not filed to date.

4. In his submissions, the Plaintiff submitted that the suit and the claim is not res judicata as the previous suit was not conclusively determined because the Magistrate's Court had no jurisdiction to hear and determine the matter and that the suit was dismissed for want of prosecution. Further, that the parties in **CMCC No. 14 of 2012** were different, although Peter Macharia Kamau was enjoined as a party at a later stage.

5. I have considered the submissions by the Plaintiff. The Preliminary Objection by the Defendants is mainly that the suit is res judicata. In his ruling the **Garden Square Ltd –v- Kogo & Another (2003)eKLR** Ringera, J (as he then was) said that what constitutes a true Preliminary Objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decision of the then court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Ltd. - v – West End Distributors Ltd (1969) EA 696** in which Sir Charles Newbold, the President of that Court stated:

“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by ways of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

6. I have perused the pleadings herein. In the plaint, the plaintiff, has pleaded that there has been previous proceedings in court regarding the

suit property being **Misc. Application No.131 of 1991**. The Preliminary Objection is however is on the ground that the suit herein is res judicata, the matters in question having been conclusively determined in **Mombasa CMCC No.14 of 2012**. I have perused the Replying Affidavit filed by the Defendants. In paragraph 13 of the said Replying Affidavit, it is deponed that **CMCC No.14 of 2012** was dismissed for want of prosecution on 11th November, 2016. It is clear therefore that the court did not make a finding on the issues in **CMCC No.14 of 2012**. This is because the case was dismissed for want of prosecution. In my view, the issues in that suit were never canvassed and determined to conclusion. The issues raised in that suit did not receive a final judgment on merits. A suit will only be deemed barred by res judicata when it has been heard and determined on the substantive merits of the case. By reason of the foregoing, I find that the present suit cannot be said to be barred by the plea of res judicata as there was no determination of the claim between the parties on merit.

7. Section 7 of the Civil Procedure Act only bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. It states as follows:

“ 7. No Court shall try any suit 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 suit in which such issue has been subsequently raised, and has been heard finally decided by such Court.”

8. As already stated, the Defendants did not file or make submissions in support of the Preliminary Objection. To this extent therefore, it is neither practical nor logical to accept the notice as filed without any argument in support. It becomes even more difficult where the other party has opposed and denied the existence of the fact as pleaded.

9. For the foregoing reasons, I am inclined to dismiss the Preliminary Objection and decline to dismiss the Application and the suit as requested. The Plaintiff shall have costs.

Delivered, signed and dated at Mombasa this 27th September, 2018.

C. YANO

JUDGE