



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1071 OF 2015

LAWRENCE JOHN IRUNGU MWANGI.....1ST PLAINTIFF/APPLICANT
MIRISHO WANYANGA WANGUL.....2ND PLAINTIFF/APPLICANT
SAMUEL KINYANJUI MAINA.....3RD PLAINTIFF/APPLICANT
SIMON WAIGANJO WAMBUL.....4TH PLAINTIFF/APPLICANT
ANN WAITHERA MUTEMI.....5TH PLAINTIFF/APPLICANT
WILSON PETER KINYANYUI KINJA.....6TH PLAINTIFF/APPLICANT
ALEXANDER MBURU KAMAU.....7TH PLAINTIFF/APPLICANT
CHARLES MAINA GITHINJI.....8TH PLAINTIFF/APPLICANT
MARY WANGUL.....9TH PLAINTIFF/APPLICANT
PETER WAMWEYA MWANGI.....10TH PLAINTIFF/APPLICANT

=VERSUS=

JULIUS KIMANI MAINA T/A GEOMATH MANAGEMENT.....1ST DEFENDANT/RESPONDENT
STEPHEN KAHUGU KINYANJUI.....2ND DEFENDANT/RESPONDENT
GODFREY NJOGU GACHURU.....3RD DEFENDANT/RESPONDENT
CHARLES NJUGUNA.....4TH DEFENDANT/RESPONDENT
PATRICK KAGUTA GITHENDU.....5TH DEFENDANT/RESPONDENT
MOSES NJUGUNA KIHANDA.....6TH DEFENDANT/RESPONDENT
INKON INVESTMENTS LIMITED.....7TH DEFENDANT/RESPONDENT

RULING

1. By a plaint dated 26th November 2015 the plaintiffs sued the defendants. They sought among others; a declaration that the 1st defendant has acquired proprietary interest in land parcel number 61/16 from the defendants and the plaintiffs have legitimate assignment of interest from the 1st defendant in plot numbers 21, 24, 34, 36, 57, 58, 59, 60, 61, 62 and 71 respectively.
2. Together with the plaint, they filed a notice of motion dated 26th October 2015 seeking among other orders temporary injunction against

the 1st – 6th defendants

3. Upon being served, the 2nd – 7th defendants/respondents filed a notice of preliminary objection dated 16th November 2015.

4. On the 10th October 2016, the court directed that the preliminary objection be heard and determined in priority to the notice of motion dated 26th October 2015.

The court further directed that the preliminary objection be disposed of by way of written submissions. These directions were given in the presence of counsel for all parties except the 1st defendant. On the 17th November 2017, Mrs E. W Kamuyu for the plaintiff/applicants was present in court and sought leave to file their written submissions in respect of the preliminary objection. The court granted them leave to file the same before the close of business that day.

On 28th June 2016, the plaintiffs/applicants' counsel was absent and no written submissions had been filed in respect of the preliminary objection. The court proceeded and gave date for ruling. I notice that the submissions were filed much later on 7th November 2018.

5. The 2nd – 7th defendants'/respondents' preliminary objection is dated 16th November 2017 states:-

“Take notice that the 2nd to the 7th defendants/respondents herein will seek to have the plaintiffs/applicants' suit struck out on the following preliminary objections:-

- 1. The matter is res judicata; the issues having been settled in Thika CMCC No. 36 of 2011 in which judgment was duly rendered in favour of the 7th defendant/respondent.**
- 2. The plaintiffs/applicants have no locus standi to maintain suit against the 2nd, 3rd, 4th, 5th, 6th and 7th defendants/respondents herein in terms of section 3(3) of the Law of Contract Act Cap 23.**
- 3. The suit as filed does not disclose any cause of action against the 2nd – 7th defendants/respondents**
- 4. The applicants have not disclosed any grounds to merit the granting of the orders sought.**
- 5. The application does not meet the threshold for the grant of the orders sought.**
- 6. The application and the suit as filed are frivolous, vexatious and an outright abuse of the due process of the court.**

The 2nd – 7th Defendants'/Respondents' Submissions

6. This suit is res judicata in terms of Section 7 of the Civil Procedure Act, Cap 21. At the time of filing the suit, the Chief Magistrates Court at Thika had presided over Civil Case No 36 of 2011 in which the subject matter is the same, the parties are the same and in which on 27th July 2017 Judgment was delivered in favour of the 7th defendant. The plaintiffs/applicants herein claim through the 1st defendant/respondent. They did not appeal the judgment despite being aware of it. In the circumstances the suit is res judicata.

7. The plaintiffs/applicants herein do not have *locus standi* in terms of Section 3(3) of the Law of Contract Act, Cap 23 and Section 38 of the Land Act. They have relied on the case of **Metra investments Ltd vs Gakweli Mohamed Wawakah Nairobi Milimani HCCC No. 54 of 2006 and Nairobi Permanent Markets Society vs Salim Enterprises & Others (1995- 1998) 1 EA 232.**

8. The plaintiffs/applicants have not exhibited any document to demonstrate that they purchased any portion of the suit land from the 2nd – 7th defendants/respondents. They have also not demonstrated that the 2nd to the 7th defendants took any money from them in exchange for the said land. The plaintiffs/applicants have no legal or equitable right over the suit land. They have no *locus standi* to maintain any suit against the 2nd to the 7th defendants in respect of the suit property. They pray that the application and the suit be struck out with costs.

The Plaintiffs/Applicants' Submissions

9. The parcel of land in issue is directly and substantially the same in issue in the two matters. The parties are not the same and the decision in the earlier matter was never to be final as regarding their claim to ownership of individual plots of land sold to them. The previous suit CMCC No 36 of 2011 filed by the 7th defendant never included the defendants herein, which is interpreted to mean that their rights of ownership and occupation of their respective plots of land as individuals was right. The court then decided the suit as was presented by the said defendant then.

10. They have relied on the case of **Nicholas Njeru vs Attorney General & 8 others [2013] eKLR.**

11. Where there is no finality in a matter and also where a new cause of action has arisen then the doctrine of res judicata cannot be said to apply. The plaintiffs/applicants herein were never parties in the case heard by the subordinate court at Thika. This is the only court having jurisdiction to handle the wrongful acts committed by the defendants. The plaintiffs will demonstrate at the hearing the various agreements entered between them and the defendants on the purchase of their respective plots of land.

12. I have considered the preliminary objection herein. I have also considered the written submissions of counsel, the relevant provisions of law, and the authorities cited. The issues for determination are:-

i. Whether the matter in the suit filed is res judicata.

ii. Whether the plaintiffs/applicants have locus standi to maintain this suit in terms of Section 3(3) of the Law of Contract Act Cap 23.

13. The preliminary issue to be determined is whether the preliminary objection herein meets the criteria of a preliminary objection. In the case of **Mukisa Biscuits Co. Ltd vs West End Distributors Ltd [1969] EA 696** the court stated as per Sir Charles Newbold P;

“..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is exercise of judicial discretion.”

Law J. A stated thus:

“.....So far as I am aware a preliminary objection consists of a point of law which has been pleaded which raises clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

I am satisfied that the issues raised herein are of pure points of law.

14. Section 7 of the Civil Procedure Act provides that:

“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”.

15. I have gone through the judgment in Thika CMCC No 36 of 2011 in which the 7th defendant herein (Inkom Investment Ltd) was the plaintiff and the 1st defendant herein Julius Kimani t/a Geomath Management was the 1st defendant. In that case judgment was entered in favour of the 7th defendant herein (Inkom Investment Ltd). The court granted orders:-

1. “That a permanent injunction be and is hereby issued restraining the 1st to 25th defendants herein, employees and/or anybody claiming through them from intermeddling, alienating, selling, and/or constructing on portion LR 61/16 parcel that belongs to the plaintiff.

2. That the 1st to 24th defendants do vacate the said land and if they so fail to vacate an eviction order does issue against the 1st to 24th defendants, agents, employees from occupying LR 61/16.....”

16. It is clear from the above that the title under litigation was LR 61/16. The doctrine of res judicata is premised on the following grounds:-

a. A previous suit in which the matter was in issue.

b. The parties were the same or litigating under the same title.

c. A competent court determined the matter in issue on merit.

d. That the issue has been raised again in a fresh suit.

17. It is not in doubt that land parcel LR 61/16 is directly and substantially in issue in the two matters. In Thika CMCC No 36/2011 the court after hearing all the parties decided that the 1st defendant was not entitled to any portion of LR 61/16. He did not have rights to sell the plots hived off from LR 61/16.

18. In the plaint filed in this court dated 26th October 2015 the plaintiffs herein seek among other prayers; “the court to declare that the 1st defendant has acquired proprietary interest in Land parcel No 61/16 from the defendants and the plaintiffs have legitimate assignment of interest from the 1st defendant on plots Nos 21, 24, 34, 36 57 – 62 and 67”

It is clear from the above that there was a previous suit being Thika CMCC 36/2011 in which the ownership of LR 61/16 was in issue. The matter was settled and the court then decided the 1st defendant did not have any interest to the said land. Though the plaintiffs herein were not parties to that suit, they are claiming through the 1st defendant who allegedly sold to them the plots.

19. I note that the issues were heard on merit and a judgment delivered. The plaintiffs herein have brought the same issues again in this suit.

It appears the 1st defendant did not appeal against the said judgment. I am satisfied that the suit herein is *res judicata* as it attempts to bring up the issue of ownership of LR No 61/16 again in this suit.

20. As to the second issue, it is the 2nd – 7th defendants’ contention that the plaintiffs have no *locus standi* to maintain this suit in terms of Section 3(3) of the Laws of Contract Act, Cap 23 Laws of Kenya.

Section 3(3) of the Law of Contract Act provides that:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded on sum memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it provided.....”

Section 38 (1) of the Land Act, 2012

“No suit shall be brought upon a contract for the disposition of an interest in land unless:

a. The contract upon which the suit is founded:-

i. is in writing

ii. is signed by all parties thereto

b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party”

21. I have gone through the pleadings. The plaintiffs have not exhibited any documents to demonstrate that they purchased their respective portions they are claiming out of LR No 61/16 from the 2nd – 7th defendants. They have also not demonstrated that the 2nd – 7th defendants took any money from them in exchange for the said land. In essence they have no legal or equitable right over the suit land. In **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557** Bosire J (as he then was) held that:

“to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction”

I am not satisfied that the plaintiffs herein deserve this kind of protection.

22. It therefore means the plaintiffs have no *locus standi* to maintain the suit against the 2nd – 7th defendants in respect of the suit property. I rely on the case of **Nairobi Permanent Markets Society vs Salim Enterprises & 2 Others Nairobi CA Civil Appeal No. 185 of 1997** where the court in dismissing the appeal held that:-

“The applicants have not disclosed what right or interest they have in the suit land. In the absence of that they could not expect the court to interfere with the company’s right of ownership by putting a hold on its activities or development of the suit land. We fully agree with the learned trial judge that in the circumstances the appellants prima facie did not have locus standi to bring the said action for an injunction against the respondents”

23. The plaintiffs’ contention is that the 7th defendant who was the plaintiff in Thika CMCC No 36 of 2011 never included them and the court then decided the suit as was presented by the said defendant then. I respectfully disagree with the above position. As stated earlier, the court then found that the 1st defendant did not have a right to LR NO 61/16. It therefore mean he could not pass to the plaintiffs what he did not have. Litigation must come to an end.

24. In the conclusion, I find merit in the preliminary objection and the same is upheld. The upshot of the matter is that the plaintiffs’ notice of motion dated 26th October 2018 and the entire suit are hereby struck out with costs to the 2nd – 7th defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 22ND day of NOVEMBER 2018

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant