



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 514 OF 2017

JOSPHAT KAMANDE MACHARIA.....PLAINTIFF

VS

LIVINGSTONE WANYOIKE KING'ARA.....DEFENDANT

RULING

1. By an amended plaint, the Plaintiff filed suit against the Defendant on the 27/7/10 seeking orders inter alia a declaration that the Defendant is registered owner of parcel No LOC6/KANDANI/1706 & 1707 and LOC17/SABASABA/1537 (suit lands) in trust for himself and the Plaintiff to the half share and that the said trusteeship be determined in his favour to allow the Defendant be registered as owner of the ½ share.

2. The Defendant in denying the Respondent's claim undertook to file a Preliminary Objection under para 21 of the defence filed on the 9/8/10, which objection was filed on even date and expressed as thus;

a. That the suit is resjudicata on account that the same issues were raised in ; LDT case No. 196 of 2005, Central Provincial Tribunal Committee No Maragua 7 of 2006 and Misc Application Civil Suit No 1061 of 2007 as they were heard and determined while the parties are the same.

b. That the amended Plaint is bad in law, an abuse of the process as the same case filed in a High Court of the same rank as a civil suit matter without a disclosure that it was heard in the High Court in Nairobi.

c. That the Plaintiff is not honest and has brought the suit in bad faith as by filing this suit he is seeking to block the hearings in Misc suit No 1061 of 2007 in respect of the bill of costs in favour of the Defendant.

3. I have perused the file and it would appear that the Plaintiff did not file any response to the Preliminary objection. It is therefore undefended but I will determine the same on its merits based on the material placed before me.

4. The parties filed written submissions which I have read and considered.

5. The Defendant submitted and gave a chronology of the disputes between the parties in respect to the suit lands. Save for the suits disclosed in para 2 (a) above by both parties the Defendant submitted and disclosed the existence of SPMCC NO 302 OF 1992, Murang'a between the Defendant and one King'ara Gathu over land reference LOC6/KANDANI/1663 out of which parcel Nos. LOC6/KANDANI/1706 & 1707 were excised from. That in this suit the Defendant obtained judgment against King'ara Gathu in his favour and got 12 acres from parcel LOC6/KANDANI/1221. That the said King'ara Gathu was an uncle to both parties in this suit. That land parcel LOC6/GIATHAINI/399 was subdivided into LOC6/GIATHAINI/1379 and LOC6/GIATHAINI/1380. In discharge of his trusteeship obligation, Gathu transferred 10 acres in LOC6/GIATHAINI/1379 to the Defendant.

6. It is on the premise of the submissions in para 5 that the Defendant wants the Court to declare this suit statute barred and bad in law by virtue of section 7 of the Civil Procedure Act. He has relied on several case law which I have read and considered.

7. It is the Defendant's submission that PMCC No 302 of 1992, Murang'a was initiated by the Defendant against King'ara Gathu who held parcel No LOC6/GIATHAINI/399 in trust for both the Plaintiff and the Defendant. The said King'ara Gathu had subdivided the LOC6/GIATHAINI/399 into LOC6/GIATHAINI/1379 LOC6/GIATHAINI/1380 and transferred LOC6/GIATHAINI/1379 to the Plaintiff. It is further submitted that it is for this reason that the Plaintiff never sought to join the suit because at the time he had received his share of LOC6/GIATHAINI/399 after which the trust held by King'ara Gathu was dissolved and was content with share he received.

8. That the Plaintiff by filing this suit is seeking to reopen litigation and the current issue of trust ought to have been raised in PMCC NO 302

of 1992. On this point he placed reliance on the dicta in the case of **Henderson Vs Henderson (1843) All E R 378**. That the claim of trusteeship was determined in PMCC No 302 of 1992 which the Plaintiff ought to have sought enjoinder if he harboured any claims on the suit lands. Relying on the case of **Thomas Ondieki & Anor Vs National Bank of Kenya Limited & Anor (2015) EKLK CA No 182 of 2011**, he urged the Court to strike out the suit in *limine*.

9. The Plaintiff submitted that the claim of the Plaintiff against the Defendant is on customary trust and as such the claim is not subject to statute of limitation. That the Plaintiff was not a party to PMCC No 302 of 1992 and to claim that he ought to have sought enjoinder is stretching the doctrine of resjudicata too far. That the facts in this suit are contested and this removes the issues from being a pure point of law.

10. I have considered the Preliminary objection in line with the submissions of the parties on record and the issues that commend themselves for determination is whether the Preliminary Objection as drafted is a pure point of law and secondly whether or not the suit is resjudicata.

11. The definition of a Preliminary Objection as acknowledged in the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

"..... a Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

12. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

".....a "Preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

13. Section 7 of the Civil Procedure Act provides 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"

14. It is clearly manifest that for the Court to arrive at a determination in this case as to whether or not the suit is resjudicata, the Court has to revisit the previous suits so as to establish the facts as to whether or not there existed sameness in the parties, issues, subject matter, whether the issues were heard and determined by a competent Court inter alia. Going by the definition of a Preliminary objection as espoused in para 11 and 12 that would in all respects take the matter out of being a pure point of law.

15. I have perused the record in respect to the previous suits to wit; LDT case No. 196 of 2005, Central Provincial Tribunal Committee No Maragua 7 of 2006 and Misc Application Civil Suit No 1061 of 2007 and am persuaded that the current suit cannot be said to be resjudicata on that score because the LDT had no jurisdiction to determine title as it did. The judgment of Lady Justice Sitati in Misc Application Civil Suit No 1061 of 2007 was on point on this. I associate myself with the decision of the Court in the locus classicus of jurisdiction in **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1** in which the Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

"Jurisdiction is everything. Without it, a Court has no power to make one more step. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

16. The law is well settled that a decision which is arrived at without jurisdiction is a nullity. In the case of **Sir Ali Bin Salim vs. Shariff Mohamed Shatry Civil Appeal No. 29 1940** it was stated that; -

"If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction".

17. It goes without much saying that the above suits cannot be a bar under section 7 of the Civil Procedure Act because they were not heard and determined by a Court of competent jurisdiction. The Land Dispute Tribunal was not clothed with the power to determine title as it did. This was contra the provisions of section 3(1) of the Land Dispute Tribunal Act (now repealed).

18. Turning onto SPMCC No 302 of 1992, I have perused the pleadings and the judgment in the said case and it is clear as already admitted

by the Defendant that the Plaintiff was not a party to this suit. This suit was between the Defendant and his uncle King'ara Gathu. The issues in the previous suit and the issues in this suit are different. To my mind, to opine that the Plaintiff ought to have sought to be enjoined is as stated by the Plaintiff's counsel is stretching the doctrine of resjudicata out of context.

19. In the end I hold that this suit is not resjudicata. Let the matter be determined on trial and on its merits. Before I pen off, I note that this is a very old case having been filed in 2010 and it is yet to be determined. The preliminary objection having been raised in 2010 ought to have been prosecuted at the earliest instance to avoid delay in concluding the matter.

20. The Preliminary objection is unmerited. It is dismissed with costs to the Plaintiff.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 6TH DAY OF DECEMBER 2018

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff – Present in person. Advocate absent.

Defendant – Present in person. Advocate absent.

Irene and Njeri, Court Assistants