

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 175 OF 2016

UBA CHUBA RASHID

MBARAK ABEID.....PLAINTIFFS

-VERUS-

OMAR SEFU MOHAMED

MUNAA ABDALLA SAID AHMED

**LAND REGISTRAR MOMBASA SUED THROUGH THE ATTORNEY
GENERAL..DEFENDANTS**

RULING

1. The defendant has raised a preliminary Objection that this suit is res judicata vide the proceedings and determination before the Kadhi Court in No Civil Case No 73 of 2012. Mr Khatib submits no appeal or application for review was made against the orders of the Kadhi. That the plaintiff has made reference of the proceedings before the Kadhi in paragraphs 11 – 23. Secondly that no cause of action has been pleaded against the 1st and 2nd defendants. He therefore urged the Court to strike out the suit as against the 1st and 2nd defendants with costs.

2. Mr Kaburu in opposing the preliminary objection submitted that the proceedings before the Kadhi did not give permission for the property to be sold and referred the Court to page 2/3 of the judgement. He also submitted there are judicial review proceedings pending vide H.C.C Misc. application No 15 of 2016. That this Court has the power to hear this suit and to cancel the title. He urged the Court to dismiss the objection.

3. Mr Khatib in brief reply submitted that the cause of action arose out of the succession proceedings. Secondly Mr Khatib submitted that if there is a stay granted in the judicial review case why seek the injunction here?

4. The principle of Res judicata as espoused in section 7 of the Civil Procedure Act provides that no Court shall try any suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties where the Court who tried the matter is competent to try it. The plaintiff has disclosed to this Court through their pleadings that they have filed judicial review proceedings to challenge the decision/order of the Kadhi. Before the J. R proceedings was heard they filed the present suit.

5. It is not denied that the subject matter is the same i.e. plot No MSA/Block XVIII/119 which they alleged was fraudulently transferred to the 1st defendant. I have looked at the judgement of the Kadhi in case No 73 of 2012. The property the subject of distribution is the same as the one in this suit. The Kadhi distributed the property amongst the heirs as contained in his judgement. He also directed the parties to do a joint valuation of the estate property for purposes of distribution to the heirs.

6. In the plaintiff as submitted by Mr Khatib paragraphs 11 – 20 refers to proceedings before the Kadhi. In particular paragraph 16 alleges fraud on the part of the Kadhi and the 1st defendant. These are matters

that are not open to this Court to re-open & try unless a party come by way of judicial review or file an appeal against the decision of the Kadhi's Court. By filing of this suit during the subsistence of the J.R cause 15 of 2016, the plaintiff is also guilty of the doctrine of sub judice in contravention to the provisions of section 6 of the Civil Procedure Act.

7. Further if the 1st defendant acquired the estate property contrary to the judgement of the Kadhi then the proper process is for the applicant to move that Court (Kadhi's) for contempt or make appropriate application in regard to the breach. I am in agreement with Mr Khatib that it is not open to the plaintiffs to file a new cause of action where the subject matter has been determined by a Court competent to try the same.

8. In the result I find merit in the preliminary objection raised by the 1st and 2nd defendants and hereby strike out the suit with costs. There is no claim against the 3rd defendant in the prayers sought in the plaint. In any event, the 3rd defendant is only required to execute the orders as issued by the Court. Consequently there is nothing to remain for trial between the plaintiffs and the 3rd defendant. The entire suit is therefore struck out.

Dated and delivered in Mombasa this 14th February 2017.

A. OMOLLO

JUDGE