REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 54 OF 2017

GITAU KAMAU - PLAINTIFF/RESPONDENT

VS

NDUNGU KAMAU - 1ST DEFENDANT/APPLICANT

THE CHIEF MAGISTRATE COURT

AT THIKA - 2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to Notice of Motion filed by the 1st Defendant/Applicant on the 2nd December 2015 seeking the following orders; -

a). That this Honourable Court be pleased to strike out the Plaintiff's suit and claim as the same is seriously res judicata.

b). In the alternative, the Honourable Court be pleased to strike out the entire claim herein as the same is incompetent, frivolous, vexatious, and is an abuse of the due process of the law.

c). That the Plaintiff be ordered to pay costs of this application and the suit.

2. The application was supported by the affidavit of Ndungu Kamau dated 2nd December 2015 on the grounds deponed to and rehashed in the plaint and the affidavit that the claim and suit is bad for res judicata, time barred and is frivolous, vexatious and incompetent as the dispute was heard and determined by the District Land Disputes Tribunal and the Provincial Land Appeals Tribunal whose award was adopted as a decree of the Court by the Chief Magistrates Court at Thika case No. 21 of 2006 and issued on 18th October 2010. That the Nyeri High Court Petition No 4 of 2011 also rendered the suit and claim res judicata. That the Plaintiff is abusing the due process of the law and the Court by filing multiple other suits to wit; Kerugoya High Court ELC (OS) No. 273 of 2014 and Nyeri High Court Misc Application No 277 of 2009. That the suit and claim is time barred and that the Plaintiff's claim against the 1st defendant is a misnomer and untenable in law. That the whole suit and claim is frivolous vexation and oppressive and must be brought to an end.

3. The application was opposed and in a replying affidavit dated the 5th January 2016 sworn by Gitau Kamau, the Plaintiff/Respondent herein, deponed inter alia, that the suit is not res judicata since the issues have not been substantially determined by a competent Court of law. In any event that his claim is for a declaration touching on the illegality and unlawfulness of the awards made in the two tribunals aforesaid and adopted by the Chief Magistrates Court at Thika. That the suits cited as Nyeri High Court Petition

No. 4 of 2011, Kerugoya High Court ELC (OS) No. 273 of 2014 and Nyeri High Court Misc Application No 277 of 2009 were not substantially heard and determined on merit to render these proceedings res judicata.

4. This is family dispute involving Land Ref LOC 4/Muruka/400 measuring 3.6 acres. The land is registered in the name of Gitau Kamau, the Plaintiff herein. The Plaintiff's claim against the 1st Defendant is for a declaration that the awards issued by Maragua Land Dispute Tribunal in the case No 169 of 2005, Central Provincial Appeals Land Tribunal in Claim No. 8 of 2006 and the decree issued by the Chief Magistrate Court, Thika be declared illegal, unlawful null and void. That the Court finds in his favour that he holds 1.8 acres absolutely and the balance of 1.8 acres be shared between him and his siblings. This suit is challenging the decree of the Chief Magistrates Court that had divided the land into two halves giving the Plaintiff 1.8 acres and the 1st defendant 1.8 acres to hold for their mother's houses respectively.

5. When Counsel for the parties appeared before His Lordship Hon B. N. Olao on 14th April 2016, it was agreed that the application be canvassed by way of written submissions. The submissions were filed by all the parties as agreed except the 2nd defendant.

6. I have carefully considered the application, the rival affidavits, the list of authorities and the annextures as well as submissions by counsel and find that the main issues for determination by this Court are; -

a). Whether the instant suit is res judicata?

b). Whether this suit is incompetent, frivolous vexatious and an abuse of the due process of the law.

c). whether the suit is time barred.

7. Whether the instant suit is res judicata?

Res judicata literally means a matter that has been adjudged by a competent Court. The rationale of the doctrine of res judicata was stated in **TIMOTHEO MAKENGE-V-MANUNGA NGOCHI CA (NRB) CIVIL APPEAL NO. 25 OF 1978.** Wambuzi JA (as he then was) was of the view that the doctrine is predicated in the need to have an end to litigation as a matter of public interest. There is also need to prevent abuse of the Court process by unscrupulous litigants against hapless defendants. The doctrine prevents parties from gambling with the justice system such that where a party is awarded a judgment by one Court, he tries another to see whether he can hopefully raise his stakes. It also stops a party from vexing another in endless litigation over issues that have been heard and determined. In the absence of this doctrine the multiplicity of suits preferred by clients would clog the system, unnecessarily increase the cost of litigation and occasion an abuse of the due process of the Court.

8. Section 7 of the Civil Procedure Act, 2012 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".**

The test to determine whether a matter is res judicata is well set out in the case of **DSV SILO –VS- THE OWNERS OF SENNAR [1985] 2 All ER 104** and repeated in the Kenyan case of **BERNARD MUGO NDEGWA -VS- JAMES NDERITU GITHAE AND 2 OTHERS (2010) e KLR,** read together with Section 7 of the Civil Procedure Act (above cited) as follows; -

a). That the matter directly and substantially in issue in the subsequent suit must have been the same matter which was directly and substantially in issue in the former suit.

b). That the former suit must have been between the same parties or between the parties under whom they or any of them claim.

c). That the parties must have litigated under the same title.

d). That the former suit must have been tried by a competent Court.

e). That the former suit must have been heard and finally decided by such Competent Court. *Emphasis is mine.*

9. It is not in dispute that both the Plaintiff/Respondent and the 1st Defendant/ Applicant wilfully participated in litigating this matter both at the Maragua Land dispute Tribunal and the Central Provincial Appeals Land Tribunal where the same subject matter was decided. It is also not in dispute that the land in issue was registered in the name of the Respondent/Plaintiff herein. Whether the whole land or part of suit land was to be held in trust and for which family members is a matter for trial. It is not in dispute that a number of cases have been filed in respect to this matter. This Court will now examine them in its quest to determine whether or not they meet the test of res judicata aforestated;-

Maragua Land dispute No. 169 of 2005; - This case was initiated by the 1st defendant/Applicant seeking a share of the suit property LR LOC 4/MURUKA/400. The Tribunal decided to share the parcel of the suit property into two halves; the Plaintiff and the 1st defendant got 1.8 acres each to hold for themselves and in trust for the two houses of their father, their father having been married to two wives. Aggrieved by the decision of the District Land Dispute Tribunal at Maragua the Plaintiff/Respondent appealed to the **Provincial Land Appeals Tribunal No of 2009** where the award of the lower tribunal was affirmed and the Plaintiff's appeal was dismissed. Armed with the award, the 1st defendant moved the Chief Magistrate's Court on 18th October 2010 to adopt the decision of the Provincial Land Appeals Tribunal No of 2009 as follows;

i) land parcel LOC 4/MURUKA/400 be subdivided as follows; Ndungu Kamau to get 1.8 acres share of his mother Tabitha Wanjiru Kamau and Gitau Kamau to get 1.8 acres share of his mother.

ii) Gitau Kamau to remain with Ngatho land as before which is 2.0 acres to cater for his big family.

iii) The Government Surveyor jointly with the land Registrar to do the subdivision within a period of 90 days

iv) The executive officer to sign all the relevant documents to allow the subdivision and transfer of the same if any party fails to do so.

v) Both parties to share the costs of the surveyor

10. Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows;

a). the division of, or the determination of boundaries to land, including land held in common;

(b). a claim to occupy or work land; or

(c). trespass to land.

The Act did confer to the land dispute tribunal the jurisdiction to deal with boundary disputes, subdivision, claim to occupy or work on land and trespass to land. As rightly submitted by the learned

counsel for the applicant, it did not confer to it jurisdiction to determine disputes over title or ownership of land. The Court of Appeal in the case of **JONATHAN AMUNAVI VS. THE CHAIRMAN SABATIA DIVISION LANDS DISPUTE TRIBUNAL & ANOR, KISUMU CIVIL APPEAL NO. 256 OF 2002** (unreported) observed that in that case the Land dispute tribunal acted in excess of jurisdiction when it purported to revoke the Plaintiffs title to the suit property. It went ahead to affirm that such power was reserved for the High Court vide section 159 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed).

11. 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".**

12. It therefore follows that the decision by the Maragua Dispute Land tribunal and the Provincial Land Appeals Tribunal purporting to determine ownership and title of LOC 4/MURUKA/400 in total disregard to its limits of jurisdiction in law, were mere nullities and must be taken as such. The adoption of the said decisions of the two tribunals by the Chief Magistrates Court did not lend it legitimacy. They remain equally null and void. Though I agree with the learned Counsel for the applicant that once the Chief Magistrate entered judgement, the awards of the two tribunals ceased to exist on their own and merged into a judgement pronounced by the Court as its own. Sadly, even this adoption did not change the character of the decision which remained a nullity; a nullity begets nothing but a nullity. This Court declares the decisions of the tribunal as adopted as a judgement by the Chief Magistrate null and void and ought not have been adopted.

13. Having found the award and the judgement of the Court a nullity, I proceed to hold that the plea of res judicata must fail as against the decision of the tribunals and the Court because the decision does not meet the test of a competent Court, the tribunals and having acted without jurisdiction.

14. I now turn to the other case that was cited as being res judicata. This was **High Court Petition No 4 of 2011 at Nyeri**. The Plaintiff/Respondent in this petition sought to attack the jurisdiction of both the Maragua Land Dispute Tribunal and the Provincial land dispute appeals committee on grounds of lack of jurisdiction to adjudicate the dispute over LR LOC 4/MURUKA/400. That the decisions of the two bodies breached his constitutional right to property. The learned Judge in his ruling dismissed the application as incompetent and misplaced because it was brought under constitutional provisions instead of either Judicial review or appeal. He held thus;

> **'even if I treated the petition as a judicial review application, the same will not be completely before this Court because the same was not filed with leave and within the timelines set by statute, on the other hand, even if I was to regard the petition as an appeal, the petitioner was required to show the same was filed within the time prescribed by statute or that he had sought for leave to appeal out of time. The petitioner has failed to discharge that burden hence his petition should fail.'**

This petition was therefore not heard on its merits and the claim that the case is res judicata equally fails in that respect.

15. From the above cited cases this Court finds that the Plaintiff's case is not res judicata since the judgement of the Chief Magistrates Court emanating from the award of the land dispute tribunals was decided by incompetent Court devoid of jurisdiction and thus are a nullity. Further the **High Court**

Petition No 4 of 2011 at Nyeri was dismissed and not heard on its merits. The application to strike out the suit on ground of res judicata is therefore unmerited.

16. Whether the suit is incompetent, frivolous vexatious and an abuse of the due process of the law

The second issue is whether the Plaintiff's suit is frivolous, vexatious, incompetent and an abuse of the process of the Court. The applicant deponed that the Respondent is a frivolous litigator as shown by the numerous cases that he has filed in the matter as enumerated below; -

Nyeri HC Misc App No 277 of 2009; In this case the Plaintiff/Respondent sought a judicial review to quash the decision of the Land Dispute Tribunals. He states that his then advocates withdrew this suit on 16th November 2009. No reasons have been given for the withdrawal. He also filed **ELC Muranga No 273 of 2014**, by way of originating summons in the High Court on the 2nd October 2014 seeking to claim ownership of the LR LOC 4/MURUKA/400.This suit was also withdrawn with costs before hearing allegedly on advice of his advocates on record who advised him that there were only two ways to challenge the awards of the Land Dispute Tribunal and the decree of the Chief Magistrates Court, which ways, were to file judicial review proceedings or file a declaratory suit. This case was not heard on merits.

17. The learned Counsel for the 1st Defendant/Applicant urged and argued in his submissions that the conduct of the Respondent in filing many cases on the same matter is testament of a frivolous litigator bent on abusing the due process of the Court. He argued that the Plaintiff/Respondent squandered time in not challenging the judgement of the Chief Magistrates Court either by way of Judicial review or through leave of the Court or by appeal within the stipulated time. The award of the Central Provincial Appeals Committee was delivered on 21st May 2009. The Respondent had 60 days to file his appeal challenging the decision. It is on record that he did not. No reason is given for this. In addition, he had 6 months within which to apply for leave of the Court to file judicial review proceedings to quash the decision of the Court. It is on record that he did not and no reason was advanced for this failure. The learned Counsel for the applicant submitted that by bringing this fresh suit, the Respondent is seeking to appeal the decisions of the Court using a back door. He states that he squandered the opportunity of appeal and this Court must stop him in his tracks. That this suit is an abuse of the due process of the law and the honourable Court and urged the Court to strike it out.

18. It is trite law that the Court cannot aid the indolent. Justice Muli J (as he was then) in **RUTH KAVINDU AND RAEL SYOVONZA VS. JOSIAH MBAYA MANTU AND V B MBAYA HCCC NO. 2091 OF 1974** had this to say;

> **''A Court will not be used or called upon to aid the indolent to cause injustice and hardship to blameless Plaintiffs''**.

19. In the case at hand the Respondent will not be aided by this Court to be at liberty to take action as and when he wants. The law of limitation must be adhered to. Where a statute states that an action must be taken by an aggrieved party within a certain time frame, it just means that and no more. In default of appealing or filing a judicial review to challenge the decision in the Chief Magistrate's Court, the respondent, in normal parlance, must be said to have been indolent. Litigants must use reasonable expedition to conclude cases as it is in the public interest that litigation must be brought to an end. Perhaps if he had taken timely action, this case would not have dragged for the next 7 years as it has done. The Respondent seems to be implying that he did not get the right legal advice from his legal advisers. It is not clear if that is true or the Respondent was forum shopping or unsure of the right course to litigate his dispute or both. Be that as it may, whilst this Court would like to give him the benefit of doubt on that account, it also reiterates that judicial time must be preserved and protected for the most deserving of litigants.

20. Order 2 Rule 15(1) of the Civil Procedure Rules states as follows;

"15. (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—

(a). it discloses no reasonable cause of action or defence in law; or

(b). it is scandalous, frivolous or vexatious; or

(c). it may prejudice, embarrass or delay the fair trial of the action; or

(d). it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

21. The application before this Court as stated at the onset is to strike out the Plaintiffs suit on grounds of the suit being incompetent, frivolous or vexatious and otherwise an abuse of the process of the Court. In the case of **KENYA AIRWAYS LTD V. CLASSICAL TRAVEL AND TOURS LTD (2003) LLR 2704 (CCK),** the learned Judge Emukule J. defined what frivolous means as follows;

> "...**Cases which are clearly unsustainable fall within this category (Day v. William Hill (Park Lane) Ltd 1949 All ER 219 CA). An action is frivolous when it is without substance or unarguable. A proceeding may be said to be frivolous when a party is trifling with the Court (Chaffners v. Goldsmid(1894)1QB 186..., when to put it forward would be wasting the time of the Court (Dawkins v. Prince Edward of Saxe-Weimar (1876) QBD 499 per Mellor J, when it is not capable of reasoned argument or is unarguable; or it is without foundation; or where it cannot possibly succeed; or where the action is brought or the defence is raised only for annoyance; or to gain some fanciful advantage; or when it can really lead to no possible good; (Wills v. Earl of Beanchamp 1886 11 PD 59 per Bowen LJ at 65 described the action as hopeless...and would lead to no good result..."**

The learned Judge Emukule J., ibid, while citing the holding in *Burstall v. Beyfus (1884) 26 Ch D 35*, reiterated that a **pleading or an action is vexatious when it lacks bonafides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense.**

In the case of **METROPOLITANT BANK V. POOLEY (1885)10 AC 210 AT 221),** the learned Judge Lord Blackburn observed that;

> **"The term abuse of the process of the Court is a term of great significance. It connotes that the process of the Court must be carried out properly, honestly and in good faith; and it means that the Court will not allow its function as a Court from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the Court will intervene to order stay or even dismissal of the proceedings, although it should not be lightly done yet it may often be required by the very essence of justice to be done"**

22. From the above cases, it is true that by dint of Order 2 rule 15(1) the Court is clothe with power to strike out pleadings that are *inter alia* frivolous, vexatious and otherwise an abuse of the process of the Court. It has also been held that that jurisdiction to strike out suits must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. In **G.B.M KARIUKI VS. NATION MEDIA GROUP LIMITED & 3 OTHERS [2012] eKLR, HCCC AT MILIMANI, CIVIL SUIT 555 OF 2009**, the learned Judge Odunga J. expressed himself at length as follows;

> **" ……. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the Court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a**

triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the Court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the Court to allot appropriate share of the Court's resources, while taking into account the need to allot resources to other cases."

23. In the case of **KENYA COMMERCIAL FINANCE COMPANY LIMITED VS. RICHARD AKWESERA ONDITI CIVIL APPLICATION NO. NAI. 329 OF 2009** it was decided that; -

'The law is that a statement of claim should not be struck out and the Plaintiff driven from the judgement seat unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavit, it is not a plain and obvious case on its face….''.

24. The case before this Court is a dispute relating to title and ownership of land. The Plaintiff's case is that he is the registered proprietor of the land registered as LR LOC 4/MURUKA/400 measuring 3.6 acres but in 2005 the 1st defendant who is his step brother, filed a claim at Maragua Land Dispute Tribunal vide case no 169 of 2009 seeking a share of the land, where he was awarded 1.8 acres. On appeal to the Provincial Land Appeals Tribunal vide case no. 8 of 2006, the award to the District Land disputes tribunal was upheld and the same was adopted by the Chief Magistrate's Court at Thika as the judgement of the Court and gave a decree. The Plaintiff avers that the awards of the District Land disputes tribunal and the Provincial Land Appeals Tribunal and the decree given by the Chief Magistrates Court at Thika were illegal, null and void. In that plaint he seeks *inter alia*, a declaration that the Plaintiff owns 1.8 acres out of LR LOC 4/MURUKA/400 absolutely, a determination of the trust in 1.8 acres out of LR LOC 4/MURUKA/400 as follows; Ndungu Kamau, Wangoru Kamau, the Plaintiff and the Defendant.

Clearly there are triable issues that should be heard and determined by the Court so as to do justice to the rights and interests of the parties in this matter.

25. Whether the suit is time barred

The Applicant depones in his affidavit that the Respondents suit is legally flawed and the entire claim is legally and hopelessly time barred. No submissions are tendered to support this plea and in response the respondent avers that there is no limitation for filing statutory suits and just stops at that. This Court will say no more on this except that the Respondent has hazarded an explanation for the delay in bringing this suit; which is that he kept changing course due to the advice or otherwise of his legal advisers.

26. Under Article 50 (1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Keeping with the spirit of Article 159 (2) (d) of the Constitution, 2010, this Court will be hesitant to strike out this case as prayed y the Applicant. This Court is the right forum to hear and determine the suit and it is in the interest of justice that this suit proceeds to full hearing and the same be decided on its merits.

27. In the upshot, this Court makes the following orders; -

1. **The Applicant's Notice of Motion dated 2nd December 2015 is not merited and the same is hereby dismissed.**

2. Since this is a family dispute each party to meet their own costs.

3. Parties must take steps to set this suit for hearing within the next 45 days.

It is so ordered.

Delivered, dated and signed at Murang'a, this 17th day March 2017.

J.G. KEMEI

JUDGE.