



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 83 OF 2015

HASHAM LALJI PROPERTIES LIMITED.....PLAINTIFF

VERSUS

BAHADURALI HASHAM LALJI.....DEFENDANT

RULING

Bahadurali Hasham Lalji, (*hereinafter referred to as the Defendant*) has come to court against **Hasham Lalji Properties Ltd** (*hereinafter referred to as the Plaintiff*), praying for orders by way of Notice of Motion dated 6th July, 2015 that the plaintiff/Respondent's plaint dated 16th March, 2015 be struck out and that the Plaintiff/Respondent's undated verifying Affidavit annexed to the aforesaid plaint be struck out. That consequently, the plaintiff/Respondent's entire suit against the Defendant/Applicant be struck out and dismissed. That the costs of this application be awarded to the Defendant/Applicant. That Diamond Lalji be prosecuted for perjury.

The application is based on the grounds that the suit is scandalous, frivolous and vexatious and is otherwise an abuse of the court process. The suit is founded on dishonesty and perjury on material and fundamental facts inclusive of allegations that there has been no previous suit between the parties when in fact a previous suit was filed, and withdrawn upon demand for particulars, with the supporting Affidavits deposed by the same deponent in this suit. Moreover, that the Plaintiff/Respondent concealed material facts by failing and/or neglecting and/or refusing to disclose that there have been previous proceedings in court, to wit, Eldoret ELC No. 391 of 2012 (Originally HCCC No. 173 of 2007) between the same parties and on the same subject matter.

Furthermore, that the lease targeted (unjustly) by the Plaintiff expired, and the lease in issue is new and separate and was issued on 13th May 2010 for a term of 50 years commencing on 1st August 2009, by the Commissioner of Lands at the request of the Defendant for his benefit and appealing to the Land Commissioner's justiciable discretion. The suit Eldoret ELC 391 of 2012 was withdrawn for want of particulars. The Verifying Affidavit and Plaint are incurably fatally defective hence should be struck out in tot for breaching inter alia Order 4 Rule 1, Civil Procedure Rules 2010. The Plaintiff's allegation that the Defendant holds the suit property in trust is unsubstantiated and in any event, it is inconceivable in law to have an individual hold an asset in trust for a company. The suit herein is Res judicata in view of the previous suit Eldoret ELC 391 of 2012 between the same parties that lasted in court for approximately seven (7) years from the year 2007.

The affidavit is supported by the affidavit of ***Bahadurali Hasham Lalji*** who states that the plaintiff's plaint is fatally defective for failing to disclose that there have been previous proceedings in court between the plaintiff and the defendants over the same subject matter and otherwise the suit is frivolous, vexatious, scandalous, abuse of court process, based on perjury and founded on concealment of material facts. Moreover, the suit is res-judicata.

The plaintiff/Respondent had previously filed a suit involving the same parties and on the same subject matter, being Eldoret ELC number 391 of 2012 (formerly Eldoret HCC No. 173 of 2007). That he is aware that the Plaintiff/Respondent through its then Advocates Oluoch Olunya & Company Advocates, filed a Notice of withdrawal of suits dated 31st October 2013 and filed on 8th November 2013. On 5th February 2014, the court made an order marking the suit as withdrawn. In total, the suit lasted in court of a period of about seven years. In the current plaint, the plaintiff has falsely stated, “the plaintiff avers that there is no other suit pending, and there has been no previous proceedings in any court between the plaintiff and the Defendant over the same subject matter.”

This allegation verified by the Affidavit amounts to perjury as it is untrue as a fact and that It was in the active knowledge of the Plaintiff and therefore It is meant to mislead the court on a material and fundamental fact. The deponent of the verifying affidavit one Diamond H. Lalji has sworn a verifying affidavit filed on 23rd March, 2015, in which he swears on the correctness of the averments made in the plaint despite having knowledge that the same is false.

That he is advised by his advocates on record which advice he verily believe to be true that where a deponent sears a false affidavit under oath and makes deceitful claims therein, the same is fatally defective, and may attract criminal culpability in the nature of, inter alia, perjury.

As a consequence of the above, the plaint herein is incurably and fatally defective and in this regard, the plaintiff’s verifying affidavit annexed to the aforesaid plaint should be struck out together with the plaint dated 16th March, 2015.

Diamond H. Lalji should be prosecuted for perjury as he knew that there was a previous suit that the plaintiff had filed against him over the same subject matter and parties. The previous suit Eldoret ELC No. 391 of 2012 (formerly Eldoret HCCC. No.173 of 2007) was withdrawn upon his advocates on record demanding for particulars including details of any Directors meeting or shareholders meeting and the bona-fide resolution by the plaintiff’s directors and/or Directors decisions with quorum and or by majority shareholders to lodge the suit as held out in court or at all and for Diamond Lalji to swear the Verifying Affidavit as purported or at all and to instruct the advocate’s firm to act for the plaintiff company as pleaded or at all. Lastly, proof of the company’s ownership of the suit premises.

The property in issue in the suit relates to a new and separate lease obtained on 13th May, 2010 for a term of 50 years commencing on 1st August, 2009 and over which the Plaintiff company could not conceivably have any interest over. Even assuming, which is not admitted, the plaintiff company had proprietary rights over the suit property, the same expired and abated upon expiry of the lease term and renewal in his favour.

He asserts that the property Eldoret Municipality Block 8/64 belongs to him by right and he has not committed fraud whatsoever, both in the initial and the subsequent lease. He is entitled to the possession, ownership, occupation and use of the said land parcel Eldoret Municipality Block 8/64 including but not limited to leasing out and charging rent and demanding for overdue rent as he has done. The demand notices dated 12th February 2015 and 12th May, 2015 seeking payment of outstanding dues were done in exercise of his proprietary rights as owner of the said property.

He is the registered owner of the subject house L.R No. BLOCK 8/64, Eldoret Township purchase in 1969. Around the mid-1970s, he moved from Eldoret to Nairobi for the expansion of the business of the Hasham Lalji family. His property was then managed by the Plaintiff company. Hasham Lalji properties ltd (the plaintiff) was expected to rent the property to suitable tenants, collect rent, pay the statutory rates, and maintain the property.

He was involved in the management of Hasham Lalji properties Ltd up to 1986 or thereabouts where after he moved to Canada on behalf of the family and handed over the management of Hasham Lalji properties ltd the plaintiff to his younger brothers. None of these circumstances including the family trust and the company’s assistance in managing the property, and/or help from his brothers to manage the property

amount to ceding any of his absolute rights as the owner of the property. He asserts the right to retain ownership of the property on the additional explanations that:

a) From 1986 and more acutely from the early 1990's he has not been provided with information regarding the said suit property or Hasham Lalji properties Ltd, or the other family companies and assets including, the suit property and also personal information such as the value of his share in the family assets and the said Diamond Lalji continues to refuse to provide to him any such information to his detriment. He has consistently asked for information but his demands and requests are ignored by Diamond Lalji.

b) He is unsure of the condition of his assets.

c) The plaintiff being under the charge of the deponent of the verifying affidavit, Diamond H. Lalji, and also Ahmed Lalji have failed to account to him all the rent so far collected particulars of which are known to the said Diamond Lalji who is refusing to release information to me.

d) The deponents of the verifying affidavit in this suit, Diamond H. Lalji, has already been deemed culpable for appropriation of family assets in a manner akin to the attempt here.

That upon expiry of the 99 years lease on the said property, the same was renewed on 13th May, 2010 registered in his favour. That the property was never purchased from the assets of Hasham Lalji Properties Limited and the Plaintiff and the deponent of the verifying affidavit, Diamond H. Lalji are put to strict proof.

He asserts his right to own and possess all that parcel Eldoret Municipality Block 8/64 on the premises: -

i). That there was not at the time of purchase or now any instrument of trust upon which it could be deemed that this House was purchased in trust for and on behalf of the Plaintiff as alleged.

ii). No entry was made on the register particulars of the parcel Eldoret Municipality Block 8/64 purporting that the property was registered in his name in trust for the Plaintiff as purported.

iii). He is advised by his advocates which advice he believe to be correct that it is inconceivable in law to have an individual hold an asset in trust for a company

That his 46 years ownership of the property ousts any claim by the Plaintiff and the Plaintiff and especially the Deponent of the Verifying Affidavit, Diamond H. Lalji are liable for presenting the case with a calculated intent to hold out factual errors and suppress facts including the facts: -

a) where upon he gave the property to Hasham Lalji properties Ltd to manage as per the family based trust ethic and principle. The plaintiff did not immediately "start exercising its proprietary interest over the suit land" and that "the plaintiff took possession and fenced the suit property." On the contrary, he is the one who made improvements on the house and thereafter moved into the house with his family after the purchase.

b) He denies that upon purchase of the suit property the Plaintiff "immediately started exercising its proprietary interest over the suit land" and leased out, and continues to lease out the said parcel of land." On the contrary, he took possession of the house upon purchase and lived there until the mid-1970's when he proceeded to Nairobi

In the circumstances, he prays that the plaint, Verifying Affidavit of one Diamond H. Lalji be struck out in their entirety and costs be awarded to him. The Plaintiff has conversely filed a replying affidavit and grounds of opposition.

The gist of the Plaintiffs response is that the Plaintiff went to court in a bid to secure its property following the surprising and alarming letter from Owuor & Company Advocates and filed HCCC No. 173

of 2007, later ELC No. 391 of 2012 against the Defendant/Applicant. Indeed, therefore, the Plaintiff filed a previous suit against the Defendant/Applicant however, through a notice of withdrawal dated 31st October 2013, the suit was withdrawn by an order of the court dated 5th February, 2014.

That the previous suit between the parties was withdrawn in an attempt to create an enabling environment for parties to pursue an out of court settlement based on good will, negotiations, mediation and reconciliation particularly in light of the close relationship between the parties. That at the time of withdrawal, the matter had not yet been adjudicated upon by the court or otherwise any Tribunal of competent jurisdiction and to date has not been heard on merit.

That the purpose of the rule that party makes disclosure of existence of a previous suit between the same parties is to prevent possibility of res sub-judice and res-judicata, none of these two cardinal principles of law have been offended in this case given that the said suit, ELC 391 of 2012 was withdrawn and was not heard and determined to the finality, consequently, the requisite thresholds are unmet and the claim invariably ought to be lost.

That he is advised by his advocates which advice he believe to be true that allegations that a matter is either frivolous, scandalous and vexatious as alleged by the Defendant/Applicant has not shown how this suit is either frivolous, scandalous or vexatious.

That he is advised by his Counsel on record, which advice he believes to be true that allegations of dishonesty in a matter and or perjury must touch on and/or refer to matters that are material and fundamental in a suit, matters that go to the substance of a suit and that a case must definitely turn, the requirements for this threshold is not met in this suit.

The gravamen of the Defendants submission is that the suit is res-judicata and an abuse of the process of court as the Plaintiff had filed a suit to wit Eldoret ELC No. 391 of 2012 (originally No. 173 of 2007) between the same parties and on the same subject matter. The suit was withdrawn 7 years before the filing of the application when the defendant demanded for particulars including prove of company resolution to file suit and instruct an advocate instituting another suit over the same subject matter. That the initial lease upon which the suit was based already expired and a new and separate lease sought for and obtained by the defendant. The defendant has referred to Section 7 of the C.P.A Cap 21, Laws of Kenya and the holding in Kivanja Estates Ltd -vs- National Bank of Kenya (2014) eKLR as it relates to multiplicity of suits.

On perjury and material non-disclosure, the defendant argues that the suit is founded on dishonesty and perjury on material and fundamental facts inclusive of allegation that there has been no previous suit between the parties when in fact a previous suit was filed and withdrawn upon denial for particulars with the verifying and supporting affidavits both being deponed by the deponent.

The defendant further argues that the allegation that the applicant holds the suit property in trust is inconceivable in law because company's property is held by the company being a separate legal entity. Moreover, the defendant contents that the suit is time barred having been filed out of time. That there is no trust registered against the land and no written agreement and or memorandum on the alleged plaintiff's interest in the land.

On his part, the plaintiff submits that the principle of res-judicata does not apply as the facts relating to ELC No. 391 of 2012 are that the matter which was between the same parties and the same subject matter was withdrawn in October of 2013 by the plaintiff before it was set down for trial and before any trial or adjudication and final determination. The defendant has not demonstrated that ELC No. 391 of 2012 was heard and determined on merit. Moreover, that withdrawing a suit cannot be used as a bar to a subsequent suit or to frustrate the legitimate thirst for justice on merit.

On whether failure to comply with Order 4, Rule 1 renders the plaint, verifying affidavit fatally defective. The plaintiff submits that it is true that he did not indicate in the plaint as required by Order 4, Rule 1 the existence of a previous suit number 391 of 2012, however that the failure to do so was an

honest mistake attributable to the advocate on record. The plaintiff is willing to amend the plaint and correct the mistake. He contends that no prejudice has been suffered by the defendant. Lastly, on this point, the plaintiff submits that the court should consider the substance of the dispute and not to base its decision on technicalities.

On the issue of perjury and dishonesty, the plaintiff submits that the threshold for perjury has not been disclosed.

DETERMINATION

I have considered the pleadings, application herein for determination and the replying affidavit, rival submissions and do find the issues ripe for determination are; ***Whether Suit No. 83 of 2015 is res-judicata and therefore, an abuse of court process; Whether the respect suit is founded on perjury; Whether the plaintiff's affidavit is fatally defective for failure to comply with Order 4, Rule 1 of Civil Procedure Rules, 2010.***

The doctrine of res-judicata pre-empts a matter from being litigated upon twice, thus it ensures that there is an end to litigation. This doctrine is enacted in section 7 of the Civil Procedure Act, Cap. 21, Laws of Kenya which 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”

in **HENDERSON V HENDERSON (1843) 67 ER 313** Wigram V.C summarizes *res judicata*:

“ ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The matter in issue should be identical in both suits; the parties in the suit should be the same; there should be sameness of the title under which the claims are brought, concurrence of jurisdiction; finality of the previous decision.

in the case of **E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR** that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the

use of the doctrine of res judicata.....”

I have considered the fact that the first suit was withdrawn without any condition and was not heard and determined on merit. Withdrawing a suit is a party’s right under Order 25, Rule 1 of the Civil Procedure Rules, 2010 and cannot pre-empt a party from commencing another suit. The plaintiff in this matter was entitled to commence another suit based on the same cause of action having withdrawn the previous proceedings. In conclusion on this issue, I do find that the doctrine of res-judicata does not apply and therefore, there is no proof of abuse of court process by the plaintiff.

Moreover, the court finds that the defendant has not established that the suit is scandalous, frivolous and vexatious. Scandalous is a matter, which is irrelevant to the issues of the case and casts imputations or is abusive. If pleadings state indecent or offensive words about the other party, they can be said to be scandalous or moreover if they are unnecessary or have made charges of misconduct on a party that is not relevant to the case. Frivolous and vexatious – pleadings are vexatious if they lack bona fide or when they are hopeless, oppressive and tending to cause unnecessary expenses and anxiety on the other party. A case can be said to be frivolous when it is a waste of the court’s time and everybody else’s time. When it is not capable of sustaining a reasonable argument in court. The process of the court must be carried out properly honestly and in good faith. Therefore, the court will not allow its functions as a court of law to be misused for oppression, or in bad faith. The above conditions have not been proved by the defendant and therefore this argument fails.

On whether failure to comply with Order 4, Rule 1 renders the plaintiff’s verifying affidavit fatally defective, I do find that though the plaintiff is guilty of non-disclosure of the existence of a previous suit that was withdrawn the same can be rectified by an amendment and a further verifying affidavit. Further, the defendant has not demonstrated that he will suffer any prejudice. I do exercise my discretion by administering some oxygen to the rules and invoking Article 151(2) of the Constitution by disregarding the technicality in procedure and allowing the plaintiff to amend the plaint to enable the court administer substantive justice.

On the issue of perjury, I do find that indeed, the plaintiff lied to the court that there have been no other proceedings relating to the same matter and the plaintiff has confessed that it was an oversight though it has not been demonstrated that the same was done intentionally to mislead the court. However, the verifying affidavit demonstrates that the plaintiff read the contents of the plaint and therefore, ought to have realized that the contents of the plaint were not true and therefore cannot feign ignorance of the fact. However, this cannot lead to the striking out of the entire suit as it will deny the plaintiff access to the seat of justice. The only remedy is maybe to punish the plaintiff for misleading the court by bringing a proper application for that purpose. Ultimately, this application is dismissed with no order as to costs due to the fact that the plaintiff is guilty for non-disclosure.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE