



REPUBLIC OF KENYA



**Bongoi v Barno & 2 others (Environment & Land Case E023 of 2023)
[2024] KEELC 1116 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E023 OF 2023
EO OBAGA, J
FEBRUARY 29, 2024**

BETWEEN

KIMARU KIPLANGAT BONGOI PLAINTIFF

AND

CHRISTOPHER KIBET BARNO 1ST DEFENDANT

JACKSON KIPROTICH KEMBOI 2ND DEFENDANT

UASIN GISHU COUNTY LAND REGISTRAR 3RD DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a preliminary objection by the second defendant on the following grounds:
 1. The application dated 15th December, 2023 and the entire suit herein offends the statutory provisions of section 7 of the *Civil Procedure Act* and is as such *res judicata* in lieu of the dismissal of a similar application and the dismissal of the plaintiff's suit in Eldoret ELC No. 71 of 2016 *Kimaru Kiplangat Bongoi vs Christopher Kibet Barno & Jackson Kiprotich Kemboi*.
 2. The entire suit offends the mandatory provisions of section 4 (a) of the *Limitation of Actions Act* and ought to be struck out for being statutorily time barred.
 3. The application and the suit are bad in law and an abuse of the court process and ought to be struck out in the 1st instance.

Background;

2. The plaintiff had entered into a sale agreement with the first defendant in which it was agreed that the first defendant was to sell to the plaintiff one acre out of his land parcel No. Pioneer Ngeria/Block 1



(EATEC)/972. The first defendant subdivided Pioneer/Ngeria Block 1 (EATEC)/972 into two equal portions of one acre each that is Pioneer/Ngeria Block 1 12422 and 12423. The plaintiff retained Pioneer/Ngeria Block 1 (EATEC) 12423.

3. In February 2016, the first defendant asked the plaintiff to vacate Pioneer/Ngeria/Block 1 (EATEC) 12423 (suit property). The first defendant had threatened the plaintiff that he was going to sell the suit property to a third party. The plaintiff went and carried out a search where upon he discovered that the first defendant had transferred the suit property to the second defendant.
4. The plaintiff then filed a suit against the 1st and 2nd defendants (Eldoret ELC No. 71 of 2016 *Kimaru Kiplagat Bongoi –vs- Christopher Kibet Barno and Jackson Kiprotich Kemboi*). This suit was dismissed for non attendance in October 2018. The Plaintiff filed an application date 9.2.2023 in which he sought to have the orders of 13.10.2018 set aside. This application was dismissed vide a ruling delivered on 27.9.2023.
5. The plaintiff then filed the present suit ELC E023 of 2023 (Kimaru Kiplagat Bongoi -vs- Christopher Kibet Barno and Jackson Kiprotich Kemboi and the Uasin Gishu County Land Registrar). The plaintiff also filed a notice of motion dated 15.12.2023 in which he sought injunctive orders against the defendant. Before the application could be heard, the second defendant filed the preliminary objection which is the subject of the ruling.

The Preliminary objection;

6. The parties agreed to dispose of the preliminary objection by way of written submissions. The second defendant filed his submissions on 4.1.2024. The plaintiff filed his submissions on 1.2.2024. On 19.1.2024, the second defendant indicated to court that the first defendant was going to rely on his submissions.
7. I have gone through the submissions by the parties herein. The issues which emerge for determination are firstly, whether the plaintiff's suit is statute barred. Secondly, whether the plaintiff's suit as well as the application are res-judicata. Thirdly whether the plaintiff's suit is an abuse of the process of court.
8. On the first issue, the second defendant submitted that the plaintiff's suit is based on a sale agreement which is a contract. He therefore argues that the suit should have been filed within 6 years when the cause of action arose as stipulated in section 4(1) of the *Limitation of Actions Act*. He relied on the case of *Dennis Nyandu –vs- Francis Aburi Oyaró* (2021) eKLR where Justice Onyango stated as follows:-

“From the plaint, it is not in dispute that the Appellant's suit is based on a sale agreement that was entered into in the year 1991. The suit is therefore founded on contract and in accordance with section 4(1) of the *Limitation of Actions Act*, it ought to have been instituted within a period of six years from the date when the cause of action accrued.”

9. The plaintiff submitted that his case is based on recovery of land which was fraudulently transferred to the second defendant. He cited section 26(a) and (b) which states as follows: -

“Where in the case of an action for which a limitation is prescribed either;

- a. The action is based upon the fraud of the defendant or his agent, or if any person through whom he claims or his agent; or
- b. The right of action is concealed by the fraud of any such person as aforesaid; or
- c. The action is for relief from the consequences of a mistake.



The period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.”

10. In the instant case, the second defendant was registered as owner of the suit property on 29.3.2016. The first defendant had threatened that he was going to transfer the suit property to a third party. The plaintiff carried out a search on 31.3.2016 which search confirmed that the suit property had been transferred to the second defendant on 29.3.2016. The plaintiff filed a suit against the defendants in April 2016. The suit was based on recovery of land which had fraudulently been transferred to the 2nd defendant. This suit was however dismissed for non attendance.

11. The plaintiff was at liberty to bring a fresh suit subject to limitation. He filed the present suit on 23.11.2023. The fraud having been discovered in March 2016, the plaintiff's suit is therefore not statute barred.

12. On the second issue, it is important to reproduce section 7 of the Civil Procedure Act which states 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.”

13. The second defendant submitted that the earlier suit by the plaintiff having been dismissed for non attendance, that amounted to a final judgement and no fresh suit could be filed. In support of this, he relied on the case of Thomas K. Sambu -vs- Paul K. Chepkwony (2018) eKLR where the Court of Appeal stated as follows:-

“We have considered the decision in the *Salem Ahmed Hassan Zaidi case (supra)* in the light of the provisions of order 12 Rule 3 (1) (CPR), and are in agreement that order 12 rule 13(1) is couched in similar terms as Rule 178 as it was then. It therefore follows that the judge after considering the record before him in the light of order 12 Rule 3(1) which was couched in similar terms as Rule 178 of the rules of the court, as it was then arrived at the correct conclusion that an order of dismissal for non-attendance is in the nature of a final judgement. We adopt the same position in this appeal and hold that the order of dismissal for non attendance made by C.M Waithaka, J on the 29th day of May, 2011 amounted to a final judgment.”

14. On the other hand, the plaintiff submitted that a case which is dismissed for non attendance may amount to a judgment but that will not render the subsequent suit *res-judicata* as the earlier suit was not determined on merits.

“We accept that dismissal of a suit for non attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.”

15. The plaintiff's earlier suit having not been determined on merits, the present one cannot be said to be *res judicata*. I go with the decision in the Michael Bett Sibor case (*supra*) which I think clearly captures



what Article 50(1) of the constitution envisages on the need for a fair hearing. I therefore find that the plaintiff's suit is not res judicata.

16. However as regards the notice of motion dated 15.12.2023, I find that the same is *res judicata*. A similar application had been filed in ELC No. 71 of 2016. This application was fully heard and it was dismissed vide a ruling delivered on 14.3.2017. the application was seeking injunctive reliefs just as in the present application which is seeking similar reliefs.
17. On the third issue, I cannot see anything which the plaintiff has done which will amount to abuse of the court process. The plaintiff is simply fighting for his land which he purchased within the confines of the law. He is not vexing the defendants. He is only pursuing the land which he purchased and was given possession but which land was sold to the second defendant in unclear circumstances.

Disposition;

18. From the above analysis, I find that the second defendant's preliminary objection has partially succeed to the extent that the notice of motion dated 15.12.2023 is *res-judicata*. I proceed to strike out the notice of motion dated 15.12.2023 for being *res-judicata*. Otherwise the rest of the grounds in the preliminary objection fail. As the second defendant has partially succeeded, I order that each party do bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF FEBRUARY, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Lagat for 2nd Defendant and Ms. Tanui for 1st Defendant.

Court Assistant –Laban

