



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 66 OF 2013**

**ESTHER NZINGO KALUME.....PLAINTIFF**

**-VERSUS-**

**LAWRENCE SHARIFF SAMSON KATITE.....DEFENDANT**

**RULING**

1. For my determination is the application dated 13<sup>th</sup> July 2015 brought by the defendant seeking for the following orders:-

**1. The suit be struck out for being res judicata.**

**2. Alternatively, it be stayed generally with an order that the parties do forthwith perform and/or execute the decree in Kilifi SRMCC 66 of 2006 Rachel Kavumbi vs Lawrence Shariff Samson Katite, by transferring sub-division number 4593/III/MN in the name of the plaintiff, or his nominee, and payment to the decree holder of the agreed purchase price.**

**3. In the further alternative, the suit be transferred for trial at Malindi before the ELC under the principle in Isadore Bagorogoza vs Bazillio Mbarinda (1959) EA.**

**4. The costs of this application, and of the suit, if the application is successful, are awarded to the defendant in any event.**

2. The application is stated as grounded on the list of documents filed especially the decree in Kilifi RMCC No 66 of 2006 between Rachel Kavumbi & the present defendant. The application is further supported by the defendant's affidavit in which he deposed that they had a consent judgement in Kilifi SRMCC No 66 of 2006 which settled this matter. The defendant therefore contends that the present suit does not disclose any reasonable cause of action against him and ought to be struck out.

3. The plaintiff in opposing the application filed grounds of opposition consisting of the following statements:-

**1. Prayer 1 of the Notice of Motion is a complete miscomprehension of what constitutes res judicata. That matter cannot be res judicata since;**

**a. The issues in Kilifi SRMCC No. 66 of 2006 were not 'directly and substantially' similar with the issues in the present suit.**

**b. The parties in Kilifi SRMCC No. 66 of 2006 are not the same as the parties herein nor are they parties under whom any of them claim, litigating under the same title; and**

**c. The issue of ownership and vacant possession which form the substratum of the present suit were not finally decided in Kilifi SRMCC No. 66 of 2006.**

**2. Prayer 2 of the Notice of Motion is untenable and equivalent to the Defendant attempting to obtain title without any consideration and through an illegal process.**

**3. Prayer 3 of the Notice of Motion is unmerited because;**

**a. Article 162 (2) (b) of the Constitution and section 13 (1) of the Environment and Land Court Act 2011 has not mandated that all disputes be tried within the Environment and Land Courts in Counties where the land is situate.**

**b. The overriding objective of civil proceedings under section 1A & 1B of the Civil Procedure Act Cap 21 is to ensure disputes are resolved in an efficient and cost effective manner. Transferring the suit to Malindi, which is over 100 kilometres away from the litigants and their advocates, does not achieve that objective.**

**4. The application is in any event frivolous, vexatious, an abuse of the Court process and contrary to Order 51 Rule 4 of the Civil Procedure Rules 2010.**

4. The counsels on record for the parties made their oral submissions on 11<sup>th</sup> May 2017. Mr S. N Kimani for the applicant submitted that this suit is res judicata in terms of provisions of section 7 of the Civil Procedure Act because there could not have been a demand for purchase price or ground rent without a sale. Secondly that the matter is between the same parties under whom they claim and the subject property is also the same. He also referred the Court to Mullar on Civil Procedure page 62. According to Mr Kimani, if any matter is outstanding in the Kilifi case, the plaintiff ought to have approached that Court under the provisions of section 34 of the Civil Procedure Act. In the alternative he prayed this matter be transferred to Malindi ELC in whose geographical jurisdiction the suit property is situated.

5. Mr Kongere advocate for the plaintiff on his part submitted that the two matters are not similar. He states that the defendant was a tenant and what was being purchased was not documented. He also raised the competency of the Kilifi Court since the present title is registered under Registration of Titles Act (repealed) which Act defines the Court to mean High Court. Because of these two issues he submitted res judicata does not apply. On transfer, he submitted that Mtwapa where the land is situated as being nearer to Mombasa than it is to Malindi. He urged the Court to dismiss the application.

6. Section 7 of the Civil Procedure Act explains that a matter is res judicata if:

**i. It's determined by a Court competent to hear it.**

**ii. The parties are the same or through persons who they would bring the same claim.**

**iii. The subject matter is the same.**

7. It is not disputed the subject land parcel is the same except now there is a certificate of title. What is in dispute is whether the defendant is a tenant or a purchaser. The plaintiff in paragraph 5 & 6 pleaded thus;

**"5. The defendant has at all times material to this suit been a tenant on part of the said plot, currently plot number 5 on the subdivision sketch pursuant to the subdivision, measuring approximately Nought Decimal One Six (0.16) of a hectare.**

**6. That pursuant to the subdivision, the plaintiff accorded the defendant as tenant the first option to purchase the property, which the defendant accepted and the parties commenced the negotiations for the process of sale and pursuant to a meeting held on 28<sup>th</sup> May 2010 agreed at the sale thereof at the purchase price of Kshs. 2,000,000, with a deposit of 20% thereof at the signing of the agreement and the balance on completion of the transfer."**

The parties are not exactly the same as the ones in Kilifi Court but the present plaintiff acquired the subject matter through succession of her mother's estate who previously owned the suit plot. She annexed a copy of grant of letters of administration issued to her on 29<sup>th</sup> June 2009 in respect of the estate of Rachel Kavumbi Kalume and certificate of Confirmation of Grant.

8. This Court is therefore called to determine whether the Court who tried the former matter was competent and if the current cause of action could have been brought through the former party. The plaintiff submits that the Kilifi Court did not have jurisdiction to hear the matter because the title is registered under Registration of Titles Act. The pleadings reveal that the plaintiff became the registered owner of the suit property on 10<sup>th</sup> July 2011. The consent order in the former suit was made on 26<sup>th</sup> March 2008 which suit was filed on 25<sup>th</sup> January 2007. In paragraph 5 of the plaint in No 66 of 2007 read thus;

**"The plaintiff's claim as against the defendant is for the sum of Kshs 114000 made up of ground rent arrears with effect from June 2004 in the sum of Kshs 39,000 and the unpaid purchase price for the sum of Kshs 75000 aforesaid which is due and owing to the plaintiff the particulars whereof have been communicated to the said defendant."**

9. The plaintiff in the former suit asked for judgement in the sum of Kshs 114000, mesne profits and costs. There was no mention of registration of the land in dispute under the Act as it did not have a title then. Further the claim in the former suit clearly referred to the issue of unpaid purchase price and arrears of ground rent Accordingly the issue of the magistrate's Court jurisdiction under the said Act could not arise since the registration was obtained long after the civil case had been finalised.

10. The consent judgement entered against the defendant in SRMCC No 66 of 2007 was inclusive of purchase price which was stated at Kshs 75000= as stated in paragraph 4 of that plaint thus; **"That it was also a material term of the said tenancy agreement between the plaintiff and the defendant that the defendant do pay a sum of Kshs 75000 being the purchase price thereof."** This paragraph read together with paragraph 5 quoted earlier shows a sale took place between the then plaintiff and the current defendant. In the Coast Province payment of ground rent would be inferred to refer to the proprietorship of house without land and not necessarily the usual landlord/tenant relationship. In the Coast Province payment of ground rent would be referred to refer to the proprietorship of house without land and not necessarily the usual landlord/tenant relationship.

11. Therefore the present plaintiff having acquired her rights through her mother (who was the former plaintiff) cannot and should not be allowed to generate new cause of action on sale over the same subject land. For this reason, I do agree with the present claim is res judicata

Kilifi SRMCC No 66 of 2007. I find merit in this application and allow it in terms of prayer 1. Consequently I proceed to strike out this suit for being res judicata. The result of the striking out is that there is nothing to transfer to Malindi ELC for trial & determination which settles prayer 2 & 3 of the motion. I do award costs of this application and the suit to the defendant.

**Dated, signed & delivered at Mombasa this 20<sup>th</sup> day of July 2017.**

**A. OMOLLO**

**JUDGE**