



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. NO. 83 OF 2014

(FORMERLY MILIMANI ELC.1437/2014)

1. JERALD WANGAE KIMANI

2. JAMES NGANGA KIMANI

(Suing as the Administrator of the

estate of AYUB NGUGI KIMANI (DECEASED)

(Suing as the administrator of the late RAHAB

WAMBUI REUBEN (DECEASED)...PLAINTIFFS/RESPONDENTS

-VERSUS-

MONICA WAMBUI KAMAU.....1st DEFENDANT/APPLICANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

By a **Notice of Motion** dated **2nd March 2012**, brought under Order 2 Rule 15(1)(b) and (c) and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and all the enabling provisions of the law, the 1st Defendant/Applicant sought for the following orders:-

- 1) That the suit herein be struck out with costs.**
- 2) That the costs of this application be provided for.**

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Monicah Wambui Kamau**. These grounds are:-

- a) That the Plaintiff's suit is Res Judicata as there exists another already concluded suit between the parties over the subject matter and dealing with same facts in issue and the suit herein is therefore an abuse of the Court and bad in law..**
- b) That the Plaintiff's suit was filed when it was time barred under the Limitation of Actions Act and no leave was sought to file the same out of time.**

c) That to avert instances of abuse of court process the orders sought ought to be granted.

In her Supporting Affidavit, the Applicant ***Monica Wambui Kamau*** averred that by the time this suit was filed, there existed ***HC OS No.263 of 2005. Monica Wambui Kamau (Suing as the legal representative of the Estate of James Kamau Thiongo alias Kamau Thiongo..Vs..Ayub Ngugi Kimani & Another,*** which involved the same subject matter ***LR.NO.Limuru/Kamirithu/716***, the same parties and same facts in issue. The parties were also represented by the same Advocates herein.

She further averred that the said suit was heard in full and Judgement was entered in favour of the 1st Defendant as against the Plaintiff and the issue of ownership was delt with and the ***estate of James Kamau Thiongo alias Kamau Thiongo*** was found to be solely entitled to the parcel of land known as ***Limuru/Kamirithu/716***. It was her further contention that the Plaintiff herein fully participated in the proceedings of the above stated case and he did not seek to consolidate the two suits. She also alleged that she believed that what the Plaintiff was trying to do was to reverse the Judgement in ***HC OS No.263 of 2005***, by filing the instant suit and this action amount to an abuse of the Court process and therefore the suit should be struck out with costs to the 1st Defendant.

The application is opposed and ***Jerald Wangae Kimani*** and ***James Nganga Kimani*** filed their ***Replying Affidavit*** dated ***27th October 2015***, and confirmed that their deceased's brother ***Ayub Ngugi Kimani*** filed the suit herein on ***28th April 2009***. In the said Complaint, the said ***Ayub Ngugi Kimani*** confirmed that there was another suit being ***HC OS No.263 of 2005 – Monica Wambui Kamau...Vs..Ayub Ngugi Kimani & Gerald Wangae***. They alleged that there was no provision for any Counter-claim therein thus compelling the administrator then, ***Ayub Ngugi Kimani*** to file this case and seek for mandatory orders of eviction against the 1st Defendant herein. It was also alleged that the decision in ***HC OS No.263 of 2005*** given on ***8th February 2011***, has been appealed against and an application for stay of execution of the said Judgement was filed. Further that they belief that their advocate ***M/S Vishnu Sharma***, had filed an application for stay of proceedings in this suit pending the determination of ***High Court OS No.263 of 2005***.

The Court directed the parties to ***canvass*** the said ***Notice of Motion by way of Written Submissions***. The 1st Defendant/ Applicant filed her Written Submission on ***30th March 2017***. The Plaintiffs/Respondents did not file their Written Submissions.

The Court has now carefully considered the instant ***Notice of Motion*** and the annexures thereto. The Court has also considered the Written Submissions and the cited authorities and the relevant provisions of law. The Court makes the following findings:-

This application is brought under Order 2 Rule 15(1) of the Civil Procedure Rules which provides as follows:-

“At any stage of the proceedings, the Court may order to be struck out or amended any pleadings on the ground that:-

a) It discloses no reasonable cause of action or defence in law.

b) It is scandalous, frivolous or vexatious.

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 courts and may order the suit to be stayed, dismissed or Judgement to be entered accordingly as the case may be.”

Further the application is anchored under the provisions of Section 3A of the Civil Procedure Act which grants the Court the inherent power to make such orders that are necessary for the end of justice to be met.

Since the Applicant has sought for striking out of this suit, the Court will be guided by the principles laid down in pathora of cases that have been decided over this issue. It is not in doubt that the power to strike out pleadings is discretionary and this discretion must be exercised judiciously. See the case of **Nguruman Limited...Vs...Shompole Group Ranch & Others, Civil Appeal No.73 of 2004(2007) 2 EA 353**, where the court held that:

“The power to strike out pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realization that the Court must not drive away any litigant however his case may be from the seat of Justice. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter”.

The Court will therefore take into account that striking out a suit is a draconian act which can only be resorted to in very plain cases (**See Co-operative Merchants Bank Ltd..Vs...George Fredrick Wekesa, Civil Appeal No.54 of 1999.**

As Courts have severally held: ***“No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously disclose no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”.*** See **DT Dobie & Co. (K) Ltd...Vs...Joseph Mbaria Muchina & Another, Civil Appeal No.37 of 1978.**

The 1st Defendant/Applicant has alleged that the suit herein is *Res Judicata* and it should be struck out. Section 7 of the Civil Procedure Act 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 issues has been subsequently raised, and has been heard and finally directed by such a court.”

The issue of *Res Judicata* has been delt with in various decided cases. In the case of **Bernard Mugo Ndegwa...Vs..James Nderitu Githae & 7 Others(2010) eKLR**, the Court laid down the test for *Res judicata* as:-

- i. The matter in issue is identical in both suits.***
- ii. That the parties in the suit are subsequently the same.***
- iii. There is a concurrence of jurisdiction of the Court.***
- iv. That the subject matter is the same.***
- v. That there is a final determination as far as the previous decision is concerned.***

Taking into account the above test on the principles to be considered, the Court has to determine whether the suit herein is *Res Judicata*. It is evident that the Plaintiffs herein are seeking claim over ***LR.No.Limuru/Kamirithu/716***. There is also no doubt there exist another case ***HC OS NO.263 of 2005***, wherein it involved the suit property ***Limuru/Kamirithu/716***. The Parties in ***HC OS No.263 of 2005***, are the same parties in this suit. A Judgement was delivered on ***8th February 2011***, by Muchelule J. in which he ruled in favour of the 1st Defendant/Applicant herein. Though the Plaintiffs/Respondents have alleged that they filed a ***Notice of Appeal***, there was no evidence that a Stay of Execution of the said Judgement was issued or that the Judgement in ***HC OS NO.263 of 2005***, was overturned by the Court of Appeal. Since ***HC OS No.263 of 2005***, delt with the suit property herein ***LR.No.Limuru/Kamirithu /716*** and it involved the same parties and it has been decided, then this instant suit is *Res Judicata*.

It is trite that Section 7 of the Civil Procedure Act provides that no court has power to try an issue in which the matter has been directly and substantially in issue in an earlier matter and the parties were the

same. The issues herein and the parties are the same as in ***High Court OS No.263 of 2005***, which has already been adjudicated and a Judgement delivered.

In the case of ***Samuel Kiiru Gitau...Vs...John Kamau Gitau, Nairobi High Court, Civil Case No.1249 of 1998 (1998) LLK***, the Court held that:-

“For a matter to be resjudicata, it must be one which the Court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason, a matter is said to have been ‘heard and finally decided’ notwithstanding that the former suit was disposed off by a Decree or an Award”.

This Court will therefore concur with the 1st Defendant/ Applicant’s submission that the suit herein is *Res Judicata* and the issues raised herein were decided in a previous suit being ***High Court OS No.263 of 2005***, by a competent Court and was decided on merit. Therefore this suit cannot stand.

As was held by Gitonyo J. in the case of ***Nancy Mwangi T/A Worthlin Markers..Vs..Airtel Network (K) Ltd & Others, HCCC No.275 of 2013:-***

“The doctrine of Res Judicata is important in adjudication of cases and served two important purposes.

i. It prevents multiplicity of suits which would ordinarily clog the courts and bear unnecessary costs on the parties to litigate and defend two suit which ought to have been determined in a single suit and,

ii. It ensures litigation comes to an end:- disappointed parties are barred from camouflaging already decided cases in new garment in the act of pleadings.

Having now carefully considered the instant ***Notice of Motion*** dated ***2nd March 2012***, the Court ***finds it merited and it is allowed entirely with costs to the 1st Defendant/Applicant.***

It is so ordered.

Dated, Signed and Delivered this 29th day of September, 2017.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Respondents

Mr. Njoroge holding brief for MS Wambua for 1st Defendant/Applicant

No appearance for 2nd Defendant

Lucy - Court clerk.

L. GACHERU

JUDGE

29/9/2017

Court – Ruling read in open Court in the presence of Mr. Njoroge holding brief for M/S Wambua for the 1st Defendant/Applicant and absence of the other advocates. Notice of entry of this Ruling to be served on the Plaintiff/Respondent by the 1st Defendant/Applicant.

L. GACHERU

JUDGE

29/9/2017