



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 64 OF 2017

JOHN MUOKI MUSAU.....PLAINTIFF

VERSUS

MAVOKO LAND DEVELOPMENT CO. LTD....1ST DEFENDANT

SOLOMON MBOTE GITHINJI.....2ND DEFENDANT

RULING

1. The Notice of Preliminary Objection dated 14th February, 2017 is seeking for the dismissal of the suit for being *res judicata*.
2. The Notice of Preliminary Objection proceeded by way of written submissions in which the Defendants' advocate submitted that in the year 2006, the 1st Defendant's shareholder instituted a civil suit in Nairobi CMCC No. 14066 of 2006; that the Plaintiff lost in that matter and that a warrant of arrest was issued for the payment of a decretal sum of Kshs. 1,477,650.
3. It is the Defendants' advocates' submitted that a consent was then filed in the Nairobi matter whereby the Plaintiff herein agreed to transfer to the 1st Defendant herein plot number 38C in Mlolongo Phase 1 to stop the execution of the decree.
4. The Plaintiff's advocate submitted that the consent that was entered in Nairobi CMCC No. 14066 of 2006 was in respect of plot number 345 and not plot number 38C; that the Plaintiff herein never instructed its advocate to sign the consent in CMCC No. 14066 of 2006 and that the parties in these two suits are not the same.
5. In his Pleint, the Plaintiff has averred that on 10th August, 2015, he discovered that the 1st Defendant had unlawfully transferred plot number 38C within Mlolongo area without his authority.
6. In the said Pleint, the Plaintiff is seeking for the re-transfer of the plot to him.
7. The 1st Defendant's Director has deponed that the suit plot was transferred to the 1st Defendant pursuant to a consent order that was recorded in court in Nairobi CMCC No. 14066 of 2006.
8. I have perused the consent that was entered into between the Plaintiff and one Zakayo Mutisya in CMCC No. 14066 of 2006 (*Nairobi*).
9. In the said consent, the Plaintiff herein agreed to transfer plot number 38C in Mlolongo Phase 1 to the

said Zakayo Mutisya (*who is said to be a Director in the 1st Defendant's company*).

10. Upon the transfer of the suit property, CMCC No. 14066 of 2006 was to be marked as settled.

11. The Plaintiff has not denied that indeed the consent in Nairobi CMCC No. 14066 of 2006 do exist and that the suit property herein is the same land that was captured in the consent of 11th May, 2015.

12. The Plaintiff herein, having consented to the transfer of the suit land to Zakayo Mutisya, it does not matter that Zakayo Mutisya agreed to have the suit land re-transferred to the 1st Defendant.

13. If indeed the Plaintiff herein did not instruct his advocate to sign the consent of 11th May, 2015, then he should have the said consent set aside.

14. The Plaintiff cannot, by way of a fresh suit in this matter, allege that the suit land was fraudulently transferred to the 1st Defendant when he knows or ought to have known that the said transfer was by virtue of a valid consent order which has never been set aside.

15. The filing of the current suit, in my view, is an abuse of the court process considering that there exists Nairobi CMCC No. 14066 of 2006 in which it was decreed that the suit land be transferred to the 1st Defendant's Director.

16. In the circumstances, I am in agreement with the Defendants' Notice of Preliminary Objection dated 14th February, 2017.

17. For those reasons, I dismiss the suit with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE