REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO.1140 OF 2013

ANNE MUMBI HINGA...PLAINTIFF

VERSUS

VICTORIA NJOKI GATHARA………………...…………………1ST DEFENDANT

ZIPPORA WATETU KAMAU…………………...………………2ND DEFENDANT

JOSEPH MUOKI KAKENYI……………………..………………3RD DEFENDANT

FAITH MUTHEU KASYOKI……………………...……………...4TH DEFENDANT

CHIEF LAND REGISTRAR……………….……………………..5TH DEFENDANT

DIRECTOR OF SURVEY…………………..……………………6TH DEFENDANT

RULING

What is before me for determination are two applications and a preliminary objection. The first application is by the 1st Defendant. This application which was brought by way of a Notice of Motion dated 2nd July 2015 under Sections 1A, 1B, 3A, 7 and 8 of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order 2 Rule 15 of the Civil Procedure Rules is seeking the dismissal of this suit and a declaration that the Plaintiff is a vexatious litigant. The second application was brought by the 3rd and 4th Defendants by way of a Notice of Motion dated 25th August 2015 under Order 1 Rule 10(2), Order 2 Rule 15(a), (b) and (d) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 7 of the Civil Procedure Rules. In the application, the 3rd and 4th Defendants have sought the striking out of the suit herein. The Preliminary Objection was brought by the 2nd Defendant. The 2nd Defendant's objection is that the Plaintiffs suit is *res judicata* and as such should not be entertained by the court. Since the two applications and the Preliminary Objection raised similar issues, the court directed that the same be heard together by way of written submissions.

I have considered the Preliminary Objection, the two applications and the affidavits that were filed in support thereof. I have also considered the replying affidavits and grounds of opposition that were filed by the Plaintiff in opposition to the same. Finally, I have considered the parties' respective submissions and the authorities that were cited in support hereof.

In summary, the 1st, 2nd, 3rd and 4th Defendants have objected to the Plaintiff's suit and have sought the striking out and dismissal of the same on the following grounds:-

i. The suit is *res judicata* in that the issues raised for determination by the court had been raised in High Court Misc. Civil Case No. 617 of 2000 and Nairobi Court of Appeal Civil Appeal No. 8 of 2009 between the Plaintiff and the 1st Defendant which suits were heard and conclusively determined.

ii. The suit discloses no reasonable cause of action, is scandalous, vexatious and amounts to an abuse of the process of the court.

In her response to the applications and the Preliminary Objection, the Plaintiff denied that the suit is *res judicata* and an abuse of the process of the court. The Plaintiff contended that the issues raised in the current suit were not raised and determined in the previous suits between the Plaintiff and the 1st Defendant and that the parties to this suit are not the same as the parties in the previous suits.

This is my view on the matter. Public policy demands that there should be an end to litigation. I am in agreement with the 1st, 2nd, 3rd and 4th Defendants (hereinafter jointly referred to as “the Defendants”) that this suit is frivolous, vexatious and an abuse of the process of the court. The Plaintiff and the 1st Defendant entered into an agreement for sale dated 14th January 1999 under which the Plaintiff agreed to sell to the 1st Defendant a parcel of land that was described in the said agreement as L.R. No. 18084 (hereinafter referred to as “the suit property”) at a consideration of Kshs. 1,500,000/=. The Plaintiff failed to complete the agreement. The agreement had an arbitration clause which the 1st Defendant invoked. The arbitrator E.N.K Wanjama rendered his award on 19th October 1999. In the award, the arbitrator found that the Plaintiff was in breach of the agreement for sale and ordered specific performance of the agreement.

The 1st Defendant moved the court under Section 36 of the Arbitration Act, 1995 in Nairobi High Court Misc. Civil Case No. 617 of 2000 (“hereinafter referred to as “the first case”) for leave to enforce the award as a decree of the court. The 1st Defendant’s application was allowed and the arbitration award adopted as a judgment of the court on 17th January 2002. The Plaintiff brought an application dated 25th April 2008 seeking to set aside the said decree and/or order of the court which was made on 17th January 2002 aforesaid. The Plaintiff’s application to set aside the decree issued by the court on 17th January 2002 was dismissed on 24th September 2008. The Plaintiff was dissatisfied with the dismissal of her application and preferred an appeal to the Court of Appeal in Nairobi Court of Appeal Civil Appeal No. 8 of 2009(hereinafter referred to as “the appeal”). The Court of Appeal in a judgment delivered on 13th November 2009 held that the High Court should not have entertained the Plaintiff’s application for the setting aside of the arbitral award and the decree of the court since the application which the Plaintiff had lodged in the High court fell outside the grounds set out in Section 35 of the Arbitration Act for challenging an Arbitration Award. The Court of Appeal castigated the High Court for entertaining numerous applications by the Plaintiff aimed at upsetting the finality of the said award. The Court of Appeal struck out the Plaintiff’s appeal as well as the Plaintiff application which she had brought in the High Court dated 25th April 2008 which had given rise to the said appeal.

Before the Plaintiff had moved the High Court to set aside the arbitral award and the decree of the court through the said application dated 25th April 2008, the court had issued an order on 23rd June 2005 directing the Plaintiff to sign all the necessary documents to facilitate the transfer of the suit property to the 1st defendant within 10 days from the date of the order failure to which the Deputy Registrar was authorized to execute the said documents on behalf of the Plaintiff. There was no appeal against that order.

Following the striking out of the Plaintiff’s appeal by the court of Appeal on 13th November, 2009, the Plaintiff came back to the High Court and lodged yet another application on 15th March, 2010 seeking an order to restrain the 1st Defendant from taking possession, fencing, developing, charging, disposing of or in any other way dealing with the parcel of land measuring one (1) acre known as L.R No. 3994/49 (also known as L.R No. 18084) pending an inquiry as to how the 1st Defendant’s parcel of land measuring one

(1) acre was partitioned and/or separated from L.R No. 3994/49 (also known as L.R No. 18084). The Plaintiff contended that the position of the parcel of land that was the subject of the court decree in favour of the 1st Defendant had not been identified or determined on the ground and that it was necessary for the court to conduct inquiry to ascertain the actual position of the 1st Defendants' parcel of land on the ground.

The Plaintiff's application was opposed by the 1st Defendant. The application was considered and dismissed by Kimaru J. in a ruling that was delivered on 7th May, 2000. In the said ruling, the court ordered the Plaintiff to give the 1st Defendant vacant possession of the suit property within 10 days failure to which the 1st Defendant was authorized by the court to use reasonable force to take possession of the property. In the ruling, the court set out the Plaintiff's argument as follows:-

> *"If I understood the respondent correctly, it is her contention that the land which she sold to the Applicant was no longer in existence on the ground by virtue of the fact that she had amalgamated the various sub-divided portions of land to form one parcel of land after the said sale. It was her further contention that when the court issued the decree for the applicant to be given possession of one (1) acre of land, the decree was not specific as to the exact portion of land that the applicant was to take possession or on the ground. It was for the above reasons that the respondent was pleading with the court to conduct an inquiry to determine the exact position of the applicant's parcel of land on the ground. The respondent was quick to point out that she was not challenging the decision of the court of Appeal which in effect decreed that the suit parcel of land belonged to the applicant."*

In its decision, the court disagreed with the contention by the Plaintiff that the parcel of land which the plaintiff sold to the 1st Defendant did not exist on the ground. The court stated as follows on the issue:

> *"The agreement that the applicant entered into the respondent was in respect of a specific parcel of land known as L.R NO. 18084. That parcel of land measures one (1) acre. There is a deed plan connoting its specific existence and position on the ground. The arbitrator made an award in favour of the applicant in respect of a specific parcel of land which was identified by its land reference number. This court and the Court of Appeal referred to the dispute between the respondent and the applicant in regard to a specific parcel of land. The decree that was issued by the court when the award of the arbitrator was adopted was in respect to a specific parcel of land identifiable by a land reference number and a Deed plan….. This court, in issuing the decree in favour of the applicant was not dealing with an unidentified parcel of land on the ground."*

The court went further to state that:

> *"The respondent's application obviously has no merit. It appears to this court that the respondent is attempting to give an interpretation to the decree of the court that does not accord with the reality of the decision. It appears that the respondent has not internalized the fact that she has now reached the end of the road in litigating over her perceived right in respect of the suit property."*

The Plaintiff was granted leave on 28th May, 2010 to appeal against the said decision of Kimaru J. There is no evidence that the Plaintiff filed an appeal after her prayer for stay of proceedings was rejected by the court. After the said ruling of 7th May, 2010, the 1st Defendant took possession of the suit property and caused it to be registered in her name after the Deputy Registrar executed the transfer in her favour. The 1st Defendant thereafter proceeded to subdivide the property into two portions namely, L.R. No. 18084/1 and L.R No. 18084/2 which she sold to the 2nd and 4th Defendants herein respectively.

The Plaintiff refused to heed the advice that was given by Kimaru J. in his ruling of 7th May, 2010 which I have referred to above in detail and brought this suit on 24th September, 2013 to re-open litigation with the 1st Defendant over the suit property which has since been subdivided and sold as stated above. In the

present suit, the Plaintiff has not raised any new issue. She has only added new parties to the dispute which was heard and finally determined. The Plaintiff has once again raised the issue which she had raised in the High Court that when the suit property was sold to the 1st Defendant, her deceased husband had sub-divided the hitherto larger parcel of land into small portions measuring one (1) acre. The Plaintiff has contended that in 1997 she caused to be amalgamated all the one (1) acre plots to form larger parcels. The Plaintiff has contended that following this amalgamation, the parcel of land that she sold to the 1st Defendant ceased to exist. The Plaintiff has taken issue with the 5th and 6th Defendants acts of cancelling the alleged amalgamation pursuant to the decree issued by the High court in favour of the 1st Defendant.

It is clear from what I have stated earlier that the issue of the amalgamation of the one (1) acre plots one of which the Plaintiff had sold to the 1st Defendant was raised in the High Court and was considered and a determination made thereon. The issue is *re judicata*. It is not open to the Plaintiff to raise it again for litigation. In the case of Mwangi Njangu vs. Meshack Mbogo Wambugu and Esther Mumbu, HCCC No. 2340 of 1991 (unreported)**,** Kuloba J. stated that,

> *"If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he comes to a court, then I cannot see what use the doctrine of res judicata plays."* I cannot agree more with this observation.

In any event, the arbitral award, the decree of the High Court and that of the Court of Appeal directed the Plaintiff to perform the agreement for sale, which she had entered into with the 1st Defendant by transferring land known as L.R. No. 18084 measuring one (1) acre to the 1st defendant. The arbitral award was rendered on 19th October 1999. The award was made a judgment of the court and a decree issued in accordance therewith on 17th January 2002. If as of the date of the court decree, the Plaintiff had amalgamated the parcel of land she had sold to the 1st Defendant with other parcels, the Plaintiff had an obligation to undo the said amalgamation in obedience to the order of the court which required specific performance of the agreement for sale dated 14th January 1999. It is not open to the Plaintiff to come before this court to challenge the cancellation of the purported amalgamation in execution of the decree for specific performance issued by the court which has not been set aside. How else did the Plaintiff expect the decree of the court to be executed if she indeed had amalgamated the one (1) acre plot she had sold to the 1st Defendant with other plots? What the Plaintiff had done which no doubt was intended to defeat the 1st Defendant's claim had to be reversed.

Order 2 Rules 15 (1) (a),(b), and (d) of the Civil Procedure Rules, gives the court a discretionary power to strike out a pleading on the grounds that it discloses no reasonable cause of action or defence or that the same is scandalous, frivolous or vexatious or that the same is an abuse of the process of the court. In view of the draconian nature of this remedy, it is now settled that the court's power to strike out pleadings should be exercised with great circumspection and only in clearest of cases. In the case of D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978[1982]KLR 1, Madan J.A stated as follows on the power to strike out pleadings:

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."*

In the case of, J.P. Machira vs. Wangethi Mwangi, Court of Appeal, Civil Appeal No. 179 of 1997,Omolo J.A, stated as follows:

> *"I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company(Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently*

clear that no useful purpose could ever be served by a trial on merits……..I agree that these powers are drastic and as the court said……….the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it."

In the case of Murri –vs- Murri & Another [1991] E. A 209 (CAK), the Court of Appeal held that,

"summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable."

In the case of Riches vs. Director of Public Prosecutions [1973] 2 All ER 935, the court stated that, a stay or even a dismissal of proceedings may often be required by the very essence of justice to be done. In the book, Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein, the authors have stated that a pleading or an action is said to be frivolous when it is without substance or unarguable. Examples of pleadings which are frivolous are given as those which are put forward to waste the court's time and those which cannot possibly succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Borrowing still from the same book, a pleading or action is said to be an abuse of the process of the court if it is pretenceless or absolutely groundless.

I am satisfied that this is a suitable case in which the court should exercise its discretion to strike out a suit and dismiss the same summarily. From what I have set out above, I am in agreement with the Defendants that the Plaintiff's suit discloses no reasonable cause of action, is *re judicata*, frivolous, vexatious and an abuse of the process of the court. The Preliminary Objection by the 2nd Defendant is upheld and the 1st Defendant and the 3rd and 4th Defendants' applications are allowed. The plaint dated 24th September 2013 is struck out and the suit is accordingly dismissed. The 1st Defendant and the 3rd and 4th Defendants shall have the costs of their respective applications while the 2nd defendant shall have the costs of the Preliminary Objection. They shall also have the costs of the suit.

Delivered and signed at Nairobi this 15th day of September, 2017

S.OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Wamalwa h/b for Ndege for the Plaintiff

Ms. Oswera h/b for Macharia for the 1st Defendant

Ms. Mutegi h/b for Kibera for the 2nd Defendant

Mr. Amadi h/b for Mwangangi for the 3rd and 4th Defendant

No appearance for the 5th and 6th Defendants

Catherine Court Assistant