



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU
E.L.C. CASE NO. 102 OF 2014
(FORMERLY EMBU HCCC NO. 79 OF 2008)

JULIUS NYAGA M. NJENGA.....PLAINTIFF

VERSUS

CHARITY KAIRU.....1ST DEFENDANT

FELISTUS FATUMA WANJIKU.....2ND DEFENDANT

MOSES MUCHANGI IRERI.....3RD DEFENDANT

HERBERT NJERU NGUNJU.....4TH DEFENDANT

JOHN NJIRU NDWIGA.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

1. By a plaint dated 24th January 2008 and filed on 5th June 2008, the Plaintiff sued the 1st Defendant, Charity Kairu, who was then the sole Defendant seeking the following reliefs;

a) That the defendant transfer to the Plaintiff 4 acres out of the land parcel number Gaturi/Weru/832 and in default the Executive Officer signs all the necessary documents to facilitate the sub-division and transfer of the land to the Plaintiff (sic).

b) Costs of this suit.

c) Any other relief this honourable deems fit to grant.

2. The basis for seeking the said reliefs was an agreement for sale between those parties dated 14th March 1977 by which the said Charity Kairu had agreed to sell and transfer 4 acres out of *Title No. Gaturi/Weru/832* to the Plaintiff. The Plaintiff pleaded that he had paid the purchase price of Kshs 14,500/- in full but the Defendant had refused to transfer the property to him.

3. Vide an amended plaint dated 24th April 2015 and filed on 7th May 2015, the Plaintiff joined the 2nd – 6th Defendants in the instant suit and sought the following reliefs;

a) An order for nullification of title deeds for land parcels Gaturi/Weru/1485 and 1846.

b) An order that the 1st Defendant transfers forthwith to the Plaintiff four (4) acres out of those parcels No. 1485 and 1486 and in default the Deputy Registrar signs all the necessary documents to facilitate the transfer.

AND/OR IN THE ALTERNATIVE

c) An order for the 1st Defendant do forthwith refund the full purchase price with interest to the Plaintiff.

d) General damages for breach of contract.

e) Costs of this suit.

f) Any other relief this honourable court deems fit to grant.

4. It was pleaded in the amended plaint that the 1st Defendant had fraudulently subdivided the suit property into parcel Nos. 1485, 1486 and 1487. Parcel No. 1485 was transferred to the 2nd Defendant whereas parcel No. 1486 was transferred to the 2nd, 3rd, and 4th Defendants. It was further pleaded that the 3rd and 4th defendants had transferred parcel No. 1486 to the 5th Defendant. It was the Plaintiff's case that parcel No. 1487 was transferred to Embu Distributors Ltd which subdivided it into 2 parcels ie Nos. 3784 and 3805.

5. According to the record, only the 1st, 2nd and 3rd Defendants entered appearance and filed defences denying liability. It is also apparent that amongst those Defendants only the 2nd Defendant is represented by an advocate. In her statement of defence, the 2nd Defendant raised some preliminary objections to the suit on points of law. The said objections were also reduced into a notice of preliminary objection dated 18th July 2017 and filed on 24th July 2017.

6. By consent of the advocates for Plaintiff and the 2nd Defendant, it was agreed that the said preliminary objection shall be canvassed through written submissions. Consequently, the 2nd Defendant filed her submissions on 24th July 2017 whereas the Plaintiff filed his on 21st September 2017.

7. The preliminary objections as framed by the 2nd Defendant's advocate were as follows;

a) *That the Plaintiff's suit is res judicata and offends the mandatory provisions of **section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)**.*

b) *That the Plaintiff's suit is statute barred and offends the provisions of sections **4 (1) and 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya)**.*

c) *That the Plaintiff has no valid claim as against the 2nd Defendant and the suit as filed against the 2nd Defendant ought to be struck out with costs.*

8. The court is of the view that the 3rd objection is not really a preliminary objection properly so called and the court shall not consider it as one. If the 2nd Defendant intended to fully ventilate the question of whether or not the Plaintiff has valid claim or reasonable cause of action against her, it was incumbent upon her to file a formal application for determination under the relevant provisions of the Civil Procedure Rules. The court shall therefore consider only the 1st and 2nd objections contained in the notice of preliminary objection.

9. The 2nd Defendant's advocate submitted that the preliminary objections raised fell within the

parameters set out in the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696** where the court stated as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

10. The 2nd Defendant’s counsel submitted that the Plaintiff’s suit was *res judicata* because there was a previous suit namely, Runyenjes RMCC No. 16 of 1991 between the Plaintiff and the Defendant over the suit properties in which the Plaintiff’s suit was dismissed with costs. It was further submitted that the Plaintiff did not appeal against the said decision but instead chose to file a fresh suit over the same cause of action. The 2nd Defendant submitted that the instant suit was barred by virtue of **section 7 of the Civil Procedure Act**. It was the 2nd Defendant’s contention that litigation ought to come to an end. The 2nd Defendant relied upon the case of **Njue Ngai Vs Ephantus Njiru Ngai & Another Nyeri Civil Appeal No. 29 of 2015**.

11. The second preliminary objection related to the **Limitation of Actions Act (Cap 22)**. It was submitted that the Plaintiff’s suit was time barred under both **section 4 (1) and (7) of the said Act** since the Plaintiff pleaded that he was relying on a sale agreement for land which was dated 14th March 1977. The 2nd Defendant submitted that in so far as the suit was based on breach of contract, it ought to have been filed within 6 years from the date on which the cause of action occurred. Even if the limitation period of 12 years stipulated in section 7 of the said Act were to be applied, the Plaintiff’s suit would still be out of time. It was also submitted that the instant suit was filed without leave of court some 31 years after the sale agreement was made. The court was urged to allow the preliminary objections and strike out the suit with costs to the 2nd Defendant.

12. The Plaintiff opposed the said preliminary objections and relied upon the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (supra)**. It was submitted by the Plaintiff’s counsel that the objections raised by the 2nd Defendant were not preliminary objections properly so called within the meaning of that case. It was submitted that a preliminary objection cannot be raised where facts are uncertain or the matter involves the exercise of judicial discretion. The Plaintiff was of the view that the facts in the case are highly contested. The Plaintiff’s counsel invited the court to rely upon the dissenting opinion of **Nambuye J.A.** in the case of **Attorney General Vs Andrew Maina Githinji & Another, Nyeri Civil Appeal No. 21 of 2015**.

13. On the first preliminary objection, it was submitted on behalf of the Plaintiff that the instant suit was not *res judicata*. It was submitted that the 4 conditions to be satisfied as set out in the case of **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others, Nairobi Civil Appeal No. 36 of 1996** had not been satisfied in this suit.

14. The Plaintiff also submitted that the Resident Magistrate’s Court at Runyenjes which decided Civil Suit No. 16 of 1991 was not a court of competent jurisdiction because it acted in excess of jurisdiction by setting aside the arbitral award and dismissing the entire suit. The Plaintiff’s counsel cited several authorities for the proposition that where a tribunal or court has acted without jurisdiction, the resultant decision was a nullity.

15. The Plaintiff’s counsel also submitted that there were new facts which came to the knowledge of the Plaintiff since the filing of Runyenjes RMCC No 16 of 1991 which could not have been raised in that suit. It was submitted that the discovery of the new facts justified the filing of a fresh suit and in this regard the Plaintiff relied upon the case of **Uhuru Highway Development Ltd (supra)**.

16. Finally, it was submitted that court is duty bound to ensure that justice is served without undue regard to technicalities under **Article 159 (2) (d) of the Constitution of Kenya** as read with **sections 1A and 1B**

of the Civil Procedure Act (Cap 21).

17. The court has considered the two preliminary objections, the 2nd Defendant's submissions thereon as well as the Plaintiff's submissions thereon. On the issue of *res judicata*, the conditions for its application are fairly well settled. They are to be found in **section 7 of the Civil Procedure Act (Cap 21)** although those provisions are not exhaustive according to case law. There are also various decided authorities on the issue. In summary, there must be a previous suit in which the subject matter was litigated; the parties should be the same and litigating under the same title; the previous court must have been competent to hear the issue; and the same issue must have been raised in the new suit.

18. Whereas the 2nd Defendant contended that the requirements of **section 7 of the Civil Procedure Act** have been satisfied, the Plaintiff thought otherwise. The Plaintiff submitted that the RM's court at Runyenjes was not a competent court. It was also contended that new facts had come to light since the filing of RMCC No. 16 of 1991 hence the issues and parties in the instant suit are different from those of the previous suit. There is no doubt that the subject matter in the previous suit was *Title No. Gaturi/Weru/832* from which the Plaintiff was claiming 4 acres from the 1st Defendant on the basis of a sale agreement dated 14th March 1977. Unbeknown to the Plaintiff at the material time, the said property had already been subdivided into various parcels of land and sold to third parties who are now the 2nd – 5th Defendants. The resultant parcels upon subdivision were Nos. 1485, 1486, 1487, 3784 and 3805.

19. In the instant suit, the Plaintiff is still claiming the 4 acres on the basis of the same sale agreement dated 14th March 1977. The inclusion of additional Defendants and inclusion of an alternative claim for general damages for breach of contract does not in my view change the character of the proceedings or the main question for determination in the new suit. The original suit property was sub-divided long before the filing of civil suit No. 16 of 1991, a matter which the Plaintiff could have discovered with a little diligence.

20. The court is unable to agree with the Plaintiff that the RM's court at Runyenjes was not a court of competent jurisdiction. The mere fact that the magistrate's court may have acted erroneously in setting aside the arbitral award or in dismissing the entire suit would not deprive it of jurisdiction it had in the first instance. If the court erred in its decision, it was upon the Plaintiff to move to a higher court through an appellate process for such errors to be corrected. It must be remembered that the previous suit was filed by the Plaintiff in the RM's court and he cannot be heard to assert lack of jurisdiction long after dismissal of his suit.

21. The case of **Uhuru Highway Development Ltd** (*supra*) relied upon by the Plaintiff did not open the gates for multiplicity of suits and applications based on the same transaction or series of transactions. If anything, that case confirmed that the doctrine applies not only to bar the filing of fresh suits on the same issue previously decided but also to the filing of fresh applications in the same suit. The Court of Appeal stated, *inter alia*,

“...There must be an end to applications of similar nature; that is to say, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation...”

22. In the said case, the Court of Appeal further held that;

“...We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (section 7) is not exhaustive...”

23. If the Plaintiff was denied access to the judiciary and its institutions prior to 2002 as alleged in his suit and submissions, there is no reason why he did not apply for appropriate relief such as leave to appeal out

of time as from 2003 when he claimed the oppressive regime got out of power. It is also not a plausible excuse for the Plaintiff to submit that he was a lay person who was not familiar with the operative legal regime. Ignorance of the law cannot be employed to dislodge the application of the doctrine of *res judicata*. The Plaintiff was at liberty to seek legal advice on the matter.

24. The court is of the view that the Plaintiff is simply re-litigating the same issues or substantially the same issues that were raised in previous proceedings. The fact that the trial magistrate may have been wrong in setting aside the arbitral award or dismissing the Plaintiff's suit on a ground which was not canvassed by the parties did not give the Plaintiff a right to commence fresh proceedings. He could have appealed or applied for review. He did not take any action. The decree of the RM's court in Runyenjes RMCC No. 16 of 1991 cannot simply be ignored or wished away, however erroneous the Plaintiff may believe it to have been. The court is, therefore, inclined to allow 2nd Defendants plea of *res judicata*.

25. The second preliminary objection relates to the limitation of actions. The 2nd Defendant contended that the instant suit was filed out of time and without leave of court having been obtained. This is apparently one of the reasons why the Plaintiff's suit in the previous case was dismissed with costs. The Plaintiff's counsel did not submit on this aspect of limitation in the written submissions. It is common ground that the sale agreement on the basis of which the Plaintiff filed the previous and current case is dated 14th March 1977. If it is assumed in the Plaintiff's favour that when he filed Runyenjes RMCC No. 16 of 1991 a cause of action had already accrued to him, then the instant suit is definitely statute barred under **section 7 of the Limitation of Actions Act**.

26. The court takes the view that the Plaintiff's suit is mainly for recovery of land whose limitation period is 12 years as opposed to ordinary contracts whose limitation period is 6 years.

27. The court is, therefore, of the view that the Plaintiff's suit is statute barred. A cause of action could not remain alive *ad infinitum*.

28. The upshot of the foregoing is that the court is satisfied that the 1st and 2nd preliminary objections are well founded and have merit. Consequently, the notice of preliminary objection dated 18th July 2017 partially succeeds and the Plaintiff's suit is hereby struck out in its entirety with costs to the 2nd Defendant.

29. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19TH** day of **OCTOBER, 2017**

In the presence of Ms Makobu for the Plaintiff and in the absence of the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants.

Court clerk Njue.

Y.M. ANGIMA

JUDGE

19.10.17