



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.NO.270 OF 2017

PETER NGANGA MWAURA..... PLAINTIFF/APPLICANT

-VERSUS-

ALFRED MBUGUA NGUGI1ST DEFENDANT/RESPONDENT

TEMBO LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Preliminary Objection* dated 27th June 2017, filed by the 2nd Defendant herein against the *Plaintiff's Notice of Motion* dated 5th October 2016. The 2nd Defendant has sought for striking of the Plaintiff's suit on the following grounds:-

- 1. That the application and suit are both incurably defective, misconceived, incompetence, bad in law and an abuse of the process of this Honourable Court.**
- 2. That the issues canvassed in the application and the suit herein are res judicata and res subjudice, the same having directly and substantially been in issue between the same parties, and having been determined by competent courts of law in the following cases:-**
 - a. Milimani CMCC No.7128 of 1999, Alfred Mbugua Ngugi ..Vs..Peter Nganga Mwaura.**
 - b. Nairobi HC Misc.Civil Application No.1375 of 2005 – Peter Nganga Mwaura..Vs..Chief Magistrate Court, Nairobi & Another.**
 - c. Nairobi HC Misc.Civil Application No.897 of 2012 – Peter Nganga Mwaura..Vs..Alfred Mbugua Ngugi.**
 - d. Nairobi HC Misc.Civil Application No.53 of 2007 – Peter Nganga Mwaura..Vs..Alfred Mbugua Ngugi.**
 - e. Nairobi Court of Appeal, Civil Application No.23 of 2007, Peter Nganga Mwaura..Vs..Chief Magistrate Court at Nairobi & Another**
 - f. Thika D.O.Case no.52 of 2000 – Peter Nganga Mwaura..Vs..Alfred Ngugi.**
- 3. That the Plaintiff is guilty of non-disclosure of pertinent material facts.**

The 2nd Defendant attached the said decided cases in its **Notice of Preliminary Objection**.

The **Plaintiff opposed** the said **Notice of Motion** by filing of **written submissions** on **28th July 2017**, and averred that the suit is not **Res judicata** as he had never filed any suit against the 2nd Defendant before. That the cases cited by the 2nd Defendant are not relevant as none of them involve the dispute between the Plaintiff and the 2nd Defendant. The Plaintiff submitted that the suit is **not res judicata** and therefore the Court should hold and find that the **Preliminary Objection** is **misconceived, bad in law, frivolous and an abuse of the court process**.

The Court has considered the **Notice of Preliminary Objection** and the **Response** by the Plaintiff herein. The Court has to first ascertain whether what the 2nd Defendant has filed is a **Preliminary Objection** as was described in the case of **Mukisa Biscuit Manufacturing Ltd..Vs..West End Distributors Ltd (1969) EA 697**. In the above stated case, Court described Preliminary Objection as:-

“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.

Therefore it is clear that a **Preliminary Objection** raises pure points of law which are capable of disposing the matter preliminarily without the Court having to resort to ascertaining of facts from elsewhere apart from looking at the pleadings.

The 2nd Defendant has alleged that the suit herein is **res judicata** as the same had directly and substantially been in issue between the same parties and has been determined by courts of competent jurisdiction. The said different cases were cited and attached to the **Preliminary Objection**. If the suit is indeed found to be **res judicata**, then it cannot stand and the Court would have no option but to strike it out. The Court finds that the 2nd Defendant's Notice of Objection meets the criteria of what a Preliminary Objection is as described in the case of **Mukisa Biscuit (supra)**.

The next issue is whether the same is merited. **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.”

It is evident that what is at the core of the dispute herein is **Ruiru East Block 1(Githunguri 1360)**, which pits against **Peter Nganga Mwaura, the Plaintiff** herein and **Alfred Mbugua Ngugi**. The dispute herein involves ownership of this suit property **Ruiru East Block 1(Githunguri 1360)**, which a competent Court had earlier directed that it should be registered in the name of the 1st Defendant herein. The Plaintiff herein had filed a claim before the Land Dispute Tribunal, which Tribunal found that the Title Deed in the name of the 1st Defendant be cancelled and the same be registered in favour of the Plaintiff. But the Court in **Judicial Review Misc. Appl.No.1375 of 2005** had found that the Tribunal had no jurisdiction to deal with matters related to ownership of land. The Court had held that Section 3(1) of the Land Disputes Tribunal Act No.18 of 1990 (now repealed) did not donate jurisdiction to the Tribunal to deal with disputes of ownership of registered land. Prior to the decision in the Judicial Review, the Chief Magistrate's Court in **Civil case No.7128 of 1999**, had entered a Judgement in favour of the 1st Defendant herein. The Court had directed that the Plaintiff herein do give vacant possession to the 1st Defendant who was the Plaintiff in **CMCC No.7128 of 1999**.

Thereafter, the matter was litigated in several other cases involving the Plaintiff herein and the 1st

Defendant. The Plaintiff herein was the Applicant in all the stated cases and the fact remained that the 1st Defendant was declared the indefeasible owner of the said suit property and was entitled to vacant possession. The Plaintiff therefore cannot claim that he is the legal owner of the suit property as the Courts have ruled otherwise. It is evident that there exist several other suits dealing with the same issues and involving the same parties which have been litigated and various decisions given. By filing this suit, the Plaintiff is trying to relitigate the matter. That is against the spirit of Section 7 of the Civil Procedure Act. The essence of the doctrine of Res judicata is to emphasize that there must be an end to litigation.

The Plaintiff is alleging that he has now sued the 2nd Defendant and therefore the suit is not Res judicata. However, it is evident that the suit property was registered in favor of 2nd Defendant in **1997** and Court directed that he obtains vacant possession in the year **2005**. The 2nd Defendant was registered as a proprietor in the year **2014**, long after Plaintiff had lost in many suits that he had filed against the 1st Defendant. The fact that the Plaintiff has added a new Defendant does not bar the suit herein from being a matter which was directly and substantially in issue in former suits.

The Court finds that the suit herein is Res judicata and by bringing this suit in the **year 2016**, the Plaintiff is trying to relitigate a matter which has been decided by Courts of competent jurisdiction and thus Res judicata. In the case of Samuel Kiiru Gitau...Vs... John Kamau Giteru, Nairobi HCCC No.1249 of 1998, the Court held that:-

“For a matter to be res judicata, 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”.

The Court finds that the Plaintiff herein has litigated in several forums and lost in his claim. In law, any litigation has to come to an end and once a decision has been reached by a competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. The Plaintiff herein cannot keep on litigating on the issue of ownership of the suit property which the court in the former suit **CMCC No.7128 of 1999**, found belongs to the 1st Defendant.

Having carefully considered the 2nd Defendant’s **Notice of Preliminary Objection** dated **27th June 2017**, the Court finds it **merited and it is allowed entirely** and consequently, the **Court proceeds to strike out the Plaintiff’s entire suit herein and subsequent proceedings with costs to the Defendants for being Resjudicata and an abuse of the court process.**

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October, 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Mwathe holding brief for Prof. Kiama Wangai for Plaintiff/Applicant

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court clerk.

Court – Ruling read in open Court in the presence of the above stated advocate.

L. GACHERU

JUDGE