



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 34 OF 2017

FRESIA WANJIKU MBUGUA.....PLAINTIFF

VERSUS

AGNES MUTHONI MBUGUA.....1ST DEFENDANT

JOYCE WAITHERA MBUGUA.....2ND DEFENDANT

JOHN KARANJA MBUGUA.....3RD DEFENDANT

STEPHEN KUTHUIRI MUYA.....4TH DEFENDANT

PHILIP MUYA NDURU.....5TH DEFENDANT

LAND REGISTRAR UASIN GISHU.....6TH DEFENDANT

ATTORNEY GENERAL.....7TH DEFENDANT

RULING

INTRODUCTION

This is ruling in respect of an application brought by way of a Notice of motion dated 23rd October 2017 by the 1st to 5th Defendants for orders that:

1. That the plaint dated 25th day of January 2017 be struck out with costs.
2. That the costs be in the cause.

This application came up for hearing on 22nd November 2017 when Mr. Kibii Counsel for the defendants argued the application. Mr. Odongo Counsel for the 6th and 7th defendants also supported the application for striking out of this suit.

Counsel relied on the grounds on the face of the application together with the supporting affidavit of the applicant. He submitted that the issues in the plaint have been determined previously in Eldoret CMCC No. 914 of 2001 where the 2nd to 5th defendants had sought for the eviction of the plaintiff in the previous suit. Counsel further submitted that the prayers of the 2nd to 5th defendants were granted by the subordinate court whereby an eviction order was issued. The issues are directly and substantially in issue in Eldoret CMCC No. 914 of 2001 as the parties in this suit and the previous one are litigating over the same title.

It was counsel's submission that litigation must come to an end and once a judgement is rendered is binding on all parties.

Mr. Kibii Counsel for the applicants submitted that the plaintiff in the attempt to avoid the principles of *res judicata* has omitted one of the litigants in CMCC No. 914/01 known as James Thuku. He further submitted that there is an additional two defendants being the 6th and 7th defendants. The move of omitting parties and adding others is an abuse of the court process.

Counsel cited section 7 of the Civil Procedure Act which deals with the principle of *res judicata*. It was his submission that the defendants have had the judgement for more than 11 years but they have been unable to enjoy the fruits of the same due to multiplicity of suits including criminal proceedings. He prayed that the application be allowed.

Mr. Odongo Counsel for the 6th and 7th defendants supported the application and stated that the same satisfied the ingredients of section 7 of the Civil Procedure Act. The applicant has demonstrated that the issues before the court were litigated and determined by a competent court. He submitted that the inclusion of the 6th and 7th defendants was a calculative move to escape the provisions of section 7. He therefore submitted that the application is merited and should be allowed.

Miss Kibichy for the respondent opposed the application and relied on the replying affidavit. She stated that the principles of *res judicata* have not been met by the application. It was her submission that the issue of fraud was not canvassed in the previous case as the same came to the attention of the plaintiff in 2016. She stated that this is a different cause of action. It was further her submission that the 6th and 7th defendants were added due to the issue of fraud. She prayed that the application be dismissed.

Analysis and determination

The issue for determination is as to whether this suit is *res judicata*. Does the application meet the ingredients of section 7 of the Civil Procedure Act. Section 7 provides that

7. 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 issue has been subsequently raised, and has been heard and finally decided by such court.

I notice that the parties in the previous suit being CMCC No 914 of 2001 are similar apart from the 6th and 7th defendants who were added and an omission of James Thuku Ndirangu. The subject property is also similar in both suits being LAINGUSE/KIPTENGA BLOCK 2 (KAMUYU 217 which was subdivided to form parcel Nos. LAINGUSE BLOCK 2 (KAMUYU) 374,375,376,377, and 378. This can be found on the attached previous plaint and the current plaint. A judgement and decree attached is also evident that this matter was determined by a competent court.

It is surprising that counsel for the respondent submitted that the plaintiff/ respondent added the 6th and 7th respondents in the new suit because they discovered that there was fraud in 2016. In essence counsel admitted that the current suit is *res judicata*, only that the plaintiff did not include the claim of fraud. Order 3 Rule 4 of the Civil Procedure Rules is very clear about suits including the whole claim. The order provides that:

4. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

The plaintiff had an opportunity to file a defence and counterclaim in the previous suit where she was a defendant. She chose not to include her claim so that the matter could be determined once and for all. If she was not satisfied with the judgement of the court she could have filed an appeal or a review of the same. Litigation must come to an end and parties should not be allowed to abuse the court process by taking the court and parties in circles.

Courts should be slow at striking out pleadings but they also must guard against abuse by litigants of the court process. When the abuse is glaring, then courts should not hesitate to uphold the integrity as it were and strike out the offending proceedings.

With that I find that the application is merited and the same is allowed. This suit is hereby struck out with costs to the defendants.

Dated and delivered at Eldoret on this 13th day of December, 2017.

M.A ODENY

JUDGE

Read in Open court in the presence of:

Mr. Kibii for 1st to 5th defendants

Mr. Kuria for the 6th and 7th defendants

Miss Kibichy for Plaintiff.

Mr. Koech – Court Assistant.