



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 644 OF 2014

FREDRICK WACHIRA NDEGWA

SUBST. (DECEASED) NDEGWA WACHIRA)PLAINTIFF

-VERSUS-

DISTRICT LAND REGISTRAR, NYERI.....1ST DEFENDANT

BEAUTAH KANYORA MUTHUI..... 2ND DEFENDANT

RULING

1. By a plaint dated **18th July, 2012** the plaintiff instituted the suit herein seeking judgment against the defendants for, *inter alia*, general damages for suffering inflicted on him owing to alleged tortious acts of the defendants.
2. Vide their statement of defence dated 25th February, 2013 the defendants denied the various allegations of wrong doing levelled on them. Terming the suit frivolous, fatally defective and an abuse of the court process, the 1st defendant intimated that during the hearing of the suit, they would seek to have the suit dismissed on the ground that it contravenes the provisions of the Government Proceedings Act, Public Limitations Act and the Civil Procedure Act.
3. The 2nd defendant in paragraph 19 of his defence raised a preliminary objection that the current suit is Res judicata CMCC No. 157 of 1979 and HCCC No. 300 of 1996 and should be struck out.
4. In line with their above mentioned intentions, when the matter came up for hearing, directions were issued to the effect that the preliminary objections be disposed of first. Further directions were issued to the effect that the objections be disposed of by way of written submissions.
5. Only the 1st defendant and the plaintiff filed written submissions.

Submissions for 1st defendant

6. In the submissions filed on behalf of the 1st defendant, it is pointed out that there have been previous proceedings concerning the suit property and submitted that the current suit is *res judicata* those proceedings. In this regard reference is made to HCCC No.300 of 1996; Civil Appeal No.15 of 1997; Court of Appeal Civil Case No.306 of 2005; Suit No. 157 of 1979 which was finally determined when the arbitration was filed and adopted as court's judgment. The lower court's judgment was the subject matter of the appeals herein.

7. In view of the foregoing, it is reiterated that the current suit is *res judicata*. Suit land to wit, Tetu/Unjiru/172 does not exist. The same was sub-divided in 1982. Reference was also made to **Section 7** of Civil Procedure Act.

8. It is pointed out that the actions or inactions of the 1st defendant complained about took place in 1982, more than 30 years ago and submitted that the suit offends the provisions of the Public Authorities Limitations Act.

9. Owing to the fact that the plaintiff has persistently filed various motions and pleadings over a matter he is fully aware has been finally and conclusively determined, the 1st defendant contends that the plaintiff's conduct is intended to annoy and harass his opponents and to that extent an abuse of the process of the court. For the foregoing reasons, the 1st defendant terms the plaintiff a vexatious litigant and urges the court to declare him as such.

10. The 2nd defendant associated himself and fully relied on the submissions filed on behalf of the 1st defendant.

11. In his submissions, the plaintiff admits that there have been a plethora of cases and applications by himself or his predecessor in claim concerning the suit property. He also admits that the outcome of those proceedings was not favourable to him. He laments that in all those proceedings he was denied justice.

12. Based on an order issued in Nairobi Court of Appeal Civil Application No. 44 of 1984, the plaintiff contends that the issues raised in the current suit are not *res judicata*.

Analysis and determination

13. The dispute herein has had a long and chequered history. The fact is laid bear in Nyeri Court of Appeal Civil Appeal No. 306 of 2005. In that matter, the Court of Appeal gave a detailed account of the dispute herein and finally rendered itself thus:-

“The appellant (plaintiff in the current proceedings) believes mistakenly though, that when this court allowed Civil Appeal No. 44 of 1984, It meant that the trial court was to start the case *de novo*. Nay. The decision meant that the trial court was commanded to allow the unsuccessful party in the arbitration an opportunity to challenge the award which had been filed. Under the relevant rules, that party had 30 days within which to challenge the arbitration award. Which she did not do. It meant that the successful party had the right which he exercised, to move the court for judgment in terms of the award. That was the law, and it is not being alleged that it was not followed. If the appellant or the person he know represents failed to move the court to set aside the arbitration, if there was a basis for it, he should not blame any other person, except himself for that lapse. It is on the basis of a judgment entered pursuant to the elders award that the suit land was sold to the 2nd respondent (the 2nd defendant in the current proceedings), and as he rightly submitted before us, he was a purchaser of the suit land for value....”

14. With regard to the plaintiff's perceived denial of justice, the Court of Appeal stated:-

“we sympathize with the appellant because he must have been misled not to challenge the second judgment which was entered in terms of the arbitration award. Instead of doing that he filed a fresh suit to wit, Civil Case No.300 of 1996 which to our minds concerned a matter which was *prima facie res judicata* or if not it was doomed to fail in view of what we have stated above...”

15. It is clear from the above determination of the Court of Appeal, that the dispute brought before this court has been subject of determination in courts of competence jurisdiction to hear and determine it. Both the High Court and the Court Appeal have made their views concerning the plaintiff's claim to the suit property known to the plaintiff. Whilst the plaintiff is entitled to hold his views concerning those

determinations, he should realise that disputes preferred in a court of law, are determined in accordance with the law and procedure applicable to such disputes.

16. In the circumstances of this case, the issues raised in the suit having been heard and determined by courts with competent jurisdiction to hear and determine them, this court lacks jurisdiction to entertain it. In this regard, see **Section 7** of the Civil Procedure Act, Cap 21 Laws of Kenya, which prohibits a court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue been dealt with 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.

17. Having found the current suit to be *res judicata*, I uphold the notice of preliminary objection contained in the 2nd defendant's statement of defence and proceed to dismiss the suit with costs to the respondents.

18. On whether the plaintiff should be declared a vexatious litigant, I have considered the submissions in that regard and the law applicable to wit, Vexatious Proceedings Act, Cap. 41 Laws of Kenya. Whereas from the material placed before me, I am convinced that a case has been made up for declaring the plaintiff a vexatious litigant, I am of the view that before such an order can be made against the plaintiff he must be subjected to the process contemplated by Cap 41.

19. The current proceedings not being the process contemplated in law for declaring a person a vexatious litigant, I decline to issue the orders sought.

Orders accordingly.

Dated, signed and delivered at Nyeri this 12th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Fredrick Wachira Ndegwa

Ms Masaka for 1st defendant

Buautah Kanyora Muthui – 2nd defendant

Court assistant - Lydia