REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT & LAND CASE NO. 88 OF 2015

GEORGE KAMAU KIMANI...1ST PLAINTIFF

REDEMPTA KIPROP …..2ND PLAINTIFF

FRANCIS G. NJUGUNA...3RD PLAINTIFF

PENROSE NDUBI...4TH PLAINTIFF

STEPHEN YEGO...5TH PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TRANS-NZOIA................................1ST DEFENDANT

NATIONAL HOUSING CORPORATION...2ND DEFENDANT

R U L I N G

The application is dated 5/6/2015 wherein the Defendant prays that the suit be struck out for offending the Principles of ***res judicata*** and for being an abuse of the process of the Court. The Defendant also prays for an order that Plaintiffs vacate the suit premises houses known as Cherangany Estate situate in Kitale Town and in default they be forcibly evicted. The application is based on grounds that the suit is ***res judicata*** as the houses and leases the subject matter of this suit are the same as **Kitale Environment & Land Case No. 66 Of 2013** between the same parties herein and which was struck out by Hon justice Obaga, in his ruling of 4/6/2015. The validity of the leases of the said houses the subject of this suit was already determined in the said **Kitale Elc No. 66 Of 2013** wherein Justice Obaga in Paragraph 15 of his ruling made a finding that the Plaintiffs' leases were not registered hence are unenforceable and also that the said leased did not have the seal of the corporation (National Housing Corporation). The said ruling in respect of which there is to date no appeal to the Court of Appeal is binding upon all including the 2nd Respondent herein; the said ruling in **Kitale Elc. No.66 of 2013** was delivered on 4/6/2014, yet the Plaintiffs have to date not filed any Appeal in the Court of Appeal to challenge it.

According to the 1st defendant, the striking out of the Plaintiff's suit in Kitale Elc No.66 Of 2013 was on points of law, hence no appeal having been filed in the Court of Appeal, and the houses and leases the subject of present suit being the same as in Kitale Elc No. 66 of 2013, the Plaintiffs' suit is under the Principles of Res Judicata not entertainable and is for dismissal. The Plaintiffs are taking advantage of the pendency of this suit to occupy the suit premises despite their purported leases having been held to be unenforceable, which is not only illegal but also unconscionable and an abuse of the Court Process; and the Plaintiffs are taking advantage of the pendency of this suit to merely buy time and continue occupying the said houses; this is evidenced that since the transfer of this suit to Eldoret, the Plaintiffs who are in

occupation of the suit houses have not taken any step in this suit. It is a matter of law that the Plaintiffs' occupation of the suit houses being based on purported leases that a Court of law has declared unenforceable is illegal and unsustainable at law, hence the Plaintiffs should vacate them. By this Honourable Court entertaining this suit, it will not only be violating the principle of Res Judicata, but will also be promoting an illegality.

The second issue is that the suit is also an abuse of the court process and a mockery of justice and violates an undertaking by the plaintiffs and their Advocate Peter Kiarie, Advocate by which the Plaintiffs undertook to vacate the suit premises and which undertaking is legally enforceable the said undertaking also doubles up as a professional undertaking by Mr. Kiarie Advocate and is enforceable as against him and his clients. Whereas the said purported leases were allegedly between the Plaintiffs and the 2nd Defendant a corporation, the same were not sealed with the said corporation hence cannot be enforced. The houses the subject of this suit are urgently required by the 1st Defendant for its officers hence it needs to take possession thereof.

The application is supported by the affidavit of Professor Nixon Sifuna who reiterates that this suit is Res Judicata in terms of the ruling of Obaga Judge delivered on 4/6/2014 in Kitale Environment & Land Case No.66 of 2013 between the same parties herein and which was struck out by the said judge.The houses and leases the subject matter of this suit are the same as in Kitale Environment & Land Case No.66 of 2013. That the validity of the leases of the said houses the subject of this suit was already determined in the said Kitale Elc. No.66 Of 2013 wherein Obaga Judge in Paragraph 15 of his ruling made a finding that the Plaintiffs' leases were not registered hence are unenforceable and also that the said leases did not have the seal of the corporation (National Housing Corporation).

Professor Sifuna further emphasizes that the said ruling in respect of which there is to date no appeal to the Court of Appeal is binding upon all including the 2nd Respondent herein; the said ruling in Kitale Elc. No.66 Of 2013 was delivered on 4/6/2014, yet the Plaintiffs have to date not filed any Appeal in the Court of Appeal to challenge it. That the striking out of the Plaintiff's suit in Kitale Elc No.66 Of 2013 was on points of law, hence no Appeal having been filed in the Court of Appeal, and the houses and leases the subject of present suit being the same as in Kitale Elc. No.66 Of 2013, the Plaintiffs' suit is under the principle of Res Judicata not entertainable and is for dismissal. That the Plaintiffs are taking advantage of the pendency of this suit to occupy the suit premises despite their purported leases having been held to be unenforceable, which is not only illegal but also unconscionable and an abuse of the court process; and the plaintiffs are taking advantage of the pendency of this suit to merely buy time and continue occupying the said houses; this is evidenced that since the transfer of this suit to Eldoret, the plaintiffs who are in occupation of the suit houses have not taken any step in this suit. That it is a matter of law that the Plaintiffs' occupation of the suit houses being based on purported leases that a court of law has declared unenforceable is illegal and unsustainable at law, hence the plaintiffs should vacate them.That by this Honourable Court entertaining this suit, it will not only be violating the principle of Res Judicata, but will also be promoting an illegality. That this suit is also violates an undertaking by the Plaintiffs and their Advocate PETER KIARIE ADVOCATE by which the Plaintiffs undertook to vacate the suit premises and which undertaking is legally enforceable the said undertaking also double s up as a professional undertaking by Mr. Kiarie Advocate and is enforceable as against him and his clients. The copy of the said undertaking was. The said undertaking, which is in their lawyer Mr. Peter Kiarie's own handwriting reads as follows (Verbatim):

(On this 9th day of June, 2014, we the undersigned, do hereby and unequivocably undertake to move out of the County Government of Trans Nzoia's houses, comprised Cherengany Estate. We undertake to move out on or before 11.6.2014. In default, we can be forthwith evicted from the said houses, by the County Government of Trans Nzoia.

"Signed by us,

PENROSE NAMISI

GEORGE KAMAU

FRANCIS GITAU

STEPHEN K. YEGO

ALLAN KIRWA

in the Presence of P. N. KIARIE ADV"

The application is opposed by the Plaintiffs. The 1st Plaintiff filed an affidavit in reply to the application stating that the 1st Defendant vide a preliminary Objection dated 18/7/2014 argued that the Plaintiff's suit was resjudicata and the preliminary objection was dismissed and therefore the instant application is res judicata for reasons that the issues raised herein are the issues which were raised in the preliminary objection dated 18/7/2014 which was dismissed. The instant application is bad in law as it invites the court to sit as an appellate court over its own decision and the application is an abuse of the due process of court. The Kitale ELC No.66 of 2013 did not proceed to full hearing instead the said case was preliminarily struck out and where a suit has been struck out the same does not stop the Plaintiff to institute a fresh suit. The allegation that the instant suit is res judicata are allegations raised on the 1st Defendant's grounds of opposition dated 10/6/2014 and it's an abuse of the court process to file the application dated 5/6/2015 on the same issue while the application dated 10/6/2014 is still pending. According to the plaintiffs, the cause of action in the instant suit seeks to challenge the undertaking dated 9/6/2014 which undertaking came later after Kitale ELC. No.66 of 2013 was struck out and it can't be said that the instant suit is res judicata. The issue of whether there exists tenancy relationship as between the Plaintiff and the 2nd Defendant has never been in dispute and the 2nd Defendant in his defence has admitted the existence of tenancy relationship as between itself and the Plaintiff's and it's not an issue for trial. The pendency of this suit in court has greatly been occasioned by the 1st Defendant who has persistently been bringing unnecessary applications which have hinted the instant case from proceeding to hearing and. The 1st Defendant is a stranger to the tenancy relationship that exists between the Plaintiff and the 2nd Defendant and has no locus to challenge the same.

It's admitted by the 2nd Defendant that they did exercise their statutory power of taking over the management of the suit property, put in the plaintiffs as tenants, collect rent to recover a debt owed to it by the Municipal Council of Kitale, which debt is now a debt recoverable from the 1st Defendant. For the fact that the agreement between the plaintiffs and the 2nd defendant creating a tenancy relationship arises from the exercise of a statutory power by the 2nd Defendant, non registration of the lease agreement does not invalidate the tenancy as section 12 of the National Housing Corporation Act empowers the 2nd defendant to do so.

The defendants have been sued by the plaintiffs for reasons that the 1st defendant has been trying to evict the plaintiffs through wrong means and without justification or orders of the court when the then Municipal Council of Kitale failed in Kitale HCCC Civil Suit No.124/2001 to obtain orders declaring the possession of the suit property herein by the 2nd defendant null and void.

Despite the fact that the Municipal Council of Kitate went to Court vide Kitale HCCC Civil Suit No.124/2001, the said case was dismissed and the objective of the Municipal Council of Kitale of which the 1st Defendant has taken its position was not achieved as the said case was dismissed. Allowing the 1st defendant's application will give room for the 1st defendant to purport to achieve what it failed to achieve in Kitale HCCC No.124 of 2001. By virtue of the dismissal of Kitale H.CCC 124 the 1st defendant has no legal capacity to purport to have control over the suit property herein unless the suit property herein has been handed over to it by the 2nd defendant voluntarily. He annexed copies of the plaint, defence, ruling and order of the court in respect to Kitale H.C C.C. No.124 of 2001 .

Professor Sifuna leaned counsel for the applicant submitted that the suit herein is res Judicata and an abuse of the process of Court. He relies on Section 7 of the Civil Procedure Act and Order 2 rule 15 of the C.P.R. 2010. The suit according to Professor Sifuna is similar to Kitale ELC. No.66 of 2013 which was struck out. The subject matter are leases signed by the Plaintiffs who are tenants. The question is whether the leases are legal. The Honourable Judge found that the leases were not registered

and therefore not legal and that the ruling of the Court had final effect. Res-judica and estoppel according to Professor Sifuna can be inter-charged. There is no appeal whilst the ruling was delivered on 4/6/2014. They should be estopped from arguing otherwise. The Court should save judicial time and abuse of the process of the Court

Mrs. Risper Arunga learned counsel for the 2nd defendant submitted that the matter is not res judicata as paragraph 11 of the Plaint refers to an undertaking executed on 9/6/2014. The undertaking was executed after delivery of the ruling. The Plaintiffs are challenging an undertaking dated 9/6/2014 s being illegal. The Plaintiffs are paying rent to the 2nd defendant hence estoppel does not arise. The 2nd defendant was not a party in No.66 of 2013. The 2nd defendant has raised a defence that raises triable issued.

The Plaintiffs through their learned Counsel Mr. Nyamu submit that the application is incompetent as one cannot pray for eviction on an application for striking out as the same should be through counter-claim. He argues that Suit No.66 of 2013, was struck out but not dismissed. No lease has been produced by the applicant as exhibit. Mr Nyamu further argues that the issue of Res Judicata was raised by way of Preliminary Objection but dismissed as it had no merit and no appeal has been filed.

Professor Sifuna in reply submits that explanation No.5 does not apply to a dismissed Preliminary Objection. The Honourable Judge did not decide on Res Judicata but concluded that the matter could be canvassed by way of application.

I have carefully considered the pleadings, the application, supporting and replying affidavit and do find that by plaint dated 10/6/2014, the Plaintiffs sued the 1st and 2nd defendants claiming to have been tenants of National Housing Corporation and that at all material times, residential houses collectively referred to as Cherangani Estate situated within what was formerly Municipal Council of Kitale and now within County Government of Tran-Nzoia. The Plaintiff claims that the five leases between them and the National Housing Corporation are subsisting and that the said tenants can only be terminated as per the provision of the said lease. The plaintiff claim that they have not been tenants of Municipal Council of Kitale as it was then, whose function have been taken up by the County Government of Trans Nzoia. The plaintiffs were given between 3/5/2013 and 30/5/2013 to vacate the houses they occupied and contend that the County Government of Trans Nzoia have no Locus Standi to terminate the leases. The 1st defendants' predecessor sued the 2nd defendant in respect of the suit property but the said suit was dismissed for want of prosecution. It is further averred that on the 9/6/2014 the 1st defendant through its agent attempted to forcefully evict the Plaintiffs but that the 1st defendant took advantage of the desperate situation to obtain on an undertaking that they would move out of the premises on between 11/6/2014 or they be evicted by the 1st defendant and claim that the undertaking is unlawful and obtained through duress. The 1st defendant filed defence and claimed that the houses in dispute do not belong to the 2nd defendant as alleged by the Plaintiffs but the said houses are situated on Parcel of Land registered under RTA as L.K No.2116/37/IV and that belong to the 1st defendant and that has never transferred the ownerships of the said houses to the 2nd defendant and that the 2nd defendant was only managing the said houses and collecting debt owed to it by the then Municipal Council of Kitale a predecessor of the 1st defendant. Moreover, the Defendant challenges the validity of the leases purportedly entered into between the Plaintiffs and 2nd Defendant.

The Plaintiffs had filed a suit against the 1st Defendant being Kitale Environment & Land Case No.66 of 2013 which was struck out and accepting the outcome, all the plaintiffs herein who were the plaintiffs therein jointly executed a written undertaking admitting the 1st Defendant's ownership of the suit premises and undertaking to move out of the suit premises by 11/6/2014 but instead of moving out as promised, and contrary to the said formal undertaking, they instead filed this suit claiming that the said earlier suit was lost on technicalities. The said undertaking which they are now disowning and breaching was executed by them voluntarily, solemnly, in writing, and in the presence of their advocate on record in that suit Peter Kiarie Advocate who also signed it as a witness, and the 1st defendant relied on the said undertaking and their said Advocates professional undertaking, to allow them time to move out of the suit premises by 11/6/2014 as promised therein by them.

Converse to the plaintiffs' assertion in the plaint that their said suit Kitale E & L No.66 of 2013 was struck out on technicalities, the same was struck out for non-compliance with the law and the court also made a finding that the suit property being registered under the Registration of Titles Act (RTA) and the purported leases the subject of the said suit being unregistered they are null and void and unenforceable; which is a finding on substantive. The defence of the 2nd defendant does not raise any issue or counter-claim against the Plaintiffs who have also not claimed anything from the said defendants. Moreover, the 2nd defendant makes no claim against the 1st defendant. There is no evidence that there is an existing suit between the 1st Defendant and 2nd Defendant. There is no reply to defence and that is how the pleadings were closed.

I have carefully considered the pleadings in Kitale ELC. No. 66 of 2013. The plaint amended on 9/12/2013 is similar to the plaint herein. Paragraph 3 of the amended plaint is similar to paragraph 4 of the plaint herein. In both plaints the claim is based on the six leases between N.H.C. and the plaintiffs. Moreover, the suits are based on the same cause of action being the notices issued on 3/5/2013. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya 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 issue has been subsequently raised and has been heard and finally decided by such court.*"

This doctrine has been applied in a number of cases including; *Reference No.1 of 2007, James Katabazi and 21 Others -vs- The Attorney General of the Republic Of Uganda EACJ* where the Court stated that for the doctrine to apply:

> *1. the matter must be 'directly and substantially' in issue in the two suits,*
>
> *2. the parties must be the same or parties under whom any of them claim, litigating under the same title; and*
>
> *3. The matter must have been finally decided in the previous suit*

I do find that the issues in the ELD. ELC. No. 66 of 2013 revolves on the tenancy of the plaintiff in respect of six residential houses collectively referred to as Cherangani Estate situated within what was formerly Municipal Council of Kitale and now within Trans Nzoia County. The main issue was whether the leases were subsisting. I have considered the issues in this suit and do find that it is the same as the issues in the former suit. This issues were heard and determined on merit and the court found that the said leases were not registered and therefore unenforceable. The plaintiffs herein are still relying on the said leases that were found to be unenforceable.

On parties, I do find that the parties are the same save the second defendant against whom no claim is made and no issues exist. The issues herein are the same between the Plaintiffs and the 1st defendant. The 2nd defendant was added to mislead the court that there is a new party, unfortunately this court cannot be misled and finds that the dispute is still between the plaintiffs and the defendants. Though there might be other issues between the two defendants the same cannot be addressed by the court as pleaded.

The suit is filed in the same court of competent jurisdiction which heard and determined the issues herein in the former suit. The upshot of the above is that the suit herein is found to be Res-Judicata. On the issue of the undertaking which was signed by the plaintiffs in the presence of their lawyer who also signed, I do find that the same was introduced by the Plaintiff to give life to an issue that has been

determined and therefore amounts to abuse of the process of the court. The plaintiff should have commenced a suit based on the undertaking and brought out the particulars of duress and there appear to be misjoinder of causes of action. The upshot of the above is that the suit herein is dismissed for being res-Judicata and abuse of the process of the Court.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST, 2016.

ANTONY OMBWAYO

JUDGE