



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

MISC ELC SUIT NO. 443 OF 2003

IN THE MATTER OF LUCKY SUMMER ESTATE LTD

AND IN THE MATTER OF SECTION 28 OF THE LIMITATION OF

ACTIONS ACT

**AND IN THE MATTER OF 120 ACRES OF LAND COMPRISED IN LR NO. 31 RUARAKA
NAIROBI OR AS OTHERWISE KNOWN AND DESCRIBED**

AND

**IN THE MATTER OF ACQUISITION THEREOF BY THE PALINTIFF/APPLICANT
THROUGH ADVERSE POSSESSION**

LUCKY SUMMER ESTATE LTDPLAINTIFF

VERSUS

KARIUKI GATHECA & RESOURCES LTD.....1ST DEFENDANT

DOMINIC GATHECA KINYANJUI.....2ND DEFENDANT

RULING

The Application

What is before the court for determination is a Notice of Motion dated 7th May 2013 brought by the 5th, 6th and 7th Defendants in HC Misc. Suit No. 76 of 2012(OS) (hereinafter referred to as the Applicants). The Applicants are seeking an order that this matter as consolidated with HC Misc. Suit No. 76 of 2012(OS), HC ELC No. 2292 of 2007, HCCC No. 1298 of 2006 and HCCC No. 2587 of 1994 be struck out for being *res judicata* and an abuse of the court process.

The application is supported by an undated affidavit sworn by Bonaya Bakata Argamo, the 5th Defendant in H.C. Misc. Suit No. 76 of 2012. The Applicants aver that from the Plaintiffs witness statement, the Defendants affidavits and the pleadings lodged in court in all the consolidated suits, it is common ground that all the Plaintiffs came to court seeking specific performance of a sale agreement and acquisition of the property which is the subject matter of the suits through adverse possession. It is the Applicants' contention that the Plaintiffs' claims were dismissed by the Court in HCCC No. 2587 of 1994 on 14th July 2000, and that an appeal filed by the Plaintiffs in the Court of Appeal in Civil Appeal No. 315 of 2000 was equally dismissed on 18th September 2001.

According to the Applicants, any suit on a similar cause of action between the same parties suing through or on behalf of the same parties is *res judicata*. The Applicants contend that adverse possession was pleaded, canvassed and disposed of by the Court in HCCC No. 2587 of 1994 through a judgement delivered on 14th July 2000.

It is the Applicants averment that the Plaintiffs have blatantly refused to comply with the orders of the Court of Appeal, and have instead opted to file four other suits with the same cause of action which had been disposed of by the court. The Applicants contend that the fresh suits filed are a fraud and scandalous and do not qualify as a claim for adverse possession, and further, that the specific commencement date of 12 years necessary for an adverse possession claim has not been stated.

Further, the Applicants aver that all the fresh suits are based on sale agreements which have been declared null and void by the High Court for lack of the mandatory Land Control Board Consent and further, that no claim for adverse possession can arise without repudiation of the sale agreements. It is the Applicants' contention that since the Plaintiffs have pursued specific performance since 21st July 1994 to 18th September 2001, there was no adverse possession as the two causes of action cannot co-exist.

The Applicants contend that pursuant to the orders of the Court of Appeal in Civil Appeal No. 315 of 2000, all the Plaintiffs would be deemed tenants at will or licensees without any right to adverse possession. According to the Applicants, payment of statutory levies by the registered owner nullifies any claim for adverse possession where the adverse possessor has failed to pay the levies, and where the land can be lost through provisions of the Rating Act to unknown third parties. It is the Applicants' case that the registered owner has been paying rates to the local authority since 18th September 2001 when the judgment of the Court of Appeal was delivered and therefore, that the Plaintiffs claim for adverse possession is a sham.

The Applicants further contend that when the sale agreement dated 28th March 1983 was made, it removed any notion or claim of adverse possession in favour of the Plaintiffs. Lastly, the Applicants aver that after the Plaintiffs filed suit on 21st July 1994, any claim for adverse possession was interrupted since they acknowledged the registered proprietor of the land by suing him.

The Responses

The application is opposed by the Plaintiff in the present suit who filed a replying affidavit sworn on 7th November 2014 by its director, Festus Wanjohi Rukomia. The said Plaintiff contends that the assertion that the consolidated suits are *res judicata* is not grounded on facts and/or law, since there are different parties to the various suits and further, that the reliefs sought are also different.

The Plaintiff avers that the original land known as LR No. 31/Ruaraka/Nairobi was subdivided and the subdivisions in dispute are Nairobi/Block 31/2, Nairobi/Block/4, Nairobi/Block/31/24, Nairobi/Block 31/26, Nairobi Block 31/32 and Nairobi/Block/31/33 which were exempted under section 24 of the Land Control Act through Gazette Notice No. 29 of 29th July 1998. It is the Plaintiff's case that LR No. 31/Ruaraka/Nairobi does not exist at the moment, and that the fact of its subdivision was confirmed by the 2nd Defendant herein in his supplementary affidavit dated 4th October 2011 filed in this suit.

While stating that the 5th Defendant in HC Misc. Suit No. 76 of 2012(OS) was not party to HCCC No. 2587 of 1994 and can therefore not invoke the doctrine of *res judicata*, the Plaintiff has contended that the 5th Defendant's claim is that he bought parcel no. 31/16 and not LR No. 31/Ruaraka/Nairobi which was the subject matter in HCCC No. 2587 of 1994. According to the Plaintiff, all the consolidated cases before the court relate to different parties, different parcels of land and different prayers sought and therefore, that the application to dismiss these cases on grounds of *res judicata* cannot stand.

The Plaintiffs in HCCC No. 2292 of 2007 also opposed the application through a replying affidavit sworn by the 2nd Plaintiff in that case on 25th November 2013. The said Plaintiffs contend that suit no. HCCC of

2007 was instituted by way of an originating summons whereas HCCC No. 2587 of 1994 was instituted by way of a plaint seeking specific performance of a contract. It is the said Plaintiffs' averment that the claim for adverse possession sought in HCCC No. 2292 of 2007 has never been adjudicated before any court as between the Plaintiffs and the Defendants, and does not therefore qualify to be *res judicata*. The Plaintiffs contend that the rules of natural justice dictates that a litigating party has a right to be heard and that it is only fair that the court hears and determines the matter on merit.

While stating that adverse possession is a question of fact capable of determination after a full trial, the said Plaintiffs contend that the Applicants are pre-empting and assuming that they will not be in a position to prove their case. Lastly, that Plaintiffs state that the Applicants' claim that they had paid the requisite rate was not substantiated.

The Submissions

The application was canvassed by way of written submissions. The Applicants in submissions dated 5th November 2013 argued that the Plaintiffs' claim for the suit land in all the consolidated suits was based on specific performance of various agreements for sale of the suit property entered into between the Plaintiffs and the 1st Defendant herein, as well as on adverse possession.

Counsel for the Applicants submitted that the Plaintiffs in HCCC No. 2587 of 1994 were seeking specific performance and in the alternative, ownership through adverse possession. The Applicants contended that the said suit was dismissed on 14th July 2000 on grounds that the sale agreement was unenforceable for lack of consent of the Land Control Board and further, that the suit was time barred under the Limitation of Actions Act. Further, the Applicants submitted that an appeal against the dismissal filed in Civil Appeal No. 315 of 2000 was dismissed by the Court of Appeal on 18th September 2001.

The Applicants argued that the claim for adverse possession was part and parcel of HCCC No. 2587 of 1994 which was pleaded, canvassed and disposed of by the Court in the judgment delivered on 14th July 2000. It is the Applicants' submission that a suit based on a similar cause of action between the same parties suing through or on behalf of the same parties is therefore *res judicata*. The Applicants also argued that the suits were an abuse of the court process because they attempted to circumvent the ruling delivered in HCCC No. 2587 of 1994.

In further submission, the Applicants stated that the Plaintiffs' claim for adverse possession was based on sale agreements which had not been repudiated. It was submitted that there cannot be adverse possession without first repudiating the sale agreements for the suit property and further, that time for adverse possession starts running from the date of repudiation. For this submission, reliance was placed on the case of **Sisto Wambugu vs. Kamau Njuguna, (1982-1988)1 KAR 218.**

Lastly, it was submitted that the Plaintiffs who failed to move out of the suit property after losing the case in court remained at the said property as tenants at will and therefore, that the right to adverse possession could not accrue.

The 1st - 4th Defendants in HC Misc. Suit No. 76 of 2012(OS) in submissions dated 9th February 2015 contended that the issue in HCCC No. 2587 of 1994 was that the Defendant had sold land to the four Plaintiff companies which wanted to enforce specific performance, and that the said Plaintiff in the alternative sought adverse possession. Counsel for the Defendants argued that the Plaintiffs presented a list containing the names of their shareholders and stated that the four companies were suing on behalf of the people whose names were in the said list.

It is the said Defendant's submission that the shareholders in the Plaintiffs' lists are among the people who are now purporting to sue in their individual capacity either jointly with their respective companies which represented them in 1994, or separately in their own names. Counsel for the Defendants argued that the Plaintiffs who elected to sue through their respective companies in 1994 were being dishonest and fraudulent in their claim of there being different parties in the consolidated suit.

While submitting that adverse possession was canvassed in the 1994 case and that the claim presented to the court failed after rigorous presentation and cross examination, the Defendants argued that there was nothing left on the questions of the sale agreement or adverse possession to tell the court now. Further, the Defendants submitted that the Plaintiffs were abusing the court process by coming to court as new parties yet they were the same parties in the 1994 case and therefore, that they are coming to court with dirty hands having failed to obey the Court of Appeal order evicting them.

The said Defendants further argued that since their preliminary objection in respect to the Limitation of Actions Act and the Land Control Act were exhaustively canvassed by the parties and determined, the court cannot sit on appeal of its judgment which was upheld by the Court of Appeal in 2001. The Defendants relied on the case of **Sisto Wambugu vs. Kamau Njuguna, (supra)** and submitted that the Plaintiffs were estopped from re-litigating matters which were litigated between the parties in HCCC No. 2587 of 1994, and were further precluded from litigating matters which should have been advanced and were not.

The Plaintiffs in HCCC No. 2292 of 2007 (OS) in submissions dated 26th November 2013 made reference to section 7 of the Civil Procedure Act where the requirements for *res judicata* are stipulated, and stated that HCCC No. 2587 of 1994 and ELC No. 2292 of 2007 were not/are not being litigated by the same parties. Counsel argued that whereas the parties in HCCC No. 2587 of 1994 were all limited liability companies, parties in the present suit include individuals suing in their own capacity.

Reference was made to section 16(2) of the Companies Act and it was submitted that a limited liability company is a separate legal person capable of suing and being sued in its name and that its assets and liabilities are separate from that of its shareholders who can sue or defend in their own individual capacity.

While submitting that the Plaintiffs in HCCC No. 2587 of 1994 instituted a suit by way of a Plaint where the main prayer was for specific performance of the sale agreements between them and the Defendant and in the alternative adverse possession, the Plaintiffs stated that the present suit has been instituted by way of originating summons where the only claim is that they have acquired ownership of the suit property through adverse possession.

Counsel for the Plaintiffs submitted that HCCC No. 2587 of 1994 was struck out for reasons that the sale agreements were unenforceable for lack of the consent from the Land Control Board and that the suit was time barred under the Limitation of Actions Act. It is the Plaintiffs' submission that the issue of adverse possession was not substantially in issue in HCCC No. 2587 of 1994 and that the same was not decided upon since the matter had been brought by way of a Plaint as opposed to the prescribed way of originating summons. The Plaintiffs relied on the case of **Gurbachan vs. Yowani Ekori, (1958) EA 450** where it was held that the fact that the Respondent had previously brought an unsuccessful action based on non-feasance did not estop him from bringing a second action based upon misfeasance.

In respect to the Applicants' assertion that the Plaintiffs cannot rely on the doctrine of adverse possession and sale agreement at the same time, it was submitted that HC ELC No. 2292 of 2007 is purely on adverse possession and does not seek specific performance. The court was referred to the case of **Re Estate of Stephen Maina Chege (2006) eKLR** where it was held *inter alia*, that for *res judicata* to apply, the matter in issue should not only be between the same parties but should also have been directly and substantially in issue in the present and previous application. Lastly, it was submitted that the matter in issue in the present suit is that of acquiring title in land by way of adverse possession, while in HCCC No. 2587 of 1994 the matter in issue was specific performance of a contract which are not related.

The Plaintiff in this suit filed submissions dated 25th November 2013 and reply submissions dated 17th February 2015 wherein it was argued that *res judicata* envisages that a final decision has been made by a court of law in respect to the same parties dealing with the same issues or subject matter. Counsel submitted that a proper interpretation of the doctrine of *res judicata* connotes that all the matters in contention have been identified and conclusively dealt with, as opposed to a decision based on technicalities.

The Plaintiff made reference to the judgment delivered in HCCC No. 2587 of 1994 and stated that the judge made a finding that the Plaintiffs were not without a remedy. It was submitted that the suit failed to proceed on appeal for reasons that the record of appeal was not complete. Counsel argued that although the Plaintiff and the Defendant were parties in HCCC No. 2587 of 1994, the issues are totally different since the remedy sought by the Plaintiff was grounded on contract unlike in the present suit where the remedy sought is for adverse possession. It was also submitted that the 2nd Defendant was not a party in the initial suit and further, that the present suit is prompted by a subdivision and sale of land to the 2nd Defendant.

In respect to HCCC No. 2292 of 2007, it was submitted that the 2nd - 13th Plaintiffs are new parties and were not litigants in the other suits. It was further submitted that the 2nd Defendant in the said suit was not a party in HCCC No. 2587 of 1994. Counsel submitted that the Defendant had not shown that the Plaintiff was suing on behalf of the other litigants.

While submitting that the six Plaintiffs in HCCC No. 76 of 2012 were not parties to the initial suit, the Plaintiff also contended that only the 1st Defendant in that suit was a party to HCCC No. 2587 of 1994. Counsel argued that the subject matter of HC Misc Suit No. 76 of 2012 being LR No. 31/Block 16 and 18 was different from the subject matter in HCCC No. 2587 of 1994, whose subject matter is LR No. 31 Ruaraka/Nairobi.

The Plaintiff submitted that since a company is a separate and independent entity from its directors and shareholders, the directors and shareholders are legally justified to independently litigate to safeguard their rights or mitigate losses that could otherwise occur. Counsel contended that there was an indication that few directors chose to conduct themselves in a manner that was adverse to the interests of the company. It is the Plaintiff's submission that the directors, shareholders and/or members were different from the company and therefore, that it could not be said that the current Plaintiff had stood before.

In respect to the issue of limitation, the Plaintiff submitted that the agreements dated 23rd March 1979 and 28th March 1983 do not constitute full and final settlement. Counsel argued that the issue of limitation only sets in when final payment is made and therefore, that the suits filed herein are not time barred.

In further submission, it was contended that under section 24 of the Land Control Act, the President in Gazette Supplement No. 29 of 24th July 1988 exempted LR No. 5 Nairobi/Block 31/4 and Nairobi/Block 31/24 comprising 120 acres which is the subject matter of the dispute herein. Counsel argued that by the time of the exemption, the land had been subdivided and therefore, that the Applicant is estopped from claiming that limitation had set in and that the Plaintiff cannot rely on adverse possession.

While submitting that subdivision was done with approval of the 1st Defendant and special power of attorney to the Plaintiff's directors, Counsel contended that the sub-divisions have never been challenged and further, that the 1st Defendant had been using the same approvals to sell land to other buyers. The Plaintiff further submitted that Article 159(2) (d) emphasizes the need to secure substantive justice as opposed to a determination of disputes based on technicalities. It was submitted that consolidation of the suits would have served a useful purpose if the issues were drawn and all documents made available.

In further submission, the Plaintiff contended that since the land was being sold for Kshs 5,040,000/- and that the Defendant had not denied receiving Kshs 4,139,000/-, it was not equitable to allow the Defendant to keep both the land and the money, without the matter going for full hearing. Counsel submitted that the Plaintiff has over 2000 shareholders who have been in the suit premises for over 30 years and further, that any action against the shareholders affect close to twenty thousand people. It is the Plaintiff's submission that it would be a travesty of justice for the shareholders to be evicted when the matter has not been determined on merit.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue for

determination is whether the instant suit as consolidated with HC Misc. Suit No. 76 of 2012(OS), HC ELC No. 2292 of 2007, and HCCC No. 1298 of 2006 should be struck out for being *res judicata* and therefore an abuse of the court process.

Striking out of pleadings is provided for under Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In **D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1**

The Applicants contend that this suit should be struck out for being *res judicata*. The substantive law on the doctrine of *res judicata* is section 7 of the Civil Procedure Act which 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.”

The requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

Therefore in summary, the requirements for a successful plea of *res judicata* therefore are that the two actions have to be between the same parties and their successors in title, concerning the same subject and founded on the same cause of action. Further, the judgment giving rise to the plea of *res judicata* has to be a final judgment.

The Applicants have contended that all the Plaintiffs came to court seeking specific performance of a sale agreement and acquisition of the suit land through adverse possession in HCCC No. 2587 of 1994. They contend that the said suit was dismissed on 14th July 2000 and that an appeal preferred in Civil Appeal No. 315 of 2000 was dismissed by the Court of Appeal on 18th September 2001. According to the Applicants, the Plaintiffs have now filed fresh suits which have since been consolidated, seeking specific performance and acquisition of the suit property through adverse possession.

The Plaintiffs in the various consolidated suits resisted the contention that the consolidated suits were *res judicata* and sought to demonstrate that the parties in HCCC No. 2587 of 1994 were different from the parties in the consolidated suits. In addition, the Plaintiffs argued that the issue of adverse possession was not substantially in issue in HCCC No. 2587 of 1994 and further, that adverse possession was not decided upon for reasons that the issue had been brought by way of a Plaint as opposed to an originating summons.

I have perused the pleadings filed in the consolidated suits and note that the Plaintiffs therein are either Lucky Summer Estate Ltd, who was a Plaintiff in HCCC No. 2587 of 1994 or shareholders of the Lucky Summer Estate Ltd. The common Defendant in all the suits is Kariuki Gateca & Resources and additional Defendants are agents of the said Defendant. The Plaintiffs all claim to have bought the suit properties from the said Defendant and/or acquired them by adverse possession. It is therefore the case that the parties in the consolidated suits are privy to the parties in HCCC No. 2587 of 1994, as they are representing the same interests. In addition, the issue and subject matter in the consolidated suit and previous suit is the same, being ownership of the property known as LR No. 31 Ruaraka/Nairobi and various subdivisions thereof.

I have also perused the ruling delivered by the O’Kubasu J.A in HCCC No. 2587 of 1994 on 14th July 2000. The Honourable Judge framed the issue raised by the Preliminary Objection that was the subject of the ruling as follows:

“The issue raised by the preliminary objection is the effect of the Limitation of Actions Act and Land Control Act on the respective agreements between each plaintiff and the defendant”

The Judge made definitive findings with respect to this issue that the Plaintiffs’ suit was out of time and could not be maintained, and that the subject property being agricultural land and since at the time the suit was instituted in 1994 there was no consent of the relevant land control board to the sale transaction nor exemption granted by the President under section 24 of the Land Control Act, the said transaction was null and void.

However, the Judge specifically noted in the said ruling that the Plaintiffs were not without a remedy, and could rely on their claim for adverse possession. The Judge’s finding on this claim was that since it had been brought by way of a Plaint and not an Originating Summons as required under the then Order XXXVI Rule 3D(1)(now Order 37 Rule 7) of the Civil Procedure Act, it could not be entertained in that suit. It therefore follows that the claim for adverse possession was not heard on merit, neither was it finally decided by the court in the ruling delivered on 14th July 2000 in HCCC No. 2587 of 1994.

This Court is guided in this regard by the decision in the case of **Anaj Warehousing Ltd vs. National Bank of Kenya Ltd and Another (2006) eKLR** the court stated as follows in this regard:

“A matter is res judicata when it has been heard and finally decided. And a matter is heard and finally decided when the court which heard it has exercised its judicial mind on the matter in controversy after it has heard arguments, considered it and come to a decision on it.”

The Court of Appeal has also stated in the case of **Wanguhu vs. Kania (1987) KLR 51** that a matter is not *res judicata* if it was not decided upon its merit. Likewise, the Court of Appeal in the case of **Kibogy vs. Chemweno (1981) KLR 35** stated as follows in respect to the doctrine of *res judicata*:

“True the matter directly and substantially in issue before Mead J had been directly and substantially in issue before Platt J between the same parties but it was still an open issue, it was not res judicata not having been finally decided by the court which is a condition precedent to res judicata as required in Section 7 of the Civil Procedure Act”.

It is therefore the finding of this Court that the Court in HCCC No. 2587 of 1994 did not exercise its judicial mind or give a final judgment on the issue of adverse possession which was dismissed on a

procedural technicality. It is therefore still an open issue and therefore not *res judicata*.

The present suit as consolidated with HC Misc. Suit No. 76 of 2012(OS), HC ELC No. 2292 of 2007, HCCC No. 1298 of 2006 is therefore not *res judicata* on the issue of adverse possession, which is the main claim in the said consolidated suits. The Notice of Motion dated 7th May 2013 brought by the 5th, 6th and 7th Defendants in HC Misc. Suit No. 76 of 2012 (OS) therefore fails for this reason and the prayers sought therein are denied. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___18th___ day of ___February___, 2015.

P. NYAMWEYA

JUDGE