REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.5 OF 2013

WILSON AMUGE LAGAT…….…….....PLAINTIFF

VERSUS

KIPRONO KATTEBEREWO & 4 OTHERS…….DEFENDANTS

RULING

(Application to dismiss suit summarily as being frivoulous and vexatious; plaintiff having filed previous suit over same subject matter; allegation in this case that the previous judgment is now stale; evidence showing that judgment has already been executed; suit clearly res judicata; application allowed; suit dismissed with costs)

1. The application before me is that dated 6 May 2013 filed by the 1st to 4th defendants seeking orders to have this suit struck out for want of a cause of action and for aggravated costs of the suit to be awarded to them. It is their view that this suit is scandalous, frivolous and vexatious and a total abuse of the process of court. It is further their view that the suit is res judicata. The application has been brought under the provisions of Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the affidavit of Toroitich Kapteberewo, the 3rd defendant. The application is opposed by the plaintiff who has filed a Replying Affidavit and Grounds of Opposition.

2. The gist of the application is that the suit herein is liable to be struck out summarily. It is inevitable therefore that I start with an assessment of the suit as filed.

3. This suit was commenced by way of plaint filed on 10 January 2013. In the plaint is pleaded that sometimes in the 1960s, one Kapteberewo Koibos, the father to the 1st-4th defendants, was allocated by the Settlement Fund Trustees (SFT), the 5th defendant, a land that was Plot No. 614 Parkerra 101 Scheme. It is pleaded that Kapteberewo Koibos rejected this land and the SFT then allocated it to the plaintiff. The land was then renamed as Baringo/Perkerra 101/78 (the suit land) . It is pleaded that in the year 1990, the 1st-4th defendants trespassed into the said property which prompted the plaintiff to file the suit Nakuru HCCC No. 764 of 1990. The defendants filed a counterclaim for the same land. In a judgment delivered on 31st January 1995, the plaintiff's case was dismissed and the counterclaim allowed. The plaintiff lodged an appeal to the Court of Appeal which appeal was dismissed on 27 September 1996. It is pleaded that despite having obtained judgment, and the court holding that the land should be registered in the names of the 1st-4th defendants, they never moved to execute the said judgment and it is the plaintiff's position therefore, that the judgment is stale and unenforceable by reason of the provisions of Section 4 (4) of the Limitation of Actions Act, CAP 22, Laws of Kenya. It is further pleaded that in the year 1996, the plaintiff filed suit against the SFT seeking to be compensated with similar land or payment of damages equivalent to its value. It is averred that judgment was obtained, but

could not be implemented, since the SFT maintained that it had no more land to give and that it recognized the plaintiff as the legitimate purchaser of the suit land. It is contended that the 1st-4th defendants or their father, never paid for the suit land.

4. In the suit, the plaintiff has asked for the following orders:-

(a) A declaration that the judgments delivered in Nakuru HCCC No. 164 of 1990 on 31st January 1995 and Nakuru Court of Appeal No. 96 of 1995 delivered on 27th September 1996 are time barred and unforceable under the provisions of Section 4(4) of the Limitation of Actions Act, CAP 22.

(b) A declaration that the plaintiff is at liberty to apply to the 5th defendant to be allocated the land parcel Baringo/Perkerra 101/178 since the same is still registered in its name.

(c) Any other relief the court may deem fit to grant.

(d) Costs and interests thereon.

5. The 1st-4th defendants entered appearance and filed defence through the law firm of N. Kinyanjui & Company Advocates. They averred inter alia that this suit is res judicata owing to the decisions in Nakuru HCCC No. 164 of 1990 and Nakuru Court of Appeal Civil Appeal No. 96 of 1995. It is pleaded that upon conclusion of the said cases, the father of the 1st-4th defendants, applied for and obtained title deed to the suit land which was issued on 16 October 1996. It is denied that they have failed to pursue the fruits of their judgment. It is further pleaded that Kapteberewo Koibos, later applied to sub-divide the suit land among his sons and interested parties and obtained Land Board Consent to sub-divide and later transfer the parcels Baringo/Perkerra-101/964-705, and that between the years 1999 and 2000, the beneficiaries of these parcels fully processed their titles. It is averred that the plaintiff has continuously interfered with their process of registration and that the records to the 12 sub-divisions have disappeared from the Lands Registry.

6. In the supporting affidavit to this application, there are annexed copies of plaint and defence to the suit Nakuru HCCC No. 164 of 1990; the judgment of 31 January 1995; Judgment in Nakuru Civil Appeal No. 96 of 1995; title deed to the suit land; mutation form; title deeds to the land parcels Baringo/Perkerra-101/698,699,701,703 and 705; and some correspondences exchanged with the Baringo Land Registrar.

The Grounds of Opposition filed by the law firm of M/s Kiplenge & Kurgat on behalf of the plaintiff state that the application is merely intended to delay and prolong the prosecution of this suit; that the plaintiff has reasonably good prospects of success and his claim is not a sham; that there is no proof that the plaintiff is unable to pay costs of this suit in the event that he does not succeed; that there has not been presented a tabulation of costs over which security is claimed; that the application is scandalous, frivolous and vexatious and only meant to defeat the ends of justice.

7. In the Replying Affidavit, the plaintiff has admitted having filed the previous suits. He has averred that he obtained judgment against the SFT for alternative land and since the SFT has claimed that it does not have more land to give, it recognizes him as the legitimate owner of the suit land to date. He has stated that his claim emanates from the indolence and none enforcement of the judgment. He has denied that the suit land has been transferred into the names of the 1st-4th defendants or that it has been sub-divided. It is claimed that the land is still in the name of the SFT. He has stated that he has learnt that the 1st-4th defendants have acquired fraudulent title deeds and that he intends to amend the plaint. It is his view that the 1st-4th defendants have slept over their rights. He has also denied interfering with the land records in the Baringo Land Registry. He is of the firm opinion that he has a valid claim that warrants a full hearing.

8. Mrs. Kinyanjui for the applicant submitted that the suit herein is res judicata. She also submitted that there is proof of execution of the previous judgments as fresh titles over the suit land have been issued. She relied on three authorities to support her position. These are the cases of *Kingsway Tyres & Automart Ltd vs Alson Retreading Company Limited & 3 Others, High Court at Milimani, Civil Case No. 151 of 2002 (2002) eKLR*; *Charles Mwangi Ringuru v Nancy Wangari Mathenge, High Court at Nyeri, Civil*

Case No. 136 of 2011 (2014) eKLR; and *Peter Chepkochoi Mitei vs Esther Jelagat Ngeny, Eldoret E&L No. 193 of 2013 (2014) eKLR.*

Mr. Mbaka for the SFT did not oppose the application.

9. The view of counsel for the plaintiff, Mr. Cheruiyot, was that the matter deserves a full hearing on merit as issues of fraud and missing land files need to be canvassed. He relied on the cases of *DT Dobie v Muchina (1982) KLR 1*; *Anaj Warehousing Ltd v National Bank of Kenya & Another (2006) eKLR*; *Kenya Union of Teachers (Nakuru Branch) v Kihiko & 2 Others (2004) eKLR*; and *Wambugu v Njuguna (1983) KLR 172*.

10. I have considered the application, the pleadings, and the submissions of counsel alongside the authorities relied on. It will be seen that this application seeks to have this suit summarily dismissed. Summary dismissal of a case is a drastic tool that ought to be used in the clearest of cases. This was affirmed in the case of ***DT Dobie & Co vs Muchina (1982) KLR 1*** where the Court of Appeal stated as follows :-

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

11. The core complaint of the 1st-4th defendants is that the suit is res judicata, the matters herein having been previously resolved in the case Nakuru HCCC No. 164 of 1990 and Nakuru Civil Appeal No. 96 of 1995. I have looked at the pleadings and judgments in these two cases. In the said suits, the plaintiff herein had sued the same first four defendants in this case. He wanted them permanently restrained from the land parcel Baringo/Perkerra-101/178. The defendants in the suit counterclaimed and asked for the land to be registered in their names or that of their father, Kapteberewo Koibos. The plaintiff's suit was dismissed and the counterclaim allowed. The court (Rimita J) ordered that the name of the plaintiff be cancelled and that the name of one of the defendants be registered in place thereof in trust for the others. This judgment was read on 31 January 1995. The plaintiff preferred an appeal, Nakuru Civil Appeal No. 96 of 1995. The appeal was found to be without merit and was dismissed on 27 September 1996.

12. I have seen the copy of title deed and official search in respect of the suit land, annexed by the applicants in support of this application. The same show that Kapteberewo Koibos, became registered as proprietor of the suit land on 16 October 1996. This must have been pursuant to the judgment that was issued in favour of the 1st -4th defendants, for before that, the plaintiff had been the registered proprietor. There is evidence that the said land was later sub-divided into the land parcels Baringo/Perkerra-101/ 694 - 705.

13. I have no doubt in my mind that the issue of who between the plaintiff and the 1st-4th defendants is entitled to the suit land was settled in the previous suit. The plaintiff cannot now attempt to re-litigate the matter. This is barred by Section 7 of the Civil Procedure Act, CAP 21, which embodies the res judicata principle. It provides as follows:-

> *S. 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.*

14. It is as clear as day that the claim between the plaintiff and the defendants over the ownership of the suit land is an issue that has been resolved. I do not see how the plaintiff can try to seek refuge by arguing that the SFT stated that they have no more land to give and that they recognize him as owner. That is neither here nor there. Whether or not SFT recognize the plaintiff as the owner of the suit land is

immaterial as the Court has already held that the land ought to be owned by the 1st-4th defendants.

15. I take note that one of the issues raised by the plaintiff is that the defendants have failed to execute the judgment in the previous suits and is therefore barred by Section 4(4) of the Limitation of Actions Act. That provision states as follows :-

> *Section 4(4) : An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.*

16. The case herein is not an action by the 1st-4th defendants to enforce the judgment that was given in their favour in the previous suits. I do not see how Section 4(4) above can assist the plaintiff. Even if it were to apply, I have seen for myself that the 1st-4th defendants have already executed the judgment in Nakuru HCCC No. 164 of 1990 and Nakuru Civil Appeal No. 96 of 1995. The title deed to the suit land is already in their names. They have even sub-divided it and new titles to the sub-divided portions have been issued. There is nothing left to execute in the said judgments.

17. I have seen a proposal to amend the plaint. I have looked at what the plaintiff wishes to add to his pleadings. He wants to add that the titles of the 1st-4th defendant were procured fraudulently and the sub-division is fraudulent. How can this be fraudulent if the 1st-4th defendants got title through a court order ? I cannot see how the proposed amendment will assist the plaintiff.

There are of course allegations that the plaintiff has tried to interfere with the titles. I have seen the various correspondences whereby the plaintiff has sought to interfere with the issuance of titles to the 1st -4th defendants. My advice to the plaintiff is that he should stop any interference.

18. Mr. Cheruiyot tried to argue that the plaintiff deserves a hearing. My short reply to that is that the plaintiff has already been heard in a court of law on his complaint that he deserves title to the suit land. It has already been decided that he is not entitled to the suit land. He should forever hold his peace and allow those who have been declared the rightful proprietors to enjoy the fruits of their judgment. This court is not going to allow him to abuse the court process to vex others.

19. The upshot of the foregoing is that I find the plaintiff's suit to be frivolous, vexatious, scandalous, and/or an abuse of the process of court. I allow this application and hereby dismiss the plaintiff's suit with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of March 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU

In presence of:-

Mrs N Kinyanjui for the 1st - 4th defendants/applicants.

Mr Morintat or the plaintiff/respondent

Mr Mbaka of the State Law office for 5th defendant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU