



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CIVIL SUIT NO. 386 OF 2014**

**ELIZABETH OSEWE Suing On Behalf Of the Estate Of**

**MISHACK ENGWESO OMOLO).....PLAINTIFF  
VERSUS**

**ANDRONICO OTIENO ANINDO.....1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**RULING**

What I have before me is the 1<sup>st</sup> defendant's application by way of Notice of Motion dated 3<sup>rd</sup> November 2014 seeking an order that this suit be struck out and dismissed with costs. The application was supported by the affidavit sworn by the 1<sup>st</sup> defendant on 3<sup>rd</sup> November 2014 in which he stated that sometimes in 1991, he filed a suit against Meshack Ingweso Omulo and Teresa Anyango Omulo, both now deceased (hereinafter referred to as "**the deceased**"), namely, Kisii HCCC No. 91 of 1991(hereinafter referred to as "**the previous suit**") in respect of all that parcel of land known as LR No. South Sakwa/Waware/34(hereinafter referred to as "**Plot No.34**"). He stated that the previous suit was heard and determined through a judgement that was delivered on 24<sup>th</sup> September 1991. In the said judgement, the defendants in the said suit (the deceased) were ordered sub-divide Plot No.34 and transfer a portion thereof measuring 2 acres to him. He annexed to his affidavit as exhibit a copy of the decree dated 24<sup>th</sup> September 1991 that was extracted from the said judgement.

The 1<sup>st</sup> defendant stated that the defendants in the previous suit (the deceased) failed to comply with the terms of the decree aforesaid necessitating his application to the deputy registrar of the court to execute the mutation form and instrument of transfer to facilitate the subdivision of Plot No.34 and the transfer of a portion thereof measuring 2 acres to him in accordance with the judgment of the court. Plot No.34 was thereafter sub-divided into two portions namely, LR Nos. South Sakwa/ Waware/1016 and 1017. LR No. South Sakwa/ Waware/ 1017 (hereinafter referred to as the "**suit property**") was transferred and registered in his name. He exhibited as annexures to his affidavit; a copy of the title deed in respect of the suit property dated 12<sup>th</sup> September 2002 and a copy of a certificate of official search on the register of the suit property dated 25<sup>th</sup> August 2008 both showing that the suit property is registered in his name.

The 1<sup>st</sup> defendant contended that the creation, transfer and registration of the suit property in his name resulted from a lawful and legitimate decree of the court that has neither been reviewed nor appealed against. The 1<sup>st</sup> defendant contended that in the circumstances, the plaintiff's claim that he acquired the suit property fraudulently is far-fetched. He contended that the transfer and registration of the suit property in his name could only be challenged through an appeal against the decree that was issued in the previous suit aforesaid on 24<sup>th</sup> September 1991 in the absence of which, any challenge to the legality and

validity of his title to the suit property would be misconceived.

The 1<sup>st</sup> defendant stated that on 25<sup>th</sup> July 2008, the sons of the deceased trespassed upon the suit property prompting him to file another suit at the High Court at Kisii, namely, Kisii HCCC No. 106 of 2008 against them in respect of which suit, judgement was also made in his favour on 30<sup>th</sup> September 2011. The 1<sup>st</sup> defendant contended that the plaintiff herein and the defendants in Kisii HCCC No. 106 of 2008 aforesaid are related to the deceased and that they derive their claim from the estate of the deceased.

The 1<sup>st</sup> defendant contended that the plaintiff cannot raise for determination by this court the same issues which were raised by the defendants (the deceased) in Kisii HCCC No. 91 of 1991 which were conclusively determined by a court of competent jurisdiction. The 1<sup>st</sup> defendant contended that to the extent that the issues which are in dispute herein have been determined in a previous suit by a court of competent jurisdiction, the suit herein is *res judicata* and an abuse of the court process. The 1<sup>st</sup> defendant has contended further that the suit property having come into existence in the year 2002, any challenge to its title founded on fraud should have been raised within 3 years from the year 2002. The plaintiff's suit herein which was filed in the year 2014 is therefore time barred.

The 1<sup>st</sup> defendant contended further that the original parcel of land namely, Plot No. 34 which was subdivided to give rise to the suit property did not belong to the plaintiff herein and for that reason, the plaintiff has no personal interest of whatsoever nature on the suit property. The 1<sup>st</sup> defendant contended further that the plaintiff has not exhibited a copy of the grant of letters of administration in respect of the estate of the deceased on behalf of whose estate this suit has been brought and as such, she has no *locus standi* to commence or maintain the present suit. The 1<sup>st</sup> defendant contended that no amendment can cure or remedy the defects or lapses evident in the instant suit and as such the same is a proper candidate for summary dismissal.

The plaintiff opposed defendant's application through a replying affidavit sworn on 5<sup>th</sup> January 2015. The plaintiff deposed that she obtained grant of letters of administration *ad litem* in respect of the estate of Mishack Engweso Omolo on 7<sup>th</sup> August, 2014 a copy of which she annexed to her affidavit as exhibit. With regard to the previous suits, the plaintiff contended that in HCCC No. 106 of 2008, her sons who had brought the same had failed to explain to the court what had transpired in HCCC No. 91 of 1991. She contended that she would be able to explain her case exhaustively if given a chance.

On the issue of limitation of action, the plaintiff contended that the set back is cured by Article 159 of the Constitution of Kenya. She contended that even HCC No. 106 of 2008 was time barred and got a reprieve through the same article of the Constitution. The plaintiff denied that this suit is *res judicata*. She contended that she never participated in HCCC No. 91 of 1991 and HCC No. 106 of 2008. She contended that this is a fresh case which she has brought independently as of right in exercise of her right to sue guaranteed under the Constitution.

The plaintiff contended that the 1<sup>st</sup> defendant was given a piece of land measuring one acre by the plaintiff's late husband, Mishack Engweso Omolo as a gift but when they went to the Land Control Board for consent, the 1<sup>st</sup> defendant insisted that he was entitled to land measuring 2 acres. This is what gave rise Kisii HCCC No. 91 of 1991. The plaintiff contended that an appeal lodged against the judgement in HCCC No. 91 of 1991 abated following the death of her said husband. The plaintiff contended that she should be given opportunity to ventilate her grievances against the sub-division of Plot No. 34 into land parcel Nos. 1016 and 1017.

When the application came up for hearing on 17<sup>th</sup> June 2015, Mr. Oguttu advocate appeared for the 1<sup>st</sup> defendant while Mr. Agure Odero advocate appeared for the plaintiff. On the issue of *res judicata*, Mr. Oguttu submitted that the plaintiff is the widow of Mishack Engweso Omolo (deceased) and that the plaintiff brought this suit in her capacity as a legal representative of the estate her said deceased husband. Counsel submitted that this suit has been brought to challenge the subdivision of Plot No.34 and the transfer of a portion thereof namely, the suit property to the 1<sup>st</sup> defendant. Counsel submitted that the

issue regarding the subdivision of Plot No. 34 and the transfer of the suit property to the 1<sup>st</sup> defendant was the subject of Kisii HCCC No. 91 of 1991, Kisii HCC No. 106 of 2008 and CA No. 248 of 2011.

Counsel submitted that the parties who participated in the aforementioned suits were related to the plaintiff. Kisii HCCC No. 91 of 1991 was brought by the defendant against the plaintiff's said deceased husband while the plaintiff's sons were defendants in Kisii ELC No. 106 of 2008. The plaintiff's said sons were also parties to CA No. 248 of 2011. The 1<sup>st</sup> defendant's said advocate argued that the suit property was created pursuant to a decree of the court which decree the plaintiff herein is trying to challenge through the back door. Counsel submitted that the said decree could only be challenged through an appeal process.

Mr. Oguttu submitted further that since the suit property was created in execution of a court decree, any person who was aggrieved in the process should have moved the court through an application under section 34 of the Civil Procedure Act and not by way of a fresh suit. Counsel submitted that this court has no jurisdiction to entertain this suit to the extent that it has been brought to challenge the process of execution.

Counsel argued further that the plaintiff's claim which is based on the tort of fraud is time barred in that the same should have been brought within 3 years from the date when the alleged fraud was committed on 12<sup>th</sup> September, 2002 by the creation of the suit property and registration of the same in the name of the 1<sup>st</sup> defendant. The instant suit which was filed on 7<sup>th</sup> August 2014, was brought 12 years out of time. The 1<sup>st</sup> defendant submitted that, in any event, fraud could not arise in the execution of a lawful court order.

In response to the 1<sup>st</sup> defendant's submissions, the plaintiff's advocate, Mr. Agure Odero submitted that this suit was filed after the promulgation of the Constitution of Kenya 2010 and that Article 159(2)(d) enjoins this court to dispense justice without undue regard to procedural technicalities. Counsel also made reference to Article 50(1) of the Constitution and submitted that the plaintiff has a right to have her dispute with the defendants resolved by the court. He denied the 1<sup>st</sup> defendant's contention that this suit is *res judicata*.

Counsel submitted that the plaintiff was not a party to and did not participate in the previous suits which have been cited by the 1<sup>st</sup> defendant in support of his *res judicata* plea. Counsel submitted that the plaintiff has raised issues which should be determined by the court and urged the court to give the plaintiff an opportunity to have her day in court. Counsel submitted that the plaintiff is seeking the reversal of the subdivision of Plot No. 34. He reiterated that the 1<sup>st</sup> defendant was only entitled to one acre of the said parcel of land. On the issue of limitation, counsel submitted once again that the same is a technical procedural issue which is curable by Article 159 of the Constitution. Counsel urged the court not to condemn the plaintiff unheard.

In response to the plaintiff's submissions, the 1<sup>st</sup> defendant's advocate submitted that since the plaintiff has brought this suit on behalf of her deceased husband who was party to Kisii HCCC No. 91 of 1991, she is bound by the decision that was made in that suit. Counsel submitted further that there is no way that this court can reverse the subdivision of Plot No. 34 which was carried out in execution of a decree by a court of concurrent jurisdiction.

What is before me is an application to strike out a suit. The principles that apply to applications of this nature are now settled. In the case of, **D.T. Dobie & Company (K) Ltd. vs. Muchina [1982]KLR 1**, Madan JA. 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 it is so weak as to be beyond redemption and incurable by amendment.**" In the case of, **Murri vs. Murri and another [1991] E.A 209(CAK)**, it was held that summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable. In the case of, **J.P. Machira vs. Wangethi Mwangi & Another, Court of Appeal, Civil Appeal No. 179 of 1997(unreported)**, Omolo JA, stated as follows on the court's power

to strike pleadings; “**I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company(Kenya) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.**”

What I need to determine is whether this is an appropriate case in which I should exercise this court’s power to strike out a pleading. The 1<sup>st</sup> defendant has contended that this suit is *res judicata* and as such an abuse of the process of the court. The 1<sup>st</sup> defendant has contended that the issues raised by the plaintiff herein were substantially in issue in two previous cases namely, Kisii HCCC No. 91 of 1991 and HCCC 106 of 2008 and were determined conclusively. From the material on record, the following is what I make of the above mentioned cases:-

- i. In **HCCC No. 91 of 1991**, Andronico Otieno Anindo (the 1<sup>st</sup> defendant herein) sued Teresa Anyango Omulo and Misak Nyangweso Omulo as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively seeking an order that 2 acres be excised from Plot No.34 and awarded to him. The plaintiff also sought, a permanent injunction restraining the defendants, their agents, workers and family members from interfering with the plaintiff’s quiet enjoyment of the said 2 acres of land. Judgement was entered in favour of the plaintiff.
- ii. In the **Kisii HCCC No. 106 of 2008**, Andronico Otieno Anindo(the 1<sup>st</sup> defendant herein) sued Moses Odero Owuor, Lazaro Otieno Owuor and Walter Ogara Owuor seeking among others, a declaration that he was the registered and lawful owner of LR South Sakwa/Waware/1017 (“the suit property”) and a permanent injunction restraining the defendants from trespassing on the said parcel of land. Judgement was delivered in this matter in favour of the plaintiff on 30<sup>th</sup> September 2011.

In the present suit, the plaintiff has sought the following reliefs:-

- i. An order nullifying LR No. South Sakwa/Waware/1016 and LR No. South Sakwa/Waware/1017, consolidation of the said parcels of land to form the original LR No. South Sakwa/Waware/34 (Plot No.34), excision of a portion measuring 1 acre from LR No. South Sakwa/Waware/34 (Plot No.34) and the transfer thereof to the 1<sup>st</sup> defendant and the remainder to the plaintiff.
- ii. Costs of the suit
- iii. Any other costs as the court may deem fit.

It is not in dispute that the plaintiff herein is related to the persons who were defendants in Kisii **HCCC No. 91 of 1991** and Kisii **Kisii HCCC No. 106 of 2008**. Among the defendants in Kisii **HCCC No. 91 of 1991** was Mishak Engweso Omulo , deceased who was the plaintiff’s husband and on behalf of whose estate the plaintiff has brought this suit. On the other hand, the defendants in **Kisii HCCC No. 106 of 2008** were the plaintiff’s children. The issue that was central in the two cases was the ownership of Plot No.34 and the two subdivisions thereof namely LR No. South Sakwa/Waware/1016 and LR No. South Sakwa/Waware/1017 (“**Plot No.1016 and Plot No.1017**”). The two cases were heard and determined by the High Court which was competent to hear the same at the material time. As I have stated earlier in this ruling, in Kisii HCCC No. 91 of 1991 the court made a finding that the 1<sup>st</sup> defendant herein was entitled to a portion measuring 2 acres of Plot No.34 and ordered that Plot No.34 be sub-divided and the said portion thereof measuring 2 acres transferred to the 1<sup>st</sup> defendant. It is in execution of the said judgment that Plot No.34 was sub-divided and a portion thereof namely, Plot No.1017 (the suit property) which measures 2 acres was transferred to the 1<sup>st</sup> defendant. **Kisii HCCC No. 106 of 2008** was filed by the 1<sup>st</sup>

defendant against the plaintiff's sons to restrain them from trespassing on Plot No. 1017 that was created and registered in the name of the 1<sup>st</sup> defendant pursuant to the judgment of the court aforesaid. Again, the court made a finding that the 1<sup>st</sup> defendant is the lawful owner of Plot No.1017 and restrained the plaintiff's sons who claimed title to the same through their deceased father from trespassing thereon. Looking at the reliefs sought herein by the plaintiff, I am of the view that the plaintiff is trying to review and set aside the orders that were issued in HCCC No. 91 of 1991 through which Plot No. 34 was subdivided and a portion thereof registered in the name of the 1<sup>st</sup> defendant. In her plaint, the plaintiff has contended that the 1<sup>st</sup> defendant did not prove that Mishack Engweso Omulo and Teresa Anyango Omulo sold to him a portion of land measuring 2 acres out of Plot No. 34. The plaintiff contended that the 1<sup>st</sup> defendant is entitled only to 1 acre of the said parcel of land. I am in agreement with the submission by the 1<sup>st</sup> defendant that these issues had been raised in HCCC No. 91 of 1991 and conclusively determined. The plaintiff is bound by the said determination. Mishak Engweso Omulo on behalf of whose estate the plaintiff brought this suit was a party to the said HCCC No. 91 of 1991 and was bound by the court's finding that the 1<sup>st</sup> defendant was entitled to a portion measuring 2 acres of Plot No.34. The plaintiff who is the administrator of the estate of the deceased cannot be allowed re-litigate the same issue again. As rightly submitted by the 1<sup>st</sup> defendant, the only option that was open to Mishak Engweso Omulo, deceased and the plaintiff herein who is his legal representative was to appeal against the decision of the court in Kisii HCCC No. 91 of 1991. The issue being raised by the plaintiff that the 1<sup>st</sup> defendant was entitled only to a portion of Plot No. 34 measuring 1 acre is not new. The same should have been raised in HCCC No. 91 of 1991 rather than through a new suit. Explanation 4 of section 7 of the Civil Procedure Act states as follows in this regard:-

**"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit"**

In the Court of Appeal case of, **Uhuru Highway Development Limited vs. Central Bank of Kenya & others CA No. 36 of 1996(unreported)**, the court stated as follows;

**"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time"**

I am satisfied that this suit in which the plaintiff is challenging the subdivision of Plot No. 34 and the transfer of a portion thereof to the 1<sup>st</sup> defendant is *res judicata*. The issues raised herein had been determined by a court of concurrent jurisdiction and can only be challenged by way of an appeal or review. The plaintiff has contended that she was not party to Kisii HCCC No. 91 of 1991 and 106 of 2008. Under section 7 of the Civil Procedure Act, the doctrine of *res judicata* not only applies to subsequent suits between the same parties but also between parties under whom they claim. Being the legal representative of the estate of Mishack Engweso Omulo who was party to Kisii HCCC No. 91 of 1991, the plaintiff cannot escape from the grip of the doctrine of *res judicata*. A suit which is *res judicata* is no doubt a frivolous and vexatious suit which doubles up also as an abuse of the process of the court. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, a pleading or an action is said to be frivolous when it is without substance or unarguable such as those suits which are put forward to waste the court's time and those which cannot possibly succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. An action which is an abuse of the process of the court is defined in the said book as one which is absolutely groundless. This suit fits squarely the foregoing description of a frivolous and vexatious suit which is also an abuse of the process of the court. The plaintiff herein has raised for determination issues that had been raised in previous suits between the representatives of the parties and had been determined conclusively by courts of competent jurisdiction. The suit is absolutely groundless and is bound to cause the 1<sup>st</sup> defendant unnecessary anxiety and expense. No amount of amendment can inject life into this suit. The court must strike it out for the ends of justice to be served.

The upshot of the foregoing is that the 1<sup>st</sup> defendant's application dated 3<sup>rd</sup> November 2014 has merit. The same is allowed as prayed. The 1<sup>st</sup> defendant shall have the costs of the application and that of the entire suit.

**Signed at Nairobi this .....day of November, 2015**

**S. OKONG'O**

**JUDGE**

**Delivered and Dated at Kisii this 4<sup>th</sup> day of December 2015**

**J. M. MUTUNGI**

**JUDGE**

**In presence of**

.....for Plaintiff

.....for Defendants