



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 263 OF 2013**

**JOHN MICHAEL WANJAO.....PLAINTIFF**

**VS**

**GEORGE KIMETTO & 2 OTHERS.....DEFENDANTS**

***(Application that suit is res judicata; principles to be applied; plaintiff alleging to have entered into an oral contract for sale of land; land transferred to stated purchaser; plaintiff having filed previous suit seeking to enforce the contract; suit dismissed as verbal contract for disposition of land unenforceable; plaintiff filing second suit alleging fraud; plaintiff suing original defendant and two other parties; whether second suit res judicata; suit declared to be res judicata; suit dismissed with costs)***

**RULING**

Through an application dated 7 August 2013, the 2nd defendant has sought to have the suit against him dismissed for being *res judicata*. The grounds upon which the application is based are that the suit is grounded on a disposition of land but that there is no written agreement and therefore nothing to enforce pursuant to the provisions of the Law of Contract Act. It is also averred that there had been a similar suit namely Eldoret HCCC No. 134 of 2008 in which the issues in this suit were directly and substantially in issue. It is averred that this suit is therefore an abuse of the court process. The application is supported by the affidavit of the 2nd defendant and is opposed by the plaintiff.

The issue in this application is whether this suit is *res judicata* and I inevitably need to assess the plaint herein with the plaint in the suit Eldoret HCCC No. 134 of 2008, which is named as the previous suit.

In this suit, the plaintiff has sued three parties as defendants. It is pleaded that the plaintiff was the registered proprietor of the land parcel parcel Eldoret Municipality Block 9/2749. It is averred that the 1st defendant introduced the 2nd defendant as a potential buyer to the suit land but that it turned out that the plaintiff was well known to the 1st defendant. It is claimed that on 18 June 2008, the 1st defendant collected the original title together with duly signed transfer forms so that the 2nd defendant could show the same to his bank manager to secure financing. However on 20 June 2008, the 1st defendant came to the plaintiff and informed him that there are new developments and that the 1st defendant will be the one to pay the purchase price and not the 2nd defendant. The plaintiff refused to accept this arrangement. On 16 July 2008, he went to do a search on the property and found that the property had been transferred to the 2nd defendant without his knowledge. It is pleaded that the plaintiff then placed a restriction and filed the suit Eldoret HCCC No. 134 of 2008 which was struck off in the year 2012. It is claimed that the acts of the 1st and 2nd defendants were illegal and fraudulent and various particulars of fraud and illegality are spelt out. Inter alia, it is claimed that the 1st and 2nd defendants connived to illegally and fraudulently deprive the plaintiff of the suit land and that the transfer was effected without the relevant consents. The prayers sought in the plaint are as follows :-

*(a) A declaration that the purported sale of L.R No. Eldoret Municipality Block 9/2749 and transfer to the 2nd defendant on 20/06/2008 was/is fraudulent, illegal and vitiated by the law.*

*(b) An order do issue for the cancellation of the title of L.R No. Eldoret Municipality Block 9/279 and rectification of the register at the land registry be effected to reflect the plaintiff as owner thereof.*

*(c) A permanent injunction to restrain the 2nd and 3rd defendants, jointly and severally, either by themselves, their agents and or servants from transferring, charging or in any way encumbering L.R No. Eldoret Municipality Block 9/2749.*

*(d) Punitive damages and mesne profits.*

*(e) Costs of the suit.*

*(f) Any other relief this court may deem fit and just to grant.*

The 2nd defendant in his supporting affidavit to this application, annexed the plaint, defence and a ruling that struck off the suit Eldoret HCCC No. 134 of 2008. I have looked at that plaint. The plaintiff is the same as the plaintiff herein but there is only one defendant, who is the 2nd defendant herein. In the said plaint, it was pleaded that the plaintiff was the registered owner of the land parcel Eldoret Municipality Block 9/2749. It is further pleaded that on 18 June 2008 or thereabouts, the plaintiff and the defendant entered into an oral and/or verbal agreement whereby it was agreed that the plaintiff would sell and the defendant would buy the suit land at an agreed consideration of Kshs. 260,000/=. It was pleaded that pursuant to that agreement, the plaintiff handed to the defendant the original lease and signed the transfer forms to enable the defendant effect transfer. It was claimed that the plaintiff had refused to pay the purchase price . The prayers in that suit were for :-

*(a) A permanent injunction restraining the defendant, his servants,agents and/or assigns from transferring, alienating and/or in any other manner interfering with L.R No. Eldoret Municipality Block 9/2749.*

*(b) A declaration that the foresaid parcel of land belongs to the plaintiff and the original lease certificate issued in the defendant's names be cancelled or nullified or in the alternative immediate payment of the purchase price of Kshs. 260,000/=.*

*(c) Damages for breach of contract.*

*(d) Costs of the suit.*

*(e) Any other relief this Honorable Court may deem fit and just to grant.*

The defendant in the said suit filed defence and later filed an application to have that suit dismissed. The basis of his application for dismissal was that the plaintiff's suit was attempting to enforce a contract for the disposition of land yet Section 3(3) of the Law of Contract Act, (CAP 23), barred suits seeking to enforce an oral contract for the disposition of land. The application was duly considered and through a ruling delivered on 16 November 2011, the court (Azangalala J, as he then was), agreed with the arguments of the defendant and proceeded to strike out the suit with costs. As far as the judge was concerned, there was nothing to go for trial since the plaintiff's contract with the defendant was unenforceable, for the reason that their agreement was not in writing, as demanded by Section 3(3) of the Law of Contract Act.

In his supporting affidavit, the 2nd defendant has averred that the issues in the present suit were directly and substantially in issue in the former suit and that the same have been determined.

In the replying affidavit of the plaintiff, the plaintiff has contended that this suit is not *res judicata* as the suit Eldoret HCCC No. 134 of 2008 was not heard and determined on its merits. He has also contended

that the former suit was based on contract but the present case is based on fraud.

Mr. E.M. Momanyi, learned counsel for the plaintiff in his submissions, first pointed out that pursuant to Section 3(3) of the Law of Contract Act, one cannot enforce a verbal contract for the disposition of land. He relied on the case of ***Machakos District Coop Union vs Philip Nzuki Kiilu, Civil Appeal No. 112 of 1997***. He further submitted that the matters were decided with finality in the former suit and that the issues herein ought to have been raised in the former suit. He relied on the cases of ***Malik vs Callow (1958) EA 99***, and ***Gurbachan Kalsi v Ekori (1958) EA 455***.

Mr. Marube for the plaintiff, on the other hand, submitted that this suit is based on fraud, misrepresentation and/or illegalities. He submitted that the previous suit was attempting to enforce a contract. He submitted that the cause of action in this suit and in the previous suit, are therefore different and the principle of *res judicata* cannot apply. He contended that what was decided in the ruling of 16 November 2011 in the previous suit, was that the plaintiff cannot sustain a claim based on contract. He submitted that for *res judicata* to apply, the matters must be identical, the parties be identical, the title be the same, there be concurrence of jurisdiction, and there be finality of the previous decision. He relied on the case of ***Peter Nguji Kabiri vs Esther Wangari Githinji & Another (2013) eKLR***, and ***Solomon Kitundu Munywoki & 2 Others vs Park Towers Ltd & 2 Others Nairobi Milimani HCCC No. 540 of 2001***. He further submitted that the case of ***Malik v Callow*** is distinguishable from the circumstances herein, and that the case of ***Gurbachan Kalsi vs Ekori*** supports the plaintiff's submissions. He asked that the application be dismissed with costs.

I have considered the pleadings in the two suits and the rival submissions of the parties. There is no dispute that there was a previous suit over the same subject matter in this case. The only question is whether this suit raises issues that were substantially in issue in the previous case as to be caught up by the *res judicata* rule. In our statutes, the doctrine of *res judicata* is embodied in Section 7 and 8 of the Civil Procedure Act which provide as follows :-

#### *S. 7. Res judicata*

*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.*

*Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation.(4)—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.*

*Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

· *Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.*

From the above, it is my view that there are two aspects to the doctrine of *res judicata*. The first, is where the litigation is on a matter that was squarely in issue in the former suit. For example, if a person claims damages owing to a road traffic accident files suit and gets judgment, for say, a sum of Kshs. 100,000/=, the plaintiff cannot file a second suit for damages against the same parties over the same accident. This would mean that he benefits twice and the defendants suffer double jeopardy. In our instance, if the plaintiff, had sued the 2nd defendant over the alleged contract, this suit would clearly be *res judicata* as the question of the alleged contract was already determined in the previous suit.

The second aspect of *res judicata* is that brought forth by Explanation No. 4 of Section 7 of the Civil Procedure Act, which I have set out above. This bars the filing of a suit where the matter might and ought to have been made a ground of defence or attack in the former suit. If the issues raised could have formed the basis of an attack or defence in the previous suit, the statute provides that the issue shall be deemed to have been directly and substantially in issue in the previous suit, hence caught up by the doctrine of *res judicata*. The principle behind this provision is so that a party can litigate only once, and in that litigation, he must put forth all his points and arguments for determination. Thus one cannot file a second case on the same matters previously determined, but argue that he has brought forth a new ground of attack, which was not raised in the previous suit.

Mr. Marube submitted that this suit cannot be *res judicata* because first, the previous suit did not hear the suit on merits and secondly the issues raised herein are different. I do not agree with Mr. Marube. True, the previous suit did not go to hearing on merits, but the court did determine the issues therein through an interlocutory application. I have seen the cases of *Kabiri vs Githinji* and *Solomon Munywoki v Park Towers* cited by Mr. Marube, and I do not think that these cases assist him. It was in fact the holding in both cases that the suits were *res judicata*. In the case of *Munywoki vs Park Towers*, the court indeed held that the latter suit was *res judicata* although in the latter suit, the plaintiff had enjoined additional parties.

There is no question that, the issue of whether or not the plaintiff could enforce a verbal contract was actually determined albeit through an interlocutory application. It is not a must for a case to have gone for full trial for the issues therein to be determined. It can happen that the issues being raised in the case are determined through an application. If a determination is made, then the issue is settled, and it matters not that the issues were settled through an interlocutory application. The issue of contract was settled in the previous suit and cannot be raised in this suit.

The only question is whether the plaintiff can be allowed to raise a new cause of action which he did not rely on in the previous suit. The position of the law as I have set out earlier, is that if such issue could have been a ground of attack or defence in the previous suit, then one cannot found a subsequent suit on such Matter. In the case of *Gurbachan Kalsi v Ekori*, the court held that one may file a latter suit, if in that suit the issues being raised were different and raised mutually destructive pleas.

The plaintiff could of course have pleaded in the previous suit, either as a main ground or in alternative, that the transaction was vitiated by fraud or illegality. That pleading would not have been adverse to the pleading that there was a contract, and therefore could not have been "mutually destructive" as was held to be the position in the case of *Gurbachan v Ekori*. It was a ground of attack that could have been raised in the former suit but was not raised.

As was held in the case of *Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609*, the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the

subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time. That is indeed the proper interpretation of Note 4 of Section 7 of the Civil Procedure Act. The reasoning behind this law is so that parties can litigate all their issues once, and not in piecemeal.

I am aware that Section 7 talks of litigation by the same parties. Mr. Marube submitted that the parties herein are different. I agree that there are two additional parties to this suit and the parties appear to be different from the previous suit which had only one defendant. However, it is clear that the whole substratum of the case is the registration of the 2nd defendant as owner of the suit land. I do not think that a party can be allowed to argue that his subsequent case is not *res judicata*, merely by a mischievous addition of parties. Does it mean that if one sues party X, on a contract which suit is later dismissed, then he can sue party X and Y, in a subsequent suit touching on the same contract, where even party Y was not involved in the contract and yet claim that the suit is not *res judicata* for the reason that there is an additional party who was not a party in the previous suit? My answer is no, for that would be a cheeky attempt to disguise the latter matter as a different matter, which is clearly not so, and this cannot be permitted as it would avoid the mischief sought to be captured by the doctrine of *res judicata*. In our instance, I fail to see any cause of action that the plaintiff has with the 1st defendant and the 3rd defendant which can be sustained in the absence of the 2nd defendant.

My own view of this matter therefore is that although the issues being raised appear different, and the parties seem different, those issues could and/or ought to have been a ground of attack in the previous suit, and in my view the addition of the other two parties is a disguise to pass off this suit as a suit raising new issues. There is no new issue which could not have been raised in the former suit. This suit in my view is clearly caught up by the doctrine of *res judicata* and I do not hesitate to declare it as *res judicata*.

What then should I do to this suit? The 2nd defendant in his prayers asked that the case against him be dismissed. It is hereby dismissed. However, in my view, the substratum of this suit and the prayers sought, cannot be granted if the suit against him has been dismissed. The prayers sought herein will directly affect him and without him, the whole suit lacks a foundation. The only logical path to take is to have the entire suit dismissed. I therefore hereby dismiss the whole suit with costs to the defendants.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in open court in the presence of:*

*Mr. E.M. Momanyi for the 2nd defendant/applicant.*

*Mr. Mwaka holding brief for M/s Kamau Lagat for the 1st defendant.*

*Mr. D.O. Wabwire of the state Law office for 3rd defendant*

*N/A for M/s Marube & Co for the plaintiff/respondent*