REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 78 OF 2009 (OS)

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NUMBERS 209/4401/73 – 81, 209/4401/110 – 124 AND 209/4401/131 - 133, MAKADARA NAIROBI

BETWEEN

ZEPHANIA GICHURE NDUNGU…..APPLICANT/RESPONDENT

VERSUS

RWAIKAMBA RWATHIA

TRADING CO. LTD……...1ST RESPONDENT/APPLICANT

CITY COUNCIL OF NAIROBI……..2ND RESPONDENT

RULING

The 1st Respondent filed an application dated 12/11/2010 seeking orders that:

1. The court be pleased to strike out the suit for being res-judicata and an abuse of the Court process.
2. In the alternative, the suit be dismissed for want of prosecution.
3. Costs of this suit and of the application be awarded to the 1st Respondent

The application is premised on grounds that the suit relates to land parcel Nos. 209/4401/73 – 81, 209/4401/110 – 124 and 209/4401/133, Makadara (hereinafter referred to as the suit properties) which the 1st Respondent claims to be the sole beneficial and legal owner thereof. The 1st Respondent avers that the suit as filed is res judicata since the issues raised were substantially in issue and determined by a court of competent jurisdiction in ***Nairobi HCCC No. 5292 of 1991***. The 1st Respondent states that the institution of this suit is an attempt by the Applicant, (the Respondent in this application) to resurrect litigation on matters that was previously before a previous court of competent jurisdiction and which issues were heard and fully determined and having been a party to the former suit, the Applicant is estopped from filing this suit. The Applicant avers that the suit filed herein offends the mandatory provisions of Section 8 of the Civil Procedure Rules. Further that the Applicant has not made any effort to prosecute the matter ever since directions were given on 30/10/2009 and as a result, the 1st Respondent and its members have been

greatly prejudiced. The 1st Respondent contends that litigation must come to an end and therefore that the pendency of this suit constitutes a blatant abuse of the Court's process.

Solomon F.G. Kamangara, the Chairman of the 1st Respondent swore an affidavit on 12/11/2010 in support of the application. The deponent referred the Court to a Plaintiff annexed to his affidavit and deposed that the Applicant was one of the Plaintiffs in ***Nairobi HCCC No. 5292 of 1991*** wherein they sought, *inter-alia*, for a declaration that each of them were contributors and beneficiaries of the assets, consisting of the suit properties herein, of Rwaikamba Rwathia Trading Co. Ltd. The deponent stated that the suit was heard on merit and dismissed on 26/10/1999 and further that the Applicant did not appeal against that order. It is the deponents averments that 10 years to the date the suit was dismissed, the Applicant filed this suit disguising himself as the sole beneficial owner of the suit properties whereas the issue of ownership was an matter in issue in the former suit. Further that the issues raised herein were in the Applicant's knowledge at that time, therefore he cannot purport to raise them in a fresh suit. The deponent contends that the Court is now functus-officio as far as ownership of the suit properties is concerned, and it is only prudent that the suit be dismissed.

The deponent also deposed that the suit was last before court on 30/10/2009 when directions on the mode of hearing were given and that at the time of filing the application, the Applicant had not made any effort to fix the same for hearing. The deponent averred that the Applicant's disinterest in prosecuting the suit has greatly prejudiced the shareholders and members of the 1st Respondent and therefore it is only fair that the suit herein be dismissed for want of prosecution.

This application was supported by the 2nd Respondent. Aduma Joshua Owuor swore a Replying Affidavit on 3/2/2011 wherein he deposed that whereas the 2nd Respondent was not a party to the former suit, the 2nd Respondent has come to learn that the issues raised herein are similar to those in the former suit which was heard to its conclusion. It was the deponent's averments that issues of ownership of the suit properties and change of name of the 1st Respondent are incidental and related to the matters and allegations substantially in issue in the former suit. The deponent further stated that the Applicant has failed to particularize allegations of fraud made against the 2nd Respondent whereas it is a matter of legal practice and procedure that allegations of fraud must be strictly pleaded.

Response

Silas Ndungu Gichure, an administrator of the estate of Zephania Gichure Ndungu swore a Replying Affidavit on 15/12/2011. It was his disposition that the prayers and parties of the instant suit and the former suit are different and further that the land parcels in the former suit are different from the land parcels in the instant suit. Therefore the determination of the former suit does not conclusively conclude the issues herein. The deponent deposed that following the directions given on 30/9/2009, both parties had a duty to comply with the said directions and also that both parties had a duty to fix the matter for hearing. The deponent stated that in view of the non-compliance of the directions, the matter was not ready for trial. The deponent stated further that there is nothing to show that the Applicant is disinterested in the suit and further that dismissing suit would leave issues undetermined thereby amounting to miscarriage of justice. It was the deponent's averments that the 1st Respondent had not come to court with clean hands as it had failed to make a disclosure that it has sued the 2nd Respondent in **JR. Misc. Appl. No. 65/2010.** The deponent urged the Court to dismiss the 1st Respondent's application to allow the fixing of an early hearing date and the suit heard and determined without further delays.

Submissions

This application was canvassed by way of written submissions. Donald O. Owang' Advocate on instructions by Kirundi & Co. Advocates for the 1st Respondent filed submissions dated 15/5/2012. On the issue of res judicata, counsel reiterated that the issues of ownership of the suit properties were litigated upon in the former suit. Counsel submitted that the averments by the Applicant that he is a sole beneficiary of the suit properties was an issue in the former suit and he is therefore barred by rules of

procedure from revisiting the same issue in this suit. Further that if Applicant were to exercise due diligence, he would bring to the attention of the Court in the former suit the issues raised herein, such as the allegations of fraud. In support of this contention, counsel referred the Court to **Explanation 4 of Section 7 of the Civil Procedure Act** which provides:

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.

Counsel cited a Tanzanian Case of **Ramdev Malik v Lionel Albert Callow (1958) EA 99** where the Court of Appeal held:

"***the alleged fraud was included in something which has already been adjudged; to entertain the new action would be to reopen the issue already decided and to test again the evidence of the respondent and that of the appellant and his witnesses thereon which the applicant could have done in the earlier suit.***"

Counsel further referred the court to the **Black's Law Dictionary 8th (ed.)** on the **Principle of Collateral Estoppel** wherein he submitted that it is an affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other arising from the same transaction or series of transactions and that could have been but was not raised in the first suit. Further that the three essential elements are: an earlier decision on the issues; a final judgment on the merits; and the involvement of the same parties, or parties in privy with the original parties.

Kahari & Kiai Advocates for the 2nd Respondent filed submissions dated 10/5/2012 wherein counsel submitted that the introduction of the 2nd Respondent in the suit herein was a way of circumventing the law of res judicata. Counsel reiterated that formation of a co-operative society, registering the same as a partnership, membership and registration of the partnership, acquisition of properties and ownership thereof, dissolution of the partnership, converting the same to a limited liability company and transfer of the properties owned by the partnership, and collection of rents were all issues substantially adjudicated upon in the former suit. It was counsel's submission that the issues raised in the Originating Summons are ancillary to the issue of ownership of the suit properties which was available to the Applicant to raise in the former suit but he did not. In support of this submission counsel cited the authorities of **Pop-in Kenya Ltd & 3 Others v Habib Bank AG Zurich (1990) KLR 609** the Court of Appeal in placing reliance on **Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd & Another (1975) AC 581** found that *it was required of a party to litigation to bring forward the entire claim*.

Evans Thiga Gaturu Advocate for the Applicant filed submissions date 28/5/2012 wherein counsel reiterated that the Applicant in his affidavit had demonstrated that the issues raised in the two suits are different and therefore the instant suit cannot be res judicata.

Determination

The issue for determination is whether the instant suit should be dismissed for being res judicata, or for want of prosecution. The law on res judicata is stated in **Section 7 of the Civil Procedure Act**, which reads:

"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."

I have perused the Plaint dated 30/9/1991 annexed to the 1st Respondent's application and I do note that the Applicant (now deceased) was one among five Plaintiffs who instituted suit ***Nairobi HCCC No. 5292 of 1991***, referred severally in this ruling as the "*former suit*". The Applicant and his co-plaintiffs brought

the suit on their own behalf and those of 29 beneficiaries of **Rwaikamba Rwathia Trading Company** against **Rwaikamba Rwathia Trading Company Limited & 7 other Defendants.** The dispute between the said parties were, *inter-alia*, ownership of assets including the suit properties herein; formation and dissolution of a partnership, and subsequent floatation of a limited liability public company to take over the operations and assets. In the instant suit instituted by way of originating summons, the Applicant has brought the suit against the 1st Respondent, who was one of the Defendants in the former suit. The issue herein is in respect to ownership of the suit properties, which the 1st Respondents correctly points out, are part of the assets that formed the subject matter in the former suit.

However, before the Respondents can successful rely on the defence of res judicata, this court must be certain that the former suit was heard and determined on merit. The Respondents submitted that the former suit was dismissed with costs in 1999. However, none of the Respondents availed copies of proceedings and the Judgment in the said case to enable the Court to ascertain that the suit was indeed determined on merit. The 2nd Respondent in its submissions outlined an excerpt of a decision by Bosire J. in the former suit. On perusal of the Court file, I have taken note that the said decision was a ruling granting injunction orders pending the outcome of the suit. I therefore cannot determine that this suit is res judicata in the absence of proof that the same was heard and determined. I am guided by the pronouncement of the Court of Appeal in **Caneland Ltd and Others v Delphis Bank Civil Appeal No 20 of 2000** that: ***"For res-judicata to arise the issue must have been heard and decided on merit otherwise the plea cannot be sustained ".***

Secondly, the Applicant has also sued the City Council of Nairobi as the 2nd Respondent and made allegations of fraud against it. The 2nd Respondent was not a party in the former suit neither was it under a title of a Defendant in the former suit. In the 1st Respondent's view, the inclusion of the 2nd Respondent to this suit is nothing but mischief on the part of the Applicant to circumvent the law on res-judicata. Whether the Applicant is being mischievous by bringing a claim against the 2nd Respondent is a matter that the court will discern on trial. Refer to the case of **Abok James Odera Vs John Patrick Machira Civil Application No. 49 of 2001** where Keiwua J. held that to rely on a Defence of res-judicata, there must be,

i. ***A previous suit in which the matter was in issue.***
ii. ***The parties were the same or litigating under the same title.***
iii. ***A competent court heard the matter in issue.***
iv. ***The issue has been raised again in a fresh suit.***

The alternative prayer by the 1st Respondent was to dismiss the suit for want of prosecution on grounds that the Applicant has not taken any step to prosecute the matter since directions were taken on 30/10/2009. In response thereto, the Applicant avers that the directions spelt out items that needed both parties to comply and further that the responsibility of setting down the suit for hearing does not only fall on the Applicant but either party. On perusal of the Court record, it is clear that the Court directed the suit to proceed by way of viva voce evidence and the hearing would take a day. The Court record also shows that the 1st Respondent did move the court for directions in respect to hearing of the Originating Summons. Indeed setting down the suit for hearing is a joint responsibility of both parties to a suit. In my view, and I agree with my brother Mutungi J. in **Century Oil Trading Company Limited vs Gerald Mwaniki Mbogo And Another [2004] eKLR** *"**It is the duty of the Plaintiff to get on with the case".*** That said, dismissal of suits for want of prosecution is a matter of discretion. See **Ivita v Kyumbu [1984] KLR 441** where the Court has to determine, among other issues whether the delay is prolonged and the delay is excusable. It had been 1 year since directions were taken and the filing of this application and certainly, the Applicant has not rendered an explanation, satisfactory to this court to justify the delay. However, this is one matter that involves dispute dating back to the 1950s which in my view, should be heard and determined on its merits so that the matter can be put to rest. Therefore, for the sake of justice, I exercise my discretion pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act to allow the Originating Summons to proceed to hearing.

From the foregoing, the court makes the following orders:

1. ***The Applicant's Originating Summons shall proceed to full hearing.***

2. ***All parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within 45 days from the date of this ruling.***

3. ***The Applicant shall thereafter set down the suit for hearing within 30 days from the date of compliance with Order 2 hereinabove.***

4. ***Due to the apparent laxity on the part of the Applicant, the costs of this application shall be met by the Applicant.***

Dated, signed and delivered this 28th day of March

2014

L.N. GACHERU

JUDGE

In the Presence of:-

……..For the Plaintiffs

…….For the 1st Defendant

…….For the 2nd Defendant

……..Court Clerk