



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO 136 OF 2011

CHARLES MWANGI RINGURU.....PLAINTIFF

VS

NANCY WANGARI MATHENGE.....DEFENDANT

RULING

The defendant has filed before this court a notice of motion dated 10th March 2014. She prays that the suit be dismissed and or struck out with costs, on ground that it is Res judicata, time barred under section 7 of the limitation of actions act, incompetent and a vexation to the defendant.

Case history.

The cause in this matter was first filed in S.R.M.C.C case No. 36 of 1970 where the plaintiffs' father sought to enforce contract of sale of the suit property, which case was dismissed when the trial magistrate observed that the suit being a contract, was meant to expire after 6 years and dismissed the suit for being time barred and filed out of time pursuant to section 4(1)a of the Act No. 21 of 1963 with the right of appeal. That decision was never appealed.

The defendant's husband filed H.C.C.C No. 3 of 1973 seeking eviction of the plaintiffs' father. The plaintiff counter claimed adverse possession in defence in paragraph 6 claiming prescriptive rights to the land due to the operation of the doctrine of effluxion of time, which claims were dismissed in 1983 for want of prosecution. The defendant died during the pendency of the suit and letters of representation were taken By Rachael Karungari Kingori, his wife.

The plaintiffs' father again filed case No. 165 of 1988 seeking to enforce the sale contract, just as was done in the S.R.M.C.C case earlier dismissed claiming possession rights. He however died in 1991 and his son Paul Mathenge obtained grant of representation in his place. The court in its ruling on 16/12/1993 found that the case was Res-judicata in view of the orders of the court in the above cases decided by courts which had not been appealed. This ruling too was not appealed against.

After suit No. 165 of 1988 was declared as res judicata, the defendant filed an application to have the suit struck out under order VI rule 13(1) (a) (2) of the Old Civil Procedure Rules. The court however ruled on 31st July 1996 that the dismissal of a case for want of prosecution was not a bar to subsequent proceedings, and dismissed the application. The suit was set to proceed for hearing. Parties were heard on evidence.

However when it came for judgment on the 16th Feb 2006, the judge refused to make any finding over the the case in light of the conflicting rulings earlier made in the matter and set aside the proceedings in the matter in view of that contradiction.

The defendant filed a notice of motion dated 20th July 2007 seeking the setting aside of the ruling of 31st July 1996, which the plaintiff opposed. The court finally set aside the 1996 orders on 14th November 2007.

The defendant there after filed a notice of motion on 25th January 2008 seeking the plaintiff to be ordered to vacate the suit premises pursuant to the orders of the court made in 1993 which found the suit as res judicata, but in view of that ruling the court found that it was functus officio and dismissed the application.

The plaintiffs children in 165 of 1988 filed O.S No. 122 of 2010 seeking adverse possession of the suit property which had been mutated by the defendant and transmitted to her children, which children had been enjoined as defendants to the suit. The defendant too filed Suit No. 136 of 2011, seeking eviction of the plaintiffs from the suit property. The court consolidated the two suits into Case No. 136 of 2011 and found them to be res judicata on the 28th Feb 2014. Pursuant to that ruling the defendant has now filed this application for the suit to be dismissed.

The application is opposed as being an abuse of the court process, incompetent, bad in law and unmerited. At the hearing of the application, Mr. Nyaaga was present for the applicant, while Mr. Wahome was present for the respondent. The applicant relied on his pleadings as being res judicata and time barred. In opposition Wahome argued that it was a waste of courts time for a party to come to court in a matter that the court has declared as res judicata under Sec 7 of the Civil Procedure Act in preliminary objection before the matter is heard on merits, indicating the matter should be heard on merit and retained by the court.

I have observed that the parties in this cause of action continue to bring to this court the same proceedings. The plaintiff continually claims before this court the possession of the suit land, whereas the defendant continually brings the proceedings of eviction of the plaintiffs. The plaintiff and his descendants have approached the court with claim for the possession and ownership of the suit property 3 times, 1970, 1988 and 2010. The defendant has approached the court with the eviction claim in 1973, 2008 and 2011. He has filed another application and now in the instant application.

*The doctrine of res judicata, which has been severally stated as a bar to the many proceedings in the suits related to this claim, is of the effect that no proceedings can be continued upon a cause of action once a decision has been pronounced. It then means the judgment upon which the pronouncement was based on stands, unless its appealed upon. The 2 judgments of the court culminating to the pronouncement of the res judicata are the SRMCC 36/1970 and the HCCC 3/1973. The magistrate court found that the suit was time barred and dismissed the suit with the right of appeal. In that suit the defendant was represented by an advocate. The claim of time limitation is a jurisdictional issue as was held in case of **Peter Nyamai & 7 Others V M. J. Clarke Limited [2013] eKLR**. The judgment was never appealed, so it stood. Thus it meant the land belonged to the defendant as it meant that the plaintiff had no case abinitio.*

The defendant instead of extracting and executing that decree that found in his favour went ahead and filed a H.C.C.C No. 3 of 1973 for eviction of the plaintiff. In this new matter the plaintiff filed a counter claim for adverse possession which were all dismissed for want of prosecution. Since doctrine of res judicata rests on matter that have been adjudicated on merit, the plaintiff based on that knowledge went

ahead and filed the 1988 suit to pursue the same cause of action that had been dismissed as time barred and that of adverse possession.

However, the court found that both issues were *res judicata* based on the two previous suits and dismissed that suit. The plaintiff did not appeal against this ruling, but instead went ahead to defend in court why the suit should not be struck out when the defendant filed such an application. The court heard and reserved the matter which had already been ruled to be *res judicata*.

determination

I have considered the arguments and submissions of both parties in the matter herein. The parties have previously proceeded with this suit when the court had already declared the cause of action in this matter as *res judicata*.

Res judicata is described in Sec 7 of The Civil Procedure Act as;

“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 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 orders of *res judicata* (claim preclusion), where an earlier decision rendered by a court in a lawsuit between parties is conclusive as to the issues or controverted points so that they cannot be re-litigated in subsequent proceedings involving the same parties. In the case of **Christopher Mwangi Gakuu V Kenya National Highway Authority & 5 Others [2013] eKLR** – It was held that *Res judicata* comprises a bar to further proceedings in a matter.

The parties instead of lodging appeal or review of the unfavourable orders, they filed new matters in court. In the case of **Friedman v. State 53 Misc. 2d 955, 278 N.Y.S.2d 999 (Ct. Cl. 1967)** where the trial court did not have jurisdiction to try the matter, it was found that its finding could only be appealed against and not be abandoned to file a new claim in the right court. This was held to forming a ground of estoppel and *res judicata*. The act has not provided on jurisdiction hence the competence of trial court is a ground of appeal and not a reason to abandon the suit and file another one.

It was held, When a court has ruled on a matter, rightly or wrongly, its upon the aggrieved party to appeal, and not file another suit in **Karia and Another v the Attorney General and Others (2005) 1EA 83**. It therefore follows that the essence of the doctrine of *Res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was also the holding in **Omondi v National Bank of Kenya Ltd and Others (2001) EA 177**. The parties have not followed that ruling, Hence since 1993 the same cause of action has found its way in the court wrongly when the ruling of *res judicata* stands.

In the case of **Edwin Thuo v Attorney General and Anor Petition No. 212 of 2012**, It was stated that the Court must be vigilant and guard against evading the doctrine of *res judicata* by introducing new causes of action. It was stated as follows;

“The Courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff is in the second suit is trying to bring before the court in another

way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”

Also in the case of **Kenya Hotel Properties Limited V Willisden Investments Limited & 4 Others [2013] eKLR** the purpose of Res judicata doctrine was discussed. It was held to be a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests.

The only bar to the raising of this issue is if the court did not have jurisdiction. This line has never been argued by any party in this matter. It is clear from the above that the effect of pronouncement of res judicata no other action can be taken on that particular cause of action unless and until such orders are vacated and or set aside and that has been the language of the court to the parties since 1993, and both parties have been abusing the process of the court. Its upon the parties and their advocates to keep track of their case to guard it to ensure a favourable outcome. Res judicata orders are matters of substantive law and can form basis of jurisdiction in a matter.

The plaintiff did not pursue this order in review or appeal for the court to re look over the same. He sat on his right. With that ruling still on record the claim for purchase was blocked and no other action could be taken. On the claim of adverse possession, having been claimed in the 1973 case and same having been dismissed for want of prosecution, it could not be raised again by a similar suit, it could only be revived by reinstating the dismissed suit and not filing a similar claim.

This was held in the case of **Birds Paradise Tours & Travel Ltd v Hotel Secretaries Kenya Law Reports [1990] KLR 58** the court held ... **“Though the earlier suit does not operate as res judicata, its dismissal either directly under order IXB rule 4 or by virtue of order XVI rule 3, and it involving the same cause of action as the present application and the plaint upon which it rests, and the applicant not having applied to set aside or vary the order of dismissal, the applicant was prohibited from bringing the present application”**.

As regards the defendant, he has been desirous to have the suit property, but has never pursued the ruling in 1970 SRMCC case, where court found that it had no jurisdiction over the matter due to time lapse. The courts of equity aids the vigilant. He filed another suit which he never executed, or reinstated upon dismissal as stated above. Failure to review dismissal orders and reinstated his case after 1983, or even pursuing eviction orders after the 1970spmcc ruling, he has been barred from raising any claim from this court.

In the upshot the defendants application is thus an abuse of the court process and, as there is no suit existing since the time the orders of res judicata were pronounced in this cause back in 1993. To make it clear to the parties, once the orders of res judicata are pronounced in a cause of action, nothing can resurrect that cause of action back to life again, except by applying to vacate them, which parties are all guilty of not doing.

The application is hereby dismissed. Each party bear its own costs. It is so ordered.

Dated, signed and delivered on 11th day of December 2014.

A. OMBWAYO

JUDGE



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