



REPUBLIC OF KENYA



KENYA LAW

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Gwaka wa Utheri Mwitikiria Investments Utawala Limited (Formerly Mwitikiria Investments Company) v Ng'ang'a & 2 others (Sued in their capacity as legal representatives of the Estate of Ndinguri Karugia (Deceased)) (Environment & Land Case E010 of 2021) [2023] KEELC 16617 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16617 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E010 OF 2021

CA OCHIENG, J

MARCH 27, 2023

**IN THE MATTER OF THE LAND LR NO. 7340/59 IR 7042/01 NOW
TRANSFERRED AND REGISTERED AS LR NO. 28641 IR. 152216/1**

AND

**IN THE MATTER OF DETERMINATION OF A QUESTION ARISING DIRECTLY OUT
OF THE ADMINISTRATION OF THE ESTATE OF NDINGURI KARUGIA (DECEASED)**

BETWEEN

**GWAKA WA UTHERI MWITIKIRIA INVESTMENTS UTAWALA LIMITED
(FORMERLY MWITIKIRIA INVESTMENTS COMPANY) PLAINTIFF**

AND

DAVID NG'ANG'A 1ST DEFENDANT

GRACE WACU 2ND DEFENDANT

ESTHER WAMBUI 3RD DEFENDANT

**SUED IN THEIR CAPACITY AS LEGAL REPRESENTATIVES OF THE ESTATE
OF NDINGURI KARUGIA (DECEASED)**

RULING

1. What is before Court for determination is the Defendants' Notice of Preliminary Objection dated the January 19, 2022 and filed in Court on January 24, 2022 and Notice of Motion Application dated the January 24, 2022.
2. In the Notice of Preliminary Objection, it is raised against the Originating Summons dated the March 8, 2021 and premised on the following grounds:



1. That the Application is Res Judicata, bad in law and therefore an abuse of court process as the Plaintiffs claim on the suit land was dismissed in the Ruling by Hon. Justice A Mboghli Msagha dated 7th March, 2011 in suit ELC No. 500 of 2010 at Nairobi.
 2. That the Application is unmeritorious and lacking in substance.
 3. That the Application is otherwise frivolous, vexatious and an abuse of judicial time of the court and unable to move this court to exercise its judicial discretion to declare the Plaintiffs owners of the suit property by adverse possession.
 4. That the Application was filed in flagrant violation of the well-established legal principles and statutory provisions relevant to the subject application and the same is devoid of merit.
 5. That the Application is an afterthought and the same should be struck out with costs.
- While in the Notice of Motion Application, the Applicants seek for the following Orders:
6. Spent
 7. That this Honourable Court be pleased to and hereby do grant a temporary injunction restraining the Plaintiffs by themselves, their agents, employees or anybody else whomsoever acting on their behalf from further erecting structures/buildings and immediate withdrawal of watchmen on suit property previously known as LR 7340/59 now registered as LR No. 28641 in Mavoko Municipality Machakos County pending the hearing and determination of this Application.
 8. That this Honourable Court be pleased to and hereby do grant a temporary injunction restraining the Plaintiffs by themselves, their agents, employees or anybody else whomsoever acting on their behalf from further erecting structures/buildings and immediate withdrawal of watchmen on suit property previously known as LR 7340/59 now registered as LR No. 28641 in Mavoko Municipality Machakos County pending the hearing and determination of the main suit.
 9. That the officials of the Plaintiff/Respondent be jointly and severally declared guilty of contempt of court of willful and unlawful disobedience of the consent order of this Court adopted on 30th September, 2021 and punished with a fine not exceeding Kshs. 200,000 or a custodial sentence of up to 6 months or both such fine and imprisonment.
 10. That the O.C.S Muungano Police Station be compelled to provide security in enforcement of the above orders.
 11. That the costs of this Application be provided for.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit of David Nganga. The Applicants contend that LR. No. 7340/59 now registered as LR. No. 28641 hereinafter referred to as 'suit property', is part of the Estate of the late Ndinguri Karugia which is subject of succession proceedings being Nairobi Succession Cause No. 224 of 2006 that is pending in Court and where the Respondents are active participants. They claim on 26th April, 2021 the Administrators learnt that some members of the Plaintiff had invaded the suit property and started erecting structures thereon. Further, the matter was reported to Muungano Police Station on 27th April, 2021 and the same was recorded as OB No. 12/27/04/2021. They aver that the Plaintiffs were not relenting in putting up structures and they wrote a protest to the Sub County Commissioner Athi River which was received on 6th May, 2021 but even after that, the Respondents continued to put up structures on the suit property. They explain that the acts of the Respondents was a scheme to create an impression that they



had been in occupation on the suit property to qualify their claim on account of adverse possession. They state that on 30th September, 2021, the Court directed that status quo be maintained on the suit property but despite the existence of the said orders, the Respondents continued to put up structures thereon. Further, that on 14th December, 2021, they visited the suit property only to find the entire land fenced using galvanized sheets and three permanent structures including a number of semi-permanent structures under construction. They were denied access to the suit property and reported matter to Muungano Police Station on 14th December, 2021 which was recorded as OB No. /17/14/12/2021. They reiterate that in 2010, the Respondents sued the defunct Administrator the late Hannah Gathoni Gichuri vide ELC 500 of 2010 claiming to have bought the suit property from her late husband Herman Gichuri but the claim was dismissed by Hon Justice Msagha Mbogholi on 7th March, 2011 where the court declared that Herman Gichuri did not have legal capacity to sell the suit property hence the invasion is illegal. They insist the Respondents are in contempt of orders of this court.

4. The Respondents opposed the Application by filing a Replying Affidavit sworn by Stanley Ritho Mwathi, its Director where he deposes that the Plaintiff acquired the suit property in 1993, having paid the full purchase price and proceeded to subdivide it among its 130 members. He claims the 130 members have always been in occupation and use of the suit property from the year 1993 which use and occupation included the date of 30th September, 2021 when the Court made an order preserving the status quo on the said suit property. He argues that the status quo orders did not stop the Plaintiff and or its members from utilizing the land but were to remain in occupation thereof with a view of the fact that orders of injunction would have been premature to either party before a decision is made in respect to this suit. He explains that the Application which bore the consent orders dated the 30th September, 2021 was actually filed by the Plaintiff seeking injunctive orders against the Defendants from harassing them with a view to evicting them from the suit property. He insists that the Applicants have not demonstrated to court how the Plaintiff is in contempt of a court order. He reiterates that the Applicants have not substantively shown the existence of any ingredients and/or particulars of the purported contempt of this court.
5. The Applicants filed a Further Affidavit reiterating their averments and insisting that the Respondent and its members were never in occupation of the suit property prior to the invasion on or around the 26th April, 2021. Further, that prior to the invasion, the only occupant on the suit property was one Njoroge Herman who has been residing thereon since 2007. They argue that the continuous building of structures on suit property is aimed at misrepresentation of true facts thereby misleading the court that members of the Plaintiff have been thereon. They reiterate that Justice Msagha Mbogholi's Ruling is relevant as the re-introduction of the claim under the guise of adverse possession is a clear case of abuse of court process.
6. The Notice of Preliminary Objection and Notice of Motion were canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the Notice of Preliminary Objection as well as the respective Affidavits and rivalling submissions, the following issues are for determination: Whether this suit is res judicata Whether the Defendants are entitled to orders of temporary injunction restraining the Plaintiff and its members from the suit property pending the outcome of the suit. Whether the Plaintiff is in contempt of the orders of this court issued on 30th September, 2021.
8. As to whether this suit is res judicata.



9. The Defendants have raised a Preliminary Objection claiming this suit is res judicata as the Respondents sued the defunct Administrator the late Hannah Gathoni Gichuri vide Nairobi ELC 500 of 2010 claiming to have bought the suit property from her late husband Herman Gichuri but the claim was dismissed by Hon Justice Msagha Mbogholi on 7th March, 2011 where he declared that Herman Gichuri did not have legal capacity to sell the suit property. This fact is dispute by the Plaintiff that contends that this is a different claim.
10. The doctrine of res judicata is set out in the Civil Procedure Act at Section 7 which provides inter alia:
- 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 can 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.”
11. The Civil Procedure Act provides explanations with respect to the application of the res judicata rule. Explanations 1-6 stipulates thus:
- Explanation. The expression “former suit” means a suit which has been decided before the suit in question —(1) whether or not it was instituted before it.
- Explanation. For the purposes of this section, the competence of a court shall be determined irrespective of — (2) any provision as to right of appeal from the decision of that court.
- Explanation. The matter above referred to must in the former suit have been alleged by one party and either — (3) denied or admitted, expressly or impliedly, by the other.
- Explanation. A matter which might and ought to have been made ground of defence or attack in such —(4) former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- Explanation. Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes —(5) of this section, be deemed to have been refused.
- Explanation. Where persons litigate bona fide in respect of a public right or of a private right claimed in —(6) 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.”
12. On res judicata, the Court of Appeal in the case of Uhuru Highway Development Ltd v Central Bank & Others, CA No. 36 of 1996 stated that: -
- In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”
13. See the case of Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR.
14. On Preliminary Objection, the court in the case of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited (1969) EA 696; held that:
- A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise



of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

15. Further in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows:

A Preliminary Objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit..... it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.”

16. In this instance the Plaintiff filed the Originating Summons dated the 8th March, 2021 seeking to be declared owner of land parcel previously known as LR 7340/59 now registered as LR No. 28641 in Mavoko Municipality by way of adverse possession. The Plaintiff which is a membership organization claims it bought the suit property in 1993 from Herman Gichuri and paid the full purchase price. It explains that its members took possession and have erected structures thereon. The Defendants contend that the dispute herein had been dealt with by Justice Mbogholi Msagha when the Respondents sued the defunct Administrator the late Hannah Gathoni Gichuri vide Nairobi ELC 500 of 2010 claiming to have bought the suit land from her late husband Herman Gichuri. Further, that the claim was dismissed by Hon Justice Msagha Mbogholi on 7th March, 2011 where the court declared that Herman Gichuri did not have legal capacity to sell suit property hence the invasion is illegal. I wish to highlight an excerpt from the said Ruling:

The other issue is whether or not the Plaintiffs/Applicants can bring this suit as they have, considering that the cause of action, if any, arose in 1993. Whatever the case having found that they were not party to the agreement, and that the purported vendor had no legal capacity to transfer the suit property and there having been no Land Control Board Consent the application must fail. Accordingly the same is hereby dismissed with costs to the Defendants.”

17. From a reading of this Ruling dated the 7th March, 2011 in Nairobi ELC Suit No. 500 of 2010 Paul Maina Ngugi & 31 Others Vs Hannah Gathoni Gichiri, Njoroge Herman, Gideon Ndinguri Herman & Boro Herman which the Applicants have relied on, I note the Court only dealt with an Application for injunction which was dismissed. Further, there is no indication if the said suit was determined. Be that as it may, I will proceed to analyze if this suit is indeed res judicata. Based on the facts as presented including the decision from Nairobi ELC 500 of 2010 while applying the legal provisions quoted above including associating myself with the decisions cited, I find that the instant suit does not fulfill all the tenets of res judicata as although the suit property is one, the issue of adverse possession was not directly and substantially in issue in the former suit between the same parties. Further, no evidence has been provided that the issue of adverse possession was heard and finally determined by Justice Mbogholi Msagha in the former suit. In the circumstance, I find the instant Notice of Preliminary Objection premature.
18. As to whether the Defendants are entitled to orders of temporary injunction restraining the Plaintiff and its members from the suit property pending the outcome of the suit.
19. The Defendants have sought orders of injunction to restrain the Plaintiff and its members from the suit property pending the outcome of this suit, which fact is opposed by the Plaintiff. The principles for granting of interlocutory injunction is well established in the case of *Giella v Cassman Brown & Co Ltd*



(1973) E.A. 356. While, in the case of *Mrao Ltd v First American Bank Ltd & 2 Others*, (2003) KLR 125, the court gave a definition of a prima facie case. The Defendants who are the administrators of the deceased estate seek to restrain the Plaintiff and its members from the suit property. The Plaintiff insists that it purchased the suit property from Herman Gachiri in 1993 and paid the full purchase price. Further, that it subdivided it, to its members who took possession and have been residing thereon. The Defendants contend that the Plaintiff and its members only invaded the suit property in 2021 and they reported the said invasion twice to the Muungano Police Station. I note the Plaintiff in 2021 had also sought orders of injunction against the Defendants and in September, 2021 both parties entered into a consent to jointly maintain the status quo. Looking at the respective documents presented by the parties herein including the photographs, I note the Plaintiff actually signed a Sale Agreement with Herman Gachiri in 1993 and there are even acknowledgement of payments from the deceased thereafter. Further, I note the Plaintiff and its members have actually been on the suit property as there are some structures both permanent as well as semi-permanent thereon. From my analysis above, it is trite that injunctive remedies are equitable remedies and I note in Nairobi ELC 500 of 2010 which is a related suit, from the Ruling of Justice Mbogholi Msagha, it emerged that members of the Plaintiff were indeed on the suit property by 2010, and not in 2021 as claimed by the Defendants. I hence find that the Defendants are not being candid. It is my considered view that since there are persons on the suit property and in the interest of justice, I will decline to restrain them, therefrom. Based on the facts as presented including the annexures herein, while relying on the two decisions I have cited, I find that the Defendants have not established a prima facie case to warrant the orders of injunction as sought. In further associating myself with the decision *Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012*, where the Court of Appeal held that in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction and I will hence decline to do so. I opine that an order of status quo that had earlier been issued on the 30th September, 2021 suffices but parties are directed not to put up any new structures as well as fences thereon pending the outcome of this suit.

20. Whether the Plaintiff is in contempt of the orders of this court issued on 30th September, 2021.
21. The Orders issued on 30th September, 2021 was a Consent Order which stated thus:

Obtaining Status Quo be maintained. The application dated the 8th March, 2021 be and is hereby marked as compromised. Parties to comply with Order 11 of the Civil Procedure Rules within 21 days from the date hereof. Pre Trial Conference on 1st November, 2021.”
22. The Defendants seek to have the Plaintiff cited for contempt claiming the members have continued to build on the suit property and even fenced it despite existence of the status quo order.
23. Black’s Law Dictionary (Tenth Edition) defines contempt of court as follows:-

Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
24. The law of contempt in Kenya is anchored on Section 63(c) of the *Civil Procedure Act* which provides as follows:

63(c) In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed, grant a temporary injunction and in case of disobedience, commit the person guilty thereof to prison and order that his property be attached and sold.”



25. Further, Section 29 of the *Environment and Land Court Act* stipulates thus:

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

26. While Section 4(1) (a) of the *Contempt of Court Act* defines civil contempt as:

Willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”

27. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* (2016) eKLR where Justice Mativo stated that:

writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:-

‘There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.’

28. Yet in the case of *Ochino & another v Okombo & 4 others* (1989) eKLR the Court of Appeal held that: -

We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of section to compel him to obey.”

29. In this instance the Defendants claim the Plaintiff and its members are in contempt of the order of status quo issued. I note at the point the order was issued the Plaintiff and its members were already on the suit property and had erected structures thereon. From the Defendants averments, they claim the Plaintiff and its members have put up further structures and fenced the suit property with iron sheets, which fact the Plaintiff denies. I note the status quo order the parties entered did not define the condition of the structures on the suit property and the Defendants have not demonstrated how the Plaintiff including its members who were already on the suit property acted in breach of the terms of the status quo order. In the circumstance, I find that the Defendants have not proved the alleged contempt to the required standard and will decline to grant the order as sought.

30. In the foregoing, I find the instant Notice of Preliminary Objection and Notice of Motion unmerited and will disallow them.

31. Costs will be in the cause.

32. I direct the parties to set down this matter for hearing expeditiously and avoid interlocutory applications.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE

