



**Gitau v Sure & another (Environment & Land Case 239 of 2016)
[2023] KEELC 16989 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 239 OF 2016**

EO OBAGA, J

APRIL 27, 2023

BETWEEN

STEPHEN KIMANI GITAU PLAINTIFF

AND

JOSEPH MOMANYI SURE 1ST DEFENDANT

PATRICK NYAUNDI OBUTU 2ND DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated October 24, 2022 in which the Plaintiff/Applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. That pending the hearing and final determination of this suit the court do issue, a permanent injunction restraining the 2nd Defendant/ Respondent by himself, his agents or servants from occupying, encroaching, trespassing, constructing and/or in any other manner from interfering with suit land being land parcel known as Elodret Municipality Block 14/323.
 4. Cost of this application be provided for.
2. The Applicant contends that he purchased 1/8 of an acre from the 1st Defendant/Respondent on 8/3/2011. He again bought another 1/8 of an acre on 6/8/2012. These two agreements were consolidated vide an agreement dated 21/1/2016. The suit property was to be curved out of Eldoret Municipality Block 14/323.
3. The Applicant contends that he took possession of the purchased property which is ¼ of an acre but that the 2nd Respondent encroached on to the property forcing him to file this suit. The Applicant



now contends that the 2nd Respondent is in the process of putting up permanent structures before the issue of ownership is determined. It is on this basis that the Applicant has prayed for the injunction which he seeks against the 2nd Respondent.

4. The 2nd Respondent has opposed the Applicant's application based on a replying affidavit sworn on 14/11/2022. The 2nd Respondent contends that the application is *res judicata*. The 2nd Respondent further contends that he has been in possession of 1/8 of an acre comprised in LR No Eldoret Municipality Block 14/323 which he purchased in 1999 from one Ranja Rabadia.
5. The 2nd Respondent states that as at the time the Applicant purchased 1/8 of an acre from the 1st Respondent, he was already in possession of his 1/8 of an acre. The 2nd Respondent has been enjoying quiet possession until 2012 when the Applicant encroached on to his 1/8 of an acre and caused disturbance by assaulting his family.
6. The 2nd Respondent states that he is residing on his 1/8 of an acre which is clearly demarcated on the ground.
7. The parties were directed to file written submissions. The Applicant filed his submissions on 16/3/2023. The 2nd Respondent filed his submissions on 10/3/2022. I have carefully considered the submissions of the parties herein. The issues which emerge for determination are firstly, whether the Applicant's application is *res judicata*. Secondly, whether the Applicant has made out a case to warrant issuance of an injunction in the manner prayed for.
8. On the first issue, the conditions to be met before a matter can be said to be *res judicata* have been settled in a number of cases but the case of *Invesco Assurance Company Limited & 2 others -vs- Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (interested parties)* (2020) eKLR stands out. It was stated in that case as follows: -

“The doctrine of *res judicata* is set out in Section 7 of the Civil Procedure Act. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. A close reading of Section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which were stipulated in conjunctive as opposed to disjunctive terms.”

9. In the *Invesco Assurance Company Limited* (supra), the Court went on to state as follows: -

“The doctrine will apply only if it is proved that;

- i. The suit or issue raised was directly and substantially in issue in the former suit,
- ii. That the former suit was between the same party or parties under whom they or any of them claim,
- iii. That those parties were litigating under the same title,
- iv. That the issue in question was heard and finally determined in the former suit,
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”



10. I have perused the record and notice that the Applicant had filed a similar application on 19/3/2020. The Applicant was granted orders of maintenance of *status quo* which was to last for 30 days. After the lapse of 30 days, there was no extension sought. The Applicant never pursued this application. The application was never determined as it is still pending. The present application is therefore not *res judicata*.
11. On the second issue, the principles for grant of an injunction were set out in the case of *Giella -vs- Cassman Brown & Co Ltd* (1973) EA 358. First an applicant must show that he has a prima facie case with probability of success. Second, an injunction will not be granted unless the Applicant will suffer injury which will not be compensated in damages. Third, if the court is in doubt, it will decide the application on a balance of convenience.
12. In the instant case, it is clear that the 2nd Respondent was in possession of the portion which the Applicant is claiming. This is clear from the previous application for injunction which the Applicant filed on 19/3/2020. The court granted an order of maintenance of *status quo* which was to last for 30 days. The *status quo* obtaining then was that it is the 2nd Respondent who had put up iron sheet structures which he was letting out.
13. The Applicant unsuccessfully tried to cite the 2nd Respondent for contempt. During the hearing of this contempt application, it was clear that the 2nd Respondent was in possession. In the circumstances, I do not see what prima facie case the Applicant has to warrant issuance of an injunction. In any case, if the court were to grant the injunction as prayed, it will amount to ordering for the eviction of the 2nd Respondent before this dispute is resolved.
14. If it turns out that the disputed portion belongs to the Applicant, the 2nd Respondent will simply remove whatever structures he has put up. The Applicant will therefore not suffer irreparable damage which will not be compensated in damages.
15. The balance of convenience tilts in favour of the 2nd Respondent who is in possession. I therefore find that the Applicant's application is devoid of merit. The same is dismissed with costs to the 2nd Respondent.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Akinyi for Mr. Omusundi for Defendant/Respondent.

Ms. Chelimo for Mr. Yego for Plaintiff.

Court Assistant –Laban

