Munene v Church Commissioner for Kenya & 3 others (Environment & Land Case 117 of 2022) [2023] KEELC 16943 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16943 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 117 OF 2022

JG KEMEI, J

APRIL 20, 2023

BETWEEN

TONY NJOROGE MUNENE ..... PLAINTIFF

AND

CHURCH COMMISSIONER FOR KENYA ..... 1ST DEFENDANT

ANGLICAN CHURCH OF KENYA (ACK) EMMANUEL THIKA MEMORIAL ..... 2ND DEFENDANT

DIRECTOR OF SURVEY ..... 3RD DEFENDANT

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT

RULING

1. The Plaintiff filed suit against the Defendants on the 6/10/2022 seeking the following orders;

    a. A permanent injunction restraining the Defendants jointly and severally from blocking access to and from Land Reference Number 4988/19.

    b. A mandatory injunction compelling the Defendants their servants and/or agents to remove any gate or material blocking the access to Land Reference Number 4988/19 or the same be done by the Plaintiff at the Defendant's costs.

    c. A mandatory injunction compelling the 3rd and 4th Defendants to re-survey and create an access road to serve Land Reference Number 4988/19 from the adjacent plots being Land Reference No 8928 which was an amalgamation of the old Church and public land.

    d. Costs and interest of the suit.

    e. Any other relief that the Court may deem fit in upholding the Plaintiff's constitutional rights.

f. Any other or further orders that this Honourable Court may deem fit to grant.

2. The gist of the Plaintiff's suit is that he is the registered owner of parcel No 4988/19 situate in Thika while the 1st Defendant is the registered owner of parcel No 8928, which lands are adjacent to each other. He avers that a survey was done in 1955 which showed that the Plaintiff could access his property through an access road which he claims was public land. That the 1st Defendant amalgamated the public land to its current parcel and failed to provided an access road to the Plaintiffs property. That in 2016 the 1st Defendant blocked the available access to his property by creating a gate across the access road forcing the Plaintiff to file a suit in Court and obtain Court orders opening the road. He averred that again in 2022 the said 1st Defendant blocked the access road without notice denying him the right of access that was available to him since 1925.

3. Simultaneously the Plaintiff filed a Motion dated the 4/10/2022 seeking the following orders;

   a. That this matter be certified urgent and service to be dispensed with in the first instance.

   b. That this Honourable Court does grant an order of injunction restraining the 1st and 2nd Defendants jointly and severally, their servants, employees and or agents from blocking the access road used by the Plaintiff's to access to Land Reference Number 4988/19 and also from destroying the perimeter wall and fences pending the hearing and determination of this application and suit.

   c. That this Honourable Court does order the 1st and 2nd Defendants their servants and/or agents to remove any gate or material blocking the access to Land Reference Number 4988/19 or the same be done by the Plaintiff at the Defendant's costs pending the hearing and determination of this application and suit.

   d. That this Honourable Court does order the 3rd Defendant, the Director of Survey to re-survey the Plaintiff's parcel of land being Land Reference Number 4988/19 and the 1st Defendant's parcel of land being Land Reference Number 8929 and ascertain the access road to the Plaintiff's parcel of land.

   e. That the costs of this application be provided for.

4. The application is supported by the affidavit of the Plaintiff fashioned along the lines of the main suit, facts which have been captured above.

5. In opposing the suit, the 1st and 2nd Defendant filed its preliminary objection on the 31/10/2022 on the following grounds;

   a. The entire suit offends the provisions of Section 6, 7 and 8 of the *CPA* since it is *Res Judicata*

   b. The Plaintiff commenced this suit out of material non-disclosure in he failed to disclose the existence of another case on the same disputes and or parties being CMCC 178 OF 2016 Libey Njoki Munene & another v The Anglican Church of Kenya and anor which suit was heard and determined and is now at execution stage.

   c. The Plaintiff lacks the necessary locus standi to commence the suit since he is not the proprietor of the property forming the dispute between the parties that is LR No 4988/19.

6. The 1st and 2nd Defendants urged the Court to strike out the suit.

7. In the Replying Affidavit dated the 29/11/2022 the 1st and 2nd Defendants through Rev Andrew Karanja Gichia stated that he is the Vicar in charge of the Anglican Church of Kenya Memorial Parish.

The Plaintiff is a neighbour to the church and a beneficiary of the estate of his late father thus lacks locus to file the suit.

8. Further that the Plaintiff filed suit CMCC No 178 of 2016 -Thika and failed to prosecute leading to its dismissal and the allowing of the 1st and 2nd Defendants counterclaim. The Plaintiff failed to disclose the existence of the case that is now at the execution stage given the decree was issued on the 19/8/2021. The 1st and 2nd Defendants obtained orders on 20/1/2022 directing the OCS to enforce and ensure compliance of the Court order. The Plaintiff has not appealed set aside and or reversed the orders. That this present case is therefore *Res Judicata*.

9. He added that in any event the dispute is purely a boundary dispute and, in his opinion, should be referred to another forum for dispute resolution and not this Court.

10. With leave of the Court the parties undertook to file written submissions which I have read and considered.

11. The Plaintiff relied on the provisions of Order 40 rule 1 - 4 of the *Civil Procedure Rules* in support of his Application for injunctive orders.

12. On the conditions of granting of an interlocutory injunction, the Applicant relied on the case of *Giella v Cassman Brown* 1973] EA 358 at 360 which set out the grounds as follows;

> " Firstly, an Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

13. On what a *prima facie* case is the Applicant relied on the definition as given in the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 others* [2003] eKLR which held that:-

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

14. In further submissions the Applicant submitted that the purpose of an injunction is to preserve the property and maintain the *status quo*. In support of this preposition, he relied on the case of *Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & another*.

15. On the adequacy of damages test the Applicant submitted that the common denominator is the *prima facie* case as set out in the *Giella v Cassman Brown* [1973] EA 358 and the balance of convenience test in *American Cynamid v Ethicon* [1975] AC 135 because under the two tests an injunction may not be granted if the injury or loss complained of may adequately be remedied by an award of damages.

16. The Applicant averred that he has a strong case with a high probability of success. That if the Respondents are not injuncted they shall proceed to block access to his property causing him loss and damage which cannot be adequately atoned by damages.

17. On the issue of *Res Judicata*, the Applicant submitted that going by the definition in the case of *Mukisa Biscuits Manufacturing Co LTD v West End Distributors* (1969) EA 696 the suit is not *Res Judicata* since the facts are yet to be investigated. Further that the lower Court did not have the jurisdiction to hear the matter; the matter was dismissed for nonattendance; the parties are different; the Applicant

was not aware of the suit and its pendency hence the non-attendance and the fault and mistake of the lawyer should not be visited on the Applicant.

18. As to whether the Applicant has met the conditions and or requirements for injunctive orders and or interlocutory orders, the Respondents submitted in the negative. That the Applicant has not demonstrated a *prima facie* case against the 1st and 2nd Respondents given that his claim for an access road is misguided, to say the least. The Applicant has no locus to file this suit since he is only a beneficiary and not an administrator of the estate of his late father.

19. It was further submitted that the Respondents are enforcing a Court order and he should abide by the said orders of this honourable Court and not file another separate suit on the same facts. He accused the Applicant of moving the Court with unclean hands on account of material non-disclosure and abuse of the process of the Court. That, moreover, the Applicant has an alternative access to his land through the mother's property which was part of the original family land. They urged the Court to dismiss the Applicant's application on want of proof of a *prima facie* case.

20. On *Res Judicata* the Respondents argued that Applicant failed to disclose the presence of CMCC No 178 of 2016, a suit that has been determined and is at the execution stage. That the case falls on all four corners of what the Court needs to inquire on whether or not the suit is *Res Judicata*. In other words the parties and subject matter is similar, the case was determined by a competent Court and the same ought to be dismissed.

Analysis & determination

21. Having considered the application, the affidavit evidence and the written submissions on record, the issues that commend themselves for determination are;

    a. Whether the suit is *Res Judicata*/subjudice.

    b. Whether the Applicant is guilty of material non-disclosure of the previous suit and what are the consequences.

    c. Whether the suit is an abuse of the process of the Court

    d. Whether the Applicant is entitled to orders of injunction.

    e. Who meets the costs of the application?

22. The *Black's Law Dictionary* 10th Edition defines "res judicata" as-

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

23. The substantive law on *Res Judicata* is enshrined in Section 7 of the *Civil Procedure Act* which provides that:

> " 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."

24. *Res Judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

25. The learned authors of Mulla, *Code of Civil Procedure*, 18th Ed. 2012 have observed that the principle of *Res Judicata*, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

> " The principle of finality or *Res Judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted in the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

26. In the case of *Henderson v Henderson* (1843) 67 E.R. 313, the rationale of the doctrine of *Res Judicata* was stated as follows:

> " ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *Res Judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." [emphasis is mine].

27. Bearing in mind the above proposition of the law, I shall now examine the issue in detail. The claim of the Plaintiff is set out in the background of the Ruling. The parties in CMCC No 178 of 2016 are the Plaintiff and his mother and the Defendants are the 1st and 2nd Defendants differently described. The subject matter of the cause of action is encroachment of the two adjacent properties owned by the parties. Basically, it is a boundary dispute. The Court that determined the matter had competent jurisdiction and there exists a Judgment in place that is yet to be set aside appealed and or reviewed. The matter of the Defendant's counterclaim was therefore determined in its finality.

28. I have read and distinguished the case referred to me by the Applicant in the Moses Mbatia v Joseph Wambura Kihara (2021) KLR on the basis that in this case there is an existing Judgement while in the Moses Mbatia (supra) there was no Judgement that is to say the matter had not been determined in finality.

29. Even if I should be wrong on the issue of *Res Judicata* on the slip ground that the Plaintiff's suit was not heard on merit, the application must surmount the test of whether or not the suit is subjudice / an abuse of the process of the Court.

30. The doctrine of subjudice which is captured in Section 6 of the *Civil Procedure Act*. Behind this doctrine and its application are some salient features of the rule of sub judice.

31. The concept of sub judice which in Latin means "under Judgement." It denotes that a matter is being considered by a Court or judge. The concept of subjudice is that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so

long as the first suit goes on. In such a situation, an order is passed by the subsequent Court to stay the proceeding and such order can be made at any stage.

32. In this regard, Section 6 of the *Civil Procedure Act* expressly provides that no Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

33. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of subjudice is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two Courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

34. The uncompromising manner in which Courts have consistently enforced the sub judice rule was best explained in *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] eKLR, which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other. Thus, I find no justification at to sustain the instant suit for the simple reason that the previous suit was heard and determined.

35. Further the Plaintiff has failed to disclose to this Court at the time of filing suit that she had previously filed Thika CMCC Case No 178 of 2016. This could amount to forum shopping and an abuse of the Court process.

36. Non-disclosure of material facts was discussed in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others* Civil Appeal No 210 of 1997 where the Court of Appeal stated as follows: -

> " It is perfectly well-settled that a person who makes an ex parte application to the Court – that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained."

37. In the case of *Ruaha Concrete Co. Ltd et al v Paramount universal Bank Ltd et al*, HCCC No 430 of 2002, the Court outlined the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure.

> " The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the Court, and not by assessment of the Applicant, and the Applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the Applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: -
>
> a) The nature of the case the Applicant is making when he makes the application.

b) The order for which the application is made and the probable effect of the order on the Defendant or the Plaintiff.

c) The degree of the legitimate urgency and the time available for the making of the inquiries."

38. It is now settled that any party seeking an equitable relief must disclose all necessary facts that may aid the Court in rendering justice to the parties. In the instant case it is the Court's finding that indeed the Plaintiff is guilty of material non-disclosure for obtaining the status quo orders without disclosing all material facts to the Court.

39. A litigant/counsel has a duty to disclose to the Court the existence of material facts which include existence of a suit; whether ongoing or concluded. This is the spirit behind the enactment of Sections 6 and 7 *Civil Procedure Act* to safeguard the Court's jurisdiction from delving into hearing/determining a suit which is sub judice or *Res Judicata*.

40. The duty to disclose is coached in mandatory terms in Order 4 Rule 1(1)(f) of the *Civil Procedure Rules* that;

"1. Particulars of Plaint [Order 4, rule 1.]

(1) The Plaint shall contain the following particulars-;

....

.....

(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaint."

41. Failure to disclose would attract consequences as was aptly discussed by RSC Omolo JA (as he then was) in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others* CA Civil Application No NAI 140 of 1995 (65/95 UR), at page 2 of his Ruling:

"Once the learned judge was satisfied, as he was, that the Applicant had obtained the order by concealing other relevant material, he was entitled not to consider the Applicants application any further for the Courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a Court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the Court."

42. In *Nyanja Holdings Limited v City Finance Bank Ltd* Nairobi HCCC No 1965 of 1991 (unreported), Nambuye J cited with approval the decision of the Court of Appeal in *Lilian S v Caltex Oil (K) Ltd* [1989] LLR 1653 (CAK) which clearly laid out the action Courts should take once a party fails to make full and frank disclosure. At page 32 of her Ruling she set out the principles to be considered

by the Court in determining whether a party had been guilty of non-disclosure of material facts to the Court. She held;

> " The material facts are those which it is material for the judge to know in dealing with the application was made, materiality is to be decided by the Court and not by the assessment of the (Applicant) or his legal advisor ... if material non-disclosure is established the Court will be astute to ensure that a Plaintiff who obtains an exparte injunction without full disclosure is deprived of any advantage he may derive by that breach of duty ... Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issue which were to be decided by the judge on the application...".

43. On the issue of abuse of the Court process, it is trite that an abuse of the process of the Court may be committed by the parties or even the Court. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR Mativo J (as he was then) attempted a definition of what an abuse of the process of the Court is as thus;

> " The situations that would give rise to an abuse of Court process are in-exhaustive. It involved situations where the process of Court had not been or resorted to fairly, properly, honestly to the detriment of the other party. Abuse of Court process also arose in the following situations:
>
> a. instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there existed a right to begin the action;
>
> b. instituting different actions between the same parties simultaneously in different Courts even though on different grounds;
>
> c. where two similar processes were used in respect of the exercise of the same right;
>
> d. where an application for adjournment was sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below;
>
> e. where there was no iota of law supporting a Court process or where it was premised on recklessness. The abuse such an instance lay in the inconvenience and inequalities involved in the aims and purposes of the action;
>
> f. where a party had adopted the system of forum-shopping in the enforcement of a conceived right;
>
> g. where an appellant filed an application at the trial Court in respect of a matter which was already a subject of an earlier application by the Respondent at the Court of Appeal;
>
> h. where two actions were commenced, the second asking for a relief which would have been obtained in the first."

44. The list is inexhaustive and in my view where a party files a suit without disclosing the existence of a similar suit as in this case, that amounts to abusing the process of the Court. I say so because of the

presence of an existing Judgment which remains undisturbed. Hearing this matter to conclusion is a waste of the Courts time, the risk of conflicting decisions of the two Courts with the likelihood of bringing the Court into disrepute.

45. The issues raised by the Applicant as to the reasons for non-attendance of the hearing leading to the dismissal of this claim and the failure to defend the counterclaim on which basis the Respondents got Judgement are issues that can be adverted in the existing suit in the lower Court. It does not give the Applicant the right to file a fresh suit.

46. Pursuant to the inherent powers of this Court as set out in Section 3A of the *Civil Procedure Act* that is the power to make orders necessary for the ends of justice and to prevent an abuse of the process of the Court, I find that it is in the interest of justice that the Preliminary Objection is upheld. Perhaps the Plaintiff would have recourse to the trial Court to plead his case subject to leave of the Court.

47. I find and hold that the Preliminary Objection is merited. The suit be and is hereby dismissed

48. I therefore find no necessity to determine the remaining issues with respect to the question relating to injunctive orders.

49. Costs shall be in favour of the 1st and 2nd Respondents.

50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF APRIL, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Odera HB Chege for Plaintiff/Applicant

1st and 2nd Defendants – Absent

3rd and 4th Defendants - Absent

Court Assistants – Kevin/Lilian