



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 840 OF 2014

PHILIP KAUVI NZENGU..... PLAINTIFF

VERSUS

WAITHERA KINYANJUI..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 25th June 2014 in which the Plaintiff/Applicant seeks for orders that the Defendant be restrained from selling, transferring, subdividing, dealing and/or in any other way alienating the parcel of land known as Kakuzi/Kirimiri Block III/50 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Philip Kauvi Nzengu, sworn on 25th June 2014, in which he averred that his parents were in occupation of the suit property since the colonial times and after independence and that they are now deceased and buried therein. He further averred that he was born on the suit property in the year 1958 and has resided thereon to date. He further averred that his first wife whom he had married died in the year 1989 and is buried on the suit property. He averred further that he married again and has 7 children and that his entire family resides on the suit property which is the only place they call home. He averred further that on 13th May 2014, officers from Makuyu Police Station in the company of the 1st Defendant and other persons descended upon his home, partly demolished his houses and caused his wife and children to flee. He further stated that in the course of the eviction, his personal property was lost or looted and his wife and children were beaten and wounded. He further stated that upon going to Makuyu Police Station, he was given a copy of a court order issued on 2nd May 2014 in **Thika Chief Magistrate’s Court D.O. Case No. 28 of 2006**. He stated that he was totally surprised by this order as he was never served with any application or notice leading to the said order. He further stated that he proceeded to the Thika Law Courts whereof he found that the Plaintiff had filed an application dated 15th April 2014 which was never served upon him and his brother who was also a party thereof and which was the basis of the orders of 2nd May 2014 for his eviction out of the suit property. He pointed out that the aforesaid application for execution was made after the passage of a period in excess of 7 years since the decree therein was given. He further averred that this matter emanated when the Defendant filed an action with the Thika Land Disputes Tribunal being TKA/LDT/19/2006/5 which was determined on 13th April 2006 which led to **Thika Chief Magistrate’s Court D.O. Case No. 28 of 2006**. He further averred that the Land Dispute Tribunal did not have jurisdiction to deal with the ownership of the suit property as the same is titled land. He further averred that the Land dispute Tribunal failed to investigate the root title and

how the same was acquired when his family was in possession of the suit property and notwithstanding the fact that he raised issues of fraud in obtaining the title thereto. He added further that in 1990, the Defendant filed a case for eviction at the Thika Law courts being **SRMCC No. 440 of 1990 Waithera Kinyanjui vs. Musyoka Nzengu & 3 Others** which case was dismissed by the court on 19th May 1992 as the Defendant could not prove her ownership of the suit property. He added that the Defendant did not file an appeal against that dismissal. He stated that instead the Defendant went to the Land Disputes Tribunal after a passage of over 16 years without disclosure of the earlier dismissed suit. He added that the Tribunal which lacked jurisdiction and without considering the dismissed suit when asked to declare the Defendant as the absolute owner of the suit property on 13th April 2006. He further stated that the Defendant's title deed is tainted with fraud and that he has appealed against the decision of the Land Disputes Tribunal through **Land Appeal Case No. Thika 17 of 2006 Philip Kavuvi Nzengu vs. Waithera Kinyanjui** which appeal is pending determination.

The Application is contested. The Defendant/Respondent, Waithera Kinyanjui, filed her Preliminary Objection dated 1st August 2014 in which she stated that this suit is res judicata having been adjudicated vide **Thika D.O. Case No. 28 of 2006** and that this suit is time barred having been filed without court's leave. The Defendant/Respondent also filed her Replying Affidavit sworn on 3rd November 2014 in which she averred that this Application and the entire suit is res judicata. She averred that the Plaintiff admitted in his pleadings that the parties herein commenced Tribunal Case TKA/LDT/19/2006/5 in regard to the suit property whereby the honorable tribunal ordered the Plaintiff to vacate the suit property within 90 days which award was adopted vide **Thika D.O. Case No. 28 of 2006**. She further averred that the said decree has never been set aside or varied and hence this suit involving the same parties and same cause of action being the suit property is res judicata and should be dismissed with costs. She further added that the Plaintiff/Applicant is seeking to appeal or review the orders of the tribunal in this suit whereas the time to do so has long expired as the decree is over 8 years old and hence not the proper forum to seek such orders. She further averred that she has in any event sold the suit property to third parties.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 12th November 2014 in which he averred that the issues raised in this suit are not the same as was adjudicated in the tribunal case and subsequent adoption in **Thika D.O. Case No. 28 of 2006**. He pointed out that he has raised issues of fraud on acquisition of the title to the suit property by the Defendant and the issue of the tribunal case being res judicata in light of the dismissal of **SRMCC No. 440 of 1990 Waithera Kinyanjui vs. Musyoka Nzengu & 3 Others**. He also said that he has raised the issue of jurisdiction of the tribunal for having made a determination of a titled land. He emphasized that this suit deals with issues which are distinct from those handled by the tribunal and are hence not res judicata. He further added that he filed an appeal with the Provincial Land Appeals Committee and in the event that he would not be satisfied would have appealed against such at this court. He further averred that the appeal has never been heard and determined and until then, the only remedy to him is for this court to look at those issues. He clarified that this present suit is not an appeal but a fresh matter seeking the intervention of this court to look at the process as he has nowhere to turn since the appeal tribunal and the supporting law thereof was appealed. He further stated that the allegation by the Defendant that she has sold off the suit property to third parties is not supported with credible evidence.

The orders sought by the Plaintiff/Applicant are orders of temporary injunction restraining the Defendant/Respondent from selling, transferring, sub-dividing, dealing and/or in any other way alienating the suit property pending the hearing and determination of this suit. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

From these precedents, it is obvious that the Plaintiff is obliged to demonstrate, at this interlocutory stage, that he has a right over the suit property which is in danger of being infringed by the Defendant and which is deserving of protection by way of a temporary injunction pending the hearing and determination of this suit. Has the Plaintiff been successful in doing this? The Plaintiff claims entitlement to the suit property on the ground that he and his family have lived on the suit property for a long time spanning from the colonial period through to the time this country acquired its independence, up to date. The Plaintiff has alleged that his late parents and first wife are buried in the suit property, that he himself was born and bred on the suit property and continues to reside thereon together with his family of 7 children up to date. It would appear that the Plaintiff’s claim over the suit property would be based on the principle of adverse possession though the Plaintiff has not, to my knowledge, filed suit for this. The Plaintiff acknowledges that the Defendant holds a title deed over the suit property which he alleges was obtained through fraud. It is admitted by both parties that there has been previous litigation between them being Tribunal Case TKA/LDT/19/2006/5 in regard to the suit property whereby the honorable tribunal ordered the Plaintiff to vacate the suit property within 90 days which award was adopted vide **Thika D.O. Case No. 28 of 2006**. The Plaintiff’s claim over the suit property has been resisted strongly by the Defendant/Respondent on the ground that this Application and the suit in its entirety are res judicata and should be dismissed. Is this the correct position?

The law pertaining to the doctrine of res judicata is captured under **Section 7** of the **Civil Procedure Act** which provides as follows-

“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.”

Having raised this Preliminary Objection, the onus is upon the Defendant to demonstrate that there had been a former suit between the same parties in a court competent to try such suit in which the same issues raised herein had been heard and finally decided by such court. The Defendant annexed a copy of the Decree in **Thika D.O. Case No. 28 of 2006** which suit was between the Defendant, the Plaintiff and one Musyoki Nzengu. The Decree was in the following terms:

1. *“The Defendants do not have any documents to prove ownership of L.R. No. Kakuzi/Kirimiri Block III/50;*
2. *The Land is not Government property as the plaintiff has a valid title deed for the suit premises;*
3. *The defendants are given 90 days to vacate the land from the date of the award – 13th April 2006; and,*
4. *After the expiry of 90 days the tribunal requests the Law courts Thika to issue the plaintiff with an eviction order to remove the defendants from her land.”*

In this suit, the Plaintiff prays for judgment to be entered against the Defendant in the following terms:

- i. An order declaring that the Thika Land Disputes Tribunal verdict in TKA/LDT/19/2006/5 –

- Waithera Kinyanjui vs. Musyoki Nzengu & Anther dated 13th April 2006 was issued without jurisdiction and in a matter that was res judicata hence the said verdict together with its subsequent adoption in **Thika D.O. Case No. 28 of 2006** is illegal, unlawful and a nullity;
- ii. An order declaring that the registration of Kakuzi/Kirimiri Block III/50 was done through fraud, illegality and in violation of the law and hence null and void;
 - iii. An order directed to the Land Registrar Thika to forthwith cancel the registration of Kakuzi/Kirimiri Block III/50 in the name of the defendant and register the same in the name of the Plaintiff.
 - iv. Costs of this suit
 - v. Any other relief that this honourable court will deem fit and just to grant.

Going by the prayers of the Plaintiff in his plaint, it is clear that the issue that is directly and substantially in issue is the ownership of the suit property, namely whether the title held by the defendant is valid or not whether through fraud or res judicata. The parties in the two suits are the same. This main issue was adjudicated upon in the Tribunal Case TKA/LDT/19/2006/5 in regard to the suit property whereby the honorable tribunal ordered the Plaintiff to vacate the suit property within 90 days which award was adopted vide **Thika D.O. Case No. 28 of 2006**. I am satisfied that this Application and suit are couched as a fresh matter but are in fact res judicata and I do so find. The Plaintiff has failed to demonstrate that he has a prima facie case with high chances of success at the main trial.

Arising from the foregoing, the Preliminary Objection raised by the Defendant is hereby upheld and this Application and suit are dismissed with costs to the Defendant.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE