



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELC MISC SUIT NO. 9 OF 2015

SOSPETER MURIMI KARITU.....APPLICANT

VERSUS

DAVID MUGO MURIMI.....1<sup>ST</sup> RESPONDENT

PAUL WANJOHI KINYUA.....2<sup>ND</sup> RESPONDENT

JAMES MUNENE NDUMBI.....3<sup>RD</sup> RESPONDENT

RULING

In the ENVIRONMENT AND LAND COURT CASE NO. 74 OF 2013 AT NYERI (the 2013 case) the 3<sup>rd</sup> respondent herein (suing as the plaintiff) had filed a suit against the applicant herein and the subject of that dispute was ownership of land parcel No. MWERUA/KANYOKORA/131 (the suit land).

**Ombwayo J.** heard the dispute and in a judgment delivered on 29<sup>th</sup> October 2014 at Nyeri, the Judge made the following findings:-

***“Ultimately, this Court makes a declaration that the plaintiff is bona fide owner of the suit land and that the suit land is not encumbered with regard to the claim by the defendant hence the plaintiff has the right to entry and all rights and privileges belonging or appurtenant thereto. The claim for damages is disallowed as it was not proved. Costs of the suit to the plaintiff”***

A notice of appeal has since been filed by the applicant herein at the Court of Appeal at Nyeri against the said judgment.

Prior to that, the applicant herein (suing as the plaintiff) had filed HIGH COURT CIVIL CASE NO. 472 OF 1986 also at Nyeri (the 1986 case) against the 1<sup>st</sup> respondent (as the 2<sup>nd</sup> defendant) and another seeking the following orders with respect to the suit land.

***a. That the 2<sup>nd</sup> defendant do transfer land parcel No. MWERUA/KANYOKORA/131 to the plaintiff.***

***b. A declaration that the 1<sup>st</sup> defendant has breached the contract and/or his undertaking and/or his obligation.***

***c. In the alternative and without prejudice to (a) above, the defendants do refund the purchase***

***price and do compensate the plaintiff for all the developments he has effected on the suit premises.***

***d. Costs of the suit.***

***e. Interest on above at Court rates.***

That dispute was heard by **Makhandia J.** (as he then was) and in a judgment delivered on 18<sup>th</sup> June 2009, the Judge entered judgment for the plaintiff (applicant herein) against the 2<sup>nd</sup> defendant (1<sup>st</sup> respondent herein) and another in the following terms:-

***a. Ksh. 3,500 being a refund of the purchase price.***

***b. Ksh. 3,080,000 being the total value of tea and arrow roots on the suit premises.***

***c. Ksh. 1,111,864.80 being the total value of the trees on the suit premises.***

The applicant has now moved this Court vide his Originating Summons dated 18<sup>th</sup> February 2015 citing the provisions of **Sections 7 and 38 of the Limitation of Actions Act, Section 3A and Order 37 of the Civil Procedure Act and Rules and Section 25, 28 and 107(1) of the Land Registration Act 2012** seeking the following orders:-

***1. That SOSPETER MURIMI KARITU be declared to have acquired title by adverse possession from DAVID MUGO MURIMI of 2.40 Hectares or thereabout of all that piece of land presently known as and comprised in Title L.R MWERUA/KANYOKORA/131.***

***2. That the registration of JAMES MUNENE NDUMBI as proprietor of MWERUA/KANYOKORA/131 and any persons deriving Title from DAVID MUGO MURIMI based on the land known as and comprised in the Title L.R MWERUA/KANYOKORA/131 be cancelled and the Land Registrar Kerugoya do rectify the register to enter the name of the plaintiff as registered proprietor of the said parcel of land.***

***3. That costs of these proceedings be borne by the respondent.***

That claim is based on the main ground that he has been in actual, physical, open and uninterrupted possession of the suit premises for a period exceeding 12 years immediately preceding the filing of this suit thereby acquiring Title by adverse possession and any claim to title by the respondent based on the registration as legal owner or anyone else of the said parcel off land Title.

On 13<sup>th</sup> November 2015 the applicant filed a Chambers Summons seeking the following substantive order against the 3<sup>rd</sup> respondent:-

***1. Spent.***

***2. Spent***

***3. That the 3<sup>rd</sup> respondent be by temporary injunction be prevented from selling, disposing off, transferring, destroying crops and/or in any other way dealing with land parcel No. MWERUA/KANYOKORA/131 pending the hearing and determination of this suit.***

That application which is the subject of this ruling is supported by the applicant's affidavit and on the grounds set out therein which are basically that he has been in quiet possession of the said parcel of land since 1967 and has developed it by planting over 100 blue gum trees and over 20,000 tea bushes yet the 3<sup>rd</sup> respondent intends to sell and/or charge the said land.

The 3<sup>rd</sup> respondent filed a replying affidavit in which the main issue raised is that this matter is res-judicata having been dealt with in Nyeri Case No. 74 of 2013 and the applicant is filing applications in every Court looking for favourable orders and does not deserve any orders from this Court.

The 2<sup>nd</sup> respondent filed grounds of opposition to the application also stating that the issues of ownership and injunction have been dealt with in the Nyeri case.

When counsels for the parties appeared before me on 30<sup>th</sup> November 2015, it was agreed that the application be canvassed by way of written submissions to be exchanged and filed on or before 25<sup>th</sup> January 2016. However, only the 3<sup>rd</sup> respondent filed submissions.

I have considered the application, the rival affidavits and the submissions by C.M. ONGOTO Advocates for the 3<sup>rd</sup> respondent. I have also considered the history of the litigation involving the parties herein over the suit land.

In their submissions, counsel for the 3<sup>rd</sup> respondent have taken issue with the fact that this suit is infact res-judicata and an abuse of the Court process. They therefore urge this Court to dismiss the application.

If indeed this suit is res-judicata, then it cannot form the basis upon which an order of temporary injunction can be granted. This Court must, at the earliest opportunity and even suo moto strike out a pleading that is res-judicata and an abuse of the Court process. Res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:-

***“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”***

**Section 7 of the Civil Procedure Act** then goes on to describe six (6) explanations that govern res-judicata **Explanation No. 4** states as follows: \_

***“Any matter which might and ought to have been made a ground of defence and attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”***

In the case of **POP-IN (KENYA) LTD & THREE OTHERS VS HABIB BANK AG ZURICH 1990 K.L.R 609**, the Court of Appeal held that a plea of res-judicata applies not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but also to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at that time. The reasoning behind this requirement is that parties should litigate all their issues at once and not, as it were, in installments. In the case of **E.T.V. ATTORNEY GENERAL & ANOTHER 2012 e K.L.R** the Court stated as follows:-

***“The Courts must always be vigilant to guard 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 in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction”***

And in **OMONDI VS NATIONAL BANK OF KENYA & OTHERS 2001 E.A 177**, the Court held that parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action to subsequent suits.

At the start of this judgment, I referred to both the 1986 and the 2013 cases which involved the same suit land subject of this suit. The applicant and the 1<sup>st</sup> respondent were parties in the 1986 case while in the

2013 case, the parties were the applicant and the 3<sup>rd</sup> respondent. The judgment in the 2013 case was that 3<sup>rd</sup> respondent was

***“the bona fide owner of the suit land and that land is not encumbered with regard to the claim by the defendant hence the plaintiff has the right to entry and all rights and privileges belonging or appurtenant thereto”.***

And in the 1986 case, the Court ordered the 2<sup>nd</sup> respondent and another to pay the applicant herein some sums of money being the value of the developments on the suit land and refund of the purchase price. This Court was not provided with the pleadings in both the 1986 and 2013 cases. All that was availed were the judgments in both cases which, under **Section 44 of the Evidence Act**, provide conclusive evidence of the finality of those decisions subject only to any decisions arising from appeal to the Superior Court. It is obvious, however, that the applicant’s claim of adverse possession could, with the exercise of due diligence, have been brought forward in either of the two previous suits. In the 1986 case, the applicant sought specific remedies that the 1<sup>st</sup> respondent do transfer the suit land to him or in the alternative, a refund of the purchase price and compensation for all the developments thereto. The Court gave him judgment for a refund of the purchase price and value of the developments on the suit land. It is not clear why the applicant did not also pursue his claim for adverse possession in the previous suits. What is clear however is that this suit and the application accompanying it are caught up by the doctrine of res-judicata and must therefore be struck out.

Even if this Court were to consider the application for temporary injunction on its merit, I would have to do so in line with the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are that the applicant must show a prima facie case with a probability of success at the trial and that if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages. If in doubt, the Court will determine the application on a balance of convenience. A prima facie case was defined by the Court of Appeal in **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS C.A CIVIL APPEAL NO. 39 OF 2002 (2003) e K.L.R** 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”.***

At the bare minimum, therefore, the applicant in an application for temporary injunction must demonstrate the infringement of a right and the probability of success at the trial. In this matter, it is clear that the issue of ownership of the suit land was conclusively settled by the two cases filed at the Nyeri High Court in 1986 and 2013. In the 1986 case, the applicant in fact abandoned his claim to the suit land and settled for a refund of the purchase price and value of the developments thereon. This is captured in the judgment of **Makhandia J.** (as he then was) in the following words:-

***“The plaintiff then took the stand and started testifying in support of his claim. Midway through his testimony however, Mr. Kariithi, his learned advocate applied to change tact in the matter. He then proposed that the matter be settled on the basis that the plaintiff be refunded the purchase price paid as pleaded in the plaint. Further, that the developments on the suit premises made by the plaintiff be valued and suitably compensated for by the defendant”***

Arising out of that proposal, the Judge directed that the District Agricultural Officer Kirinyaga District do visit the suit land and prepare a report giving a valuation of the development thereon. It is this report that guided the Judge in arriving at the judgment that he did whose import was to bring to an end the issue of ownership of the suit land. In the circumstances, I do not see what right the respondents have infringed with respect to the suit land. Further, going by the judgment of **Makhandia J.** (as he then was) delivered on 18<sup>th</sup> June 2009, the applicant’s loss, if any, can be quantified in damages which is what the Court in fact awarded him in the 1986 case. The applicant has therefore also not surmounted the second limb in

the **GIELLA** case (supra). The remedy of interlocutory injunction would accordingly not be available to him even on the merits of this Originating Summons.

Ultimately however, this Court finds that this Originating Summons is res-judicata and therefore an abuse of the Court process.

The Originating Summons dated 18<sup>th</sup> February 2015 is accordingly struck out with costs to the respondents.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

Ruling delivered in open Court this 26<sup>th</sup> February, 2016

Mr. Mwai for Mr. Madahana for Applicant present

Mr. Ngangah for the 2<sup>nd</sup> Respondent present

Also holding brief for Mr. Ongoto for 1<sup>st</sup> & 3<sup>rd</sup> Respondents present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**