REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 527 OF 2017

DAVID STEPHEN KAMIRI……..…….....PLAINTIFF/APPLICANT

VERSUS

WASHINGTON NJOGU KARIUKI ……..…….. 1ST DEFENDANT/RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED…...……2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated 26th January 2021 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following Reliefs:

(i) ……..*Spent.*

(ii) ……..*Spent.*

(iii) ……..*Spent.*

(iv) ……..*Spent.*

(v) That the firm of Njoroge Nganga & Co Advocates be granted leave to come on record for the Applicant in place of the firm of Ndenda & Co Advocates (Ndenda & Co Advocates were served on 4th March 2021).

(vi) That this Honourable court be pleased to review its ruling and orders given on 22nd December 2017 and the same be set aside and this suit reinstated.

(vii) That this court grant a temporary injunction restraining the 1st Respondent, his servants, agents, relatives, employees or anyone acting on his behalf from alienating, trespassing, constructing, evicting the Applicant or encroaching on the Applicant's home and/or in any other manner dealing, interfering or remaining on Plots No. N235 and N235B (surveyed and marked as Nairobi Block 105 (Embakasi Ranching)/14389 situate in Ruai area, Nairobi, pending the hearing and determination of the main suit herein.

(viii) That the Officer commanding Ruai Police Station ensure compliance with this order.

(ix) That costs of the application be granted to the Applicant.

2. The Subject Application is premised on the following Grounds, which have been enumerated at the foot thereof;

a) That the 1st Respondent has invaded, built some temporary iron sheet structures and fenced off the Applicant's home in Ruai Plots No. N235 and N235B (*hereinafter referred to as the suit properties*) in the scheme of Embakasi Ranching Company Limited.

b) That the 1st Respondent has used some goons and some purported police officers from Kayole to attack the Applicant's family residence.

c) That the Applicant and his family have been forced on several occasions to flee their home due to violent intimidation and threats by goons sent by the 1st Respondent.

d) That this suit was wrongly dismissed as the Applicant's advocates on record did not inform the court about some pertinent issues such as the decree issued on 17th October 2007 in Milimani CMCC 4302/2004 was against the Applicant's wife (who was wrongfully sued) and not the Applicant.

e) That the said advocate failed to inform the Applicant about the dismissal of the suit. An innocent litigant should not suffer the mistake of his advocate.

f) The Applicant was merely joined as an interested party in the said Milimani CMCC 4302/2004. In any event, the execution of the said decree is now statutorily time barred.

g) That the Applicant is the legitimate owner of the suit properties.

h) That the 1st Respondent engaged the lower court in an academic exercise in the said CMCC 4302/2004 due to misjoinder of the Applicant's wife.

i) That the Applicant purchased the suit properties from the late Muniu Kuria on 29th October 1991and the 2nd Respondent allocated the adjacent plot N235B to the Applicant as a bonus plot on 6th October 1994.

j) That the late Muniu Kuria's share in Embakasi Ranching Co. Ltd was also transferred to the Applicant on 29th October 1991.

k) That the Applicant and his family have been residing on the suit properties since 1991.

l) That the Applicant has been constructing a permanent 2 floor maisonette which investment is now threatened by the 1st Respondent's invasion.

m) That the 1st Respondent's invasion has snatched away and denied the Applicant and his family, their right to shelter.

n) That the plots purportedly owned by the 1st Respondent, being Plot Nos. P1935 and P1936 are in a totally different area, about a kilometer from the Applicant's home.

o) That in 2004, the 1st Respondent had wrongfully sued the Applicant's wife, Susan Wairimu Kamiri over the suit properties whereas the suit properties belong to the Applicant.

p) That the Applicant and his family stands to suffer irreparable loss if the orders sought are not granted.

3. Upon being served with the Application herein, the Respondent filed a Replying affidavit sworn on 7th July 2021 and wherein the 1st Respondent avers that the Application and suit are *Res judicata*.

4. It is the Respondent's position that the suit relating to the ownership of plot N235 and N235B, also described as P1936 and P1935B, was heard and determined vide Milimani CMCC No. 4302 of 2004, Washington N Kariuki Susan Wairimu Kamiri and David Stephen Kamiri. For clarity, in that suit, the 1st Respondent, then Plaintiff, was successful

5. On the other hand, it is contended that the Applicant filed another similar Application in July 2017, which application was later dismissed.

6. Besides, it has also been stated that the Applicant herein also appealed against the decision of the lower court vide Civil Appeal No 624 of 2011 David Stephen Kamiri v Washington Njogu Kariuki and his appeal was heard and dismissed by the High Court.

7. At any rate, the Respondent has further stated that the suit in the lower court, was in respect of the ownership of Plot Nos. P1935 and P1936, referred interchangeably as N235 and N235B, respectively.

8. Be that as it may, the Respondent has stated that he purchased the suit properties from Lydia Wanjiku Kahuthwa on 5th September 2003. For clarity, it was also stated that the said Lydia Wanjiku Kahuthwa had on her part, purchased the suit properties from Embakasi Ranching Company Limited.

9. On the other hand, the Respondent has also stated that upon the completion of the hearing and determination of the case, an eviction order was issued against the Applicant and thereafter the same was duly executed and/ or implemented.

10. Owing to the foregoing, the 1st Respondent took possession of the suit properties and has been in possession of the suit properties since. Consequently, the Respondent takes the position that the Application and underlying suit, are therefore an abuse of court process and ought to be dismissed.

SUBMISSIONS:

11. By consent, the parties agreed to dispose of the application by way of written submissions. In this regard, the Applicant filed his submissions on 10th November 2021, whereby same has reiterated the Grounds contained at the foot of the Application.

12. In support of the prayer for Review of the orders given on 22nd December 2017, Order 45 Rule 1 of the Civil Procedure Rules, 2010 has been cited.

13. To amplify the Grounds for Review, the Applicant submits that there is sufficient reason warranting a review and in this regard, emphasis has been placed on the following cases, **Republic v Anti Counterfeit Agency & 2 Others Ex-Parte Surgipharm Limited [2014]eKLR; Official Receiver and Provisional Liquidator, Nyayo Bus Services Corporation v Firestone EA (1969) Civil Appeal No. 172 of 1998; John Simiyu Khaemba & Another v Cooperative Bank of Kenya & Another [2019]eKLR** and **Republic v County Assembly of Kisii Committee of Powers and Privileges & 4 Others Exparte Karen Nyamoita Magara [2020].** Citing Section 4(4) of the Limitation of Actions Act and the decision in James **Maina Kinya v Gerald Kwendaka [2018]eKLR; Danson Muriithi Ayub v Evanson Mithamo Muroko [2015]eKLR,**

14. Further, the Applicant posits that the decree issued in favour of the 1st Respondent on 17th October 2007 vide CMCC 4302/2004 has lapsed by operation of law.

15. On the other hand, the Applicant has strenuously refuted the 1st Respondent's assertion that the Application and underlying suit are Res Judicata. For clarity, he submits that in the former suit, he was merely an interested party and that his wife had been wrongly enjoined.

16. In support of the foregoing position, the Applicant relies on the Decision in the case of **Luka Kiplelei Kotut v Joseph Chebii & Another [2013]eKLR; Danson Muriithi Ayub v Evanson Mithamo Muroko [2015]eKLR** and **Roseline Violete Akinyi v Celestine Opiyo Wangwau [2020]eKLR.**

17. Finally, the Applicant concludes by asserting that the prayers sought ought to be granted in the interest of justice and on the basis that the former suit was wrongfully dismissed. He cites **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR; Mbaki & Others v Macharia & Another (2005) 2 EA 206.**

18. On his part, the 1st Respondent filed his submissions on 15th December 2021, whereby same reiterates that the Application is Res judicata. According to the Respondent, the Court in dismissing a similar application by the Applicant in Civil Appeal No. 624 of 2011, found that the appellant was seeking to litigate on the same issue of ownership of the suit properties, which issue had been litigated at the lower court by his wife.

19. Consequently, It is his position that the present suit ought to follow the same fate. It is his further submission, that he was prevented from executing his decree obtained in CMCC 4302 of 2004, by reason of the pendency of the appeal lodged by the Applicant, which appeal has since been dismissed. In this regard, the Respondent has averred that the Appeal was dismissed on the 6th April 2017.

ANALYSIS AND DETERMINATION:

20. Having reviewed the Contents of the Notice of Motion Application, the Supporting Affidavit thereto as well as the Replying Affidavit which was filed on behalf of the Respondent, together with the Submissions filed, it is common ground that both the Applicant and 1st Respondent admit that there have been previous court proceedings seeking to determine the ownership of plot numbers P1935, P1936, N235 and N235B.

21. Besides, It is not in contention that the 1st Respondent herein had instituted suit No 4302 of 2004 against Susan Wairimu Kamiri and wherein, David Stephen Kamiri was impleaded as an Interested party.

22. On the other hand, there is also no disputation that Susan Wairimu Kamiri and David Stephen Kamiri are husband and wife. In that case, it came out, as it is now, that the 1st Respondent claims ownership of plot Nos P1935, P1936, and the Applicant herein lays claim to plot Nos. N235 and N235B, which plots are mysteriously on the same location.

23. The lower court issued judgement on 17th October 2007 in favour of the 1st Respondent herein, then Plaintiff. Suffice it to note that an of permanent injunction was issued against the Defendant as well as an order for vacant possession.

24. Following the rendition of the said orders, the Applicant herein, who was then the 2nd Defendant moved the court vide a Notice of Motion dated 9th August 2011 for a stay of execution of the decree issued on 17th October 2007, as well as a temporary injunction pending the hearing and determination of the application.

25. Subsequently, the application filed by the current Applicant was found to be *Res judicata* . In this regard, the application was thus dismissed on 30th November 2011.

26. It is imperative to note that the Applicant herein was Aggrieved by this decision and hence the Applicant herein filed an appeal at the High Court under Civil Appeal No.624 of 2011, challenging the decision of the court delivered on 30th November 2011.

27. It is common ground that the said Appeal was thereafter heard and determined. For clarity, the appeal was dismissed on 6th April 2017 and the Appellate Court upheld the findings of the lower court that the suit was indeed Res Judicata.

28. It appears that the Applicant was still dissatisfied, because he then filed suit under ELC Case No. 527 of 2017 and an application dated 24th July 2017, whereby same sought orders to restrain the 1st Respondent herein from accessing the suit properties, pending hearing and determination of the application.

29. As is now an emergent pattern, the 1st Respondent herein pointed out that the suit and application were res judicata and the application was dismissed on 22nd December 2017.

30. Undeterred, the Applicant has now filed the subject Application and same is keen to impeach and/ or otherwise vitiate the Decision of the Court vide the Ruling rendered on the 22nd December 2017.

31. I must observe that if there was ever an exemplification of the abuse of court process, this must be it. A lower court decision in which the Applicant herein was defeated, an application for stay which was also dismissed, an appeal that was also dismissed, a follow up suit which was again struck out and now an application for Review, all mounted on the same issues.

32. Besides, the judgement given in 2007 has also been upheld across the Board. However, despite the foregoing the Applicant has decided to re-agitate his case, with each subsequent court making a finding of res judicata.

33. In my humble view that is the kind of case that the Supreme Court had in mind in **Kenya Section of the International Commission of Jurists v Attorney-General and 2 others [2012] eKLR**, where it pronounced itself thus:

> **"The concept of "abuse of the process of the Court: bears no fixed meaning, but has to do with the motives behind the guilty party's actions: and with a perceived attempt to maneuver the Court's jurisdiction in a manner incompatible with the goals of justice.**
>
> **The bottom line in the case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption..." [D. T. Dobbie & Company (Kenya) Ltd. V. Muchina [1982] KLR 1 – per Madan, JA at p.9]. Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."**

34. Earlier, the Court of Appeal in **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) e KLR 229**, had delineated the parameters of abuse of process thus:

> **"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -**
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> **i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
>
> **ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
>
> **iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
>
> **iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness."** (*Underline, mine*)

35. It is incomprehensible why the Applicant would expect different results. As has already been found by the long line of decisions, the Applicant's case is Res Judicata. This is because it deals with the question of ownership and access to the suit properties, which has already been effectively and effectually dealt with, by Courts of Competent Jurisdiction. The parties to this suit are the same parties to previous proceedings where the issue of ownership, as said, was addressed.

36. Suffice it to say, that the matter herein is caught up by the Provisions of **Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)** provides as follows on the doctrine of *Res Judicata.*

> **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.**

37. At any rate,The Court in **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR** rationalized the doctrine of *res judicata* in the following words:

> "The rule or doctrine of *res judicata* served the salutary aim of bringing finality to litigation and afforded parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that had already been determined by a competent court. It was designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and *fora*, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* rested in the public interests for swift, sure and certain justice."

38. In my humble view, once a finding of *res judicata* has been identified, it operates as a complete estoppel against any suit that runs afoul of it, and there was is no way of going around it, not even by consent of the parties because it is the Court itself that is debarred by a jurisdictional injunct from entertaining such suit.

39. For coherence, this court invokes the power to stop a further abuse of court process as was discussed in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009, where Kimaru, J, held as hereunder;**

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."**

The court also associates itself with the dictum in **ASHMORE v CORP OF LLOYDS [1992] 2 All E.R 486 at page 488** cited with approval by the Court of Appeal in **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) e KLR 229**

> **'It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."**

CONCLUSION

40. In the premises, the subject Application is not only Res-judicata, but, also constitutes a gross abuse of the Due process of the court. Consequently, the Application dated the 26th January, 2021, be and is hereby Dismissed with Costs to the Defendant/ Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27th DAY OF JANUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Mwaura h/b for Mr. Njanja for the Plaintiff/Applicant

Mr. Maina Makome for the Defendant/Respondent