



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**ELC CASE NO. 347 OF 2015**

**HUMPHREY IRUNGU MACHARIA.....PLAINTIFF**

**VERSUS**

**NGARI KIRINGA.....1<sup>ST</sup> DEFENDANT**

**MINISTER FOR LANDS.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, MBEERE DISTRICT.....3<sup>RD</sup> DEFENDANT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 9th November 2015 in which he seeks the following orders:-

1. *Spent.*
2. *That this Honourable Court be pleased to issue a temporary injunction restraining the 1st respondent, his agents and/or members of his family from burying the remains of CHRISTOPHER NYAGA M'TETU on land parcel No. MBEERE/KIRIMA/724 pending the hearing and determination of this application inter-partes and later pending the hearing and determination of the main suit herein.*
3. *That an order of temporary injunction be issued against the 3rd respondent from implementing the decision of the 2nd respondent herein pending the hearing and determination of this application inter-partes and later pending the hearing and determination of the main suit herein.*
4. *That the costs of this application be provided for.*

The application is supported by the affidavit of the plaintiff **HUMPHREY IRUNGU MACHARIA** and based on the grounds set out therein.

The application from what I can glean from both the supporting affidavit and the grounds on which it is based, is premised on the pleading that whereas the plaintiff is the registered proprietor of the land parcel No. MBEERE/KIRIMA/724 (the suit land), the 2nd respondent delivered a decision on 26th October 2015 in Minister's Appeal Case No. 1775 of 1986 ordering that the 1st defendant be given 4 acres out of the said suit land and there is a likelihood that the 2nd defendant will implement that decision. It is also the plaintiff's case that the Chief Magistrate's Court Embu in Civil Case No. 186 of 2015 issued orders against the interment of the remains of the deceased on the suit land pending the hearing of the appeal before the Minister. Those orders expired on 10th November 2015. Annexed to that application is a copy of the title deed to the suit land, judgment in Embu Chief Magistrate's Case No. 186 of 2015 and the proceedings in the Minister's Appeal Case No. 1775 of 1986 – annexures **HM 1 to HM 3**.

Simultaneously with the filing of that application, the plaintiff had filed the suit herein seeking the following declaratory reliefs i.e.:-

1. ***A declaration that the 2nd defendant's decision is null and void.***
2. ***A declaration that the plaintiff is the absolute owner of the suit land.***
3. ***A declaration that the plaintiff is entitled to a permanent injunction against the 1st defendant, his agents and members of his family from interring the remains of CHRISTOPHER M'TETU on the suit land.***
4. ***Costs of the suit.***

The 1st defendant opposed the application and in his replying affidavit, he has deponed as follows. That he was the applicant in Minister's Appeal Case No. 1775 of 1986 where it was ordered that 4 acres out of the suit land be awarded to the family of the late **CHRISTOPHER M'TETU**, that there was Embu Chief Magistrate's Court Civil Case No. 186 of 2012 seeking the same orders as those being sought herein and there was no appeal from those orders. That this suit is an appeal through the back-door against the orders issued in Embu Chief Magistrate's Court Civil Case No. 186 of 2012. That they be allowed to bury the remains of the late **CHRISTOPHER M'TETU** on the 4 acres awarded to them by the Minister. That this application is an abuse of the Court's process and should be dismissed. Annexed to the replying affidavit is a letter dated 2nd November 2015 addressed to the Mbeere Sub-county Surveyor by the Director of Land Adjudication directing him to comply with the decision in the Minister's Appeal Case No. 1775 of 1986 and also the proceedings in that appeal.

Submissions have been filed both by the firm of Victor Andande Advocates for the plaintiff and Muthoni Ndeke Advocate for the 1st defendant.

The 2nd and 3rd defendant did not file any response.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

I must begin with prayer No. 2 of the said Notice of Motion which seeks a temporary injunction restraining the 1st defendant, his agents and/or members of his family from burying the remains of the late **CHRISTOPHER M'TETU** on the suit land pending the hearing and determination of this application and the main suit. In her submissions on behalf of the 1st defendant, Ms Muthoni Ndeke has submitted that the said application has been overtaken by events because the deceased was buried on 16th February 2016. That submission is not challenged and this Court takes it to be the correct position. In that case, there is nothing to injunct and that prayer is equally spent. All I can say is that if that burial took place in contravention of a sub-sisting Court order, then the plaintiff has recourse in the Court that issued the said order as provided for under the provisions of **Order 40 Rule 3 of the Civil Procedure Rules.**

With respect to prayer No. 3 seeking the order of temporary injunction restraining the 3rd defendant from implementing the decision of the 2nd defendant pending the hearing of this suit, it is common knowledge that the suit land was registered in the plaintiff's names and a title deed issued on 11th May 2006 as per his annexure **HM 1**. The plaintiff seeks in his suit declaratory orders that the 2nd defendant's decision is null and void and it infringed his right to property. He also seeks a declaration that he is the absolute proprietor of the suit land. In her submission, counsel for the 1st defendant suggests that this suit is res-judicata since the issues raised herein were raised and determined in Embu Chief Magistrate's Civil Case No. 186 of 2015 and also the Minister's Appeal Case No. 1775 of 1986. This Court must therefore investigate the issues of res-judicata because if it is up-held, then this Court must down its tools.

Res-judicata is provided for under **Section 7 of the Civil Procedure Act** 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 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”***

The basis for the doctrine of res-judicata is that there must be an end to litigation and therefore if a controversy has been the subject of a previous suit determined by a Court of competent jurisdiction, then it cannot be re-opened because a party should not be vexed twice. In **KAARIA & ANOTHER VS THE ATTORNEY GENERAL & OTHERS (2005) 1 E.A 83**, the Court of Appeal stated that for res-judicata to be invoked in a civil matter, the issues must have been decided by a competent Court, the matter in dispute in the prior suit must be directly and substantially in dispute in the current suit and the parties in the former suit should have been the same parties in the current suit or parties under whom they or any of them claim. I have looked at the judgment in Embu Chief Magistrate’s Court Civil Case No. 186 of 2015 in which the plaintiff was the plaintiff in this case while the defendant was one **TABITHA WAMBUI NYAGA** who is the wife of the deceased **CHRISTOPHER M’TETU**. The dispute in that suit was over the ownership of the suit land. However, this suit now before me seeks declaratory reliefs which were not the issues in controversy in that case and it is of course doubtful if in September 2015 when the subordinate Court delivered its judgment in that case, it was clothed with the jurisdiction to grant declaratory reliefs. It is also clear that the Minister’s Appeal Case No. 1775 of 1986 could not have issued declaratory reliefs even if they were raised in that forum. It is my finding therefore that this suit is not res-judicata because the remedies sought herein could not and were not raised and determined in the previous suit at both the Magistrate’s Court and the Minister’s Appeal. The plea of res-judicata cannot therefore be sustained.

I shall now consider the application on its merit.

An applicant seeking an order for temporary injunction must satisfy the Court that:-

- a. ***He has a prima facie case with a probability of success at the trial***
- b. ***If the order is not granted, he will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and***
- c. ***If the Court is in doubt, it will determine the application on the balance of convenience – GIELLA VS CASSMAN***

**BROWN & CO. LTD (1973) E.A 358.**

A prima facie case was defined in the case of **MRAO LIMITED VS FIRST AMERICAN BANK OF KENYA LTD (2003) K.L.R 125** as a case in 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 of the latter.

There is no doubt that the plaintiff is within his right to file this suit seeking declaratory remedies with regard to the suit land – **JOHANA BUTI VS WALTER OMARIBA & OTHERS C.A CIVIL APPEAL No. 182 of 2006 KISUMU**. See also the case of **NICHOLAS NJERU VS ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL No. 110 of 2011** where the Court stated that there is no limit to the powers of this Court to grant a declaratory order except such limit as it may in its discretion impose upon itself. There is also no doubt that by the time the Minister was making his decision on 26th October 2015 in his Appeal Case No. 1775 of 1986 in which he awarded the late **CHRISTOPHER M’TETU** four (4) acres out of the suit land, the said land had been registered in the names of the plaintiff on 11th May 2006 some nine (9) years earlier. Among the issues that the trial Court will need to consider is if the Minister had the jurisdiction to grant such orders. In my view, the plaintiff has established a prima facie case as required in the case of **GIELLA VS CASSMAN BROWN** case (supra).

On the issue of irreparable damage that cannot be compensated by an award of damages, the Court of Appeal in the case of **MUIRURI VS BANK OF BARODA (KENYA) LTD (2001) K.L.R 183** stated that disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss. Besides, even in the **GIELLA VS CASSMAN**

**BROWN** case (supra), the Court appreciated that an injunction will “**not normally**” be granted unless the applicant will otherwise suffer irreparable injury that cannot adequately be compensated by an award of damages. That shows that even where damages may be an adequate remedy, the Court may still grant an injunction particularly where it is shown that the respondent has acted in an oppressive manner – **WAITHAKA VS I.C.D.C 2001 K.L.R 381**. Further, damages are not always an adequate remedy where there is a breach of a legal right – **AIKMAN VS MUCHOKI 1984 K.L.R 353**. In this case now before me, the plaintiff claims that his right to the suit land has been infringed. That suggests an infringement of **Article 40 of the Constitution** which guarantees his right to own property. Then there is the issue as to whether or not the Minister had the powers to issue the orders that he did. All these issues, in my view are matters that entitle the plaintiff to the orders sought.

In the circumstances therefore, this Court, upon considering all the issues raised herein, grants the plaintiff prayer No. 3 of his Notice of Motion dated 9th December 2015.

Costs in the cause.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Ruling dated, delivered and signed in open Court this 9<sup>th</sup> day of June 2016.

Mr. Andande for Plaintiff present

Ms Muthoni for 1st Defendant present

No appearance by the other parties.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**