



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. MACHAKOS CASE NO. 21 OF 2014

KANKO OLE KELELE.....PLAINTIFF/APPLICANT

VERSUS

KIRANDU OLE MUTUNKEI.....DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 19th March 2014 brought **under Order 40 Rule 1(a), 2(1) and 4(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A, 3A and 63(e) of the Civil Procedure Act**. The Plaintiff/Applicant is seeking for an order of temporary injunction restraining the Defendant/Respondent from entering, trespassing, subdividing, altering and/or in any way interfering and/or continuing to interfere with the parcel of land registered as Kajiado/Kitengela/8506 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Kanko Ole Kelele, the Plaintiff/Applicant herein, sworn on 19th March 2014, in which he averred that he purchased the suit property from the Defendant and took possession thereof in the year 1994 to date. He further averred that he paid the Defendant the transfer charges so that he could effect transfer of the suit property to his name, but to date he has failed to effect the transfer. He further averred that he lodged a claim in regard to the suit property against the Defendant at the Kajiado Dispute Tribunal No T.C 470/08/08 where after hearing both parties the Tribunal made an award in his favour which award was read and duly adopted as the judgment of this court on 29th May 2012. He further averred that he has developed the suit property by constructing a semi-permanent house, a kitchen and a pit latrine. He further claimed that the Defendant expressed intention of subdividing the suit property. He added that he has been receiving threats on his life and forceful eviction. He contended that the Defendant’s actions are contrary to the order of the court issued by the court in Kajiado. He stated that he is now apprehensive that the Defendant may proceed to evict him from the suit property and demolish his residential house which action would render him homeless and he would suffer irreparable loss.

This Application is opposed. The Defendant, Kirandu Ole Mutuneki, has filed his Replying Affidavit sworn on 27th April 2014 in which he averred that he has never sold the suit property to the Plaintiff /Applicant at any given time as alleged and further that he was never paid any transfer charges as exhibited. He averred further that he was not aware of the claim at the Kajiado Land Dispute Tribunal by the Plaintiff/Applicant pointing out that the award and decree issued by the Kajiado Magistrate Court

were ex parte. He claimed that he was never served with any pleadings and only got to know about these proceedings after he was served on 28th March 2014. He stated further that in the circumstances, the Plaintiff/Applicant was a trespasser on the suit property and the developments thereon are illegal. He added that the Plaintiff/Applicant cannot claim breach of quiet enjoyment of the suit property as he is neither the registered nor the beneficial owner thereof but a mere trespasser who wants to dispose of his land. He further stated that the Plaintiff/Applicant does not reside on the suit property as claimed therefore no loss would be occasioned upon him. On those grounds, he stated that this Application is therefore unmerited and should be dismissed with costs.

Parties filed their respective written submissions which this court has considered.

Though the Plaintiff/Applicant seeks an order of temporary injunction, the more pressing issue to determine in this Application and the entire suit is whether or not this Application and suit is *res judicata*. This is in light of the disclosure by the Plaintiff/Applicant of the existence of Kajiado Dispute Tribunal No T.C 470/08/08 in which the issue for determination was the Plaintiff's claim over the suit property.

Is this Application and suit *res judicata*? The spirit and object of the doctrine of *res judicata* is succinctly expressed in a well-known common law maxim "*debet bis vexari pro una etadem causa* (no one ought to be twice vexed for one and the same cause)". 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."

The Plaintiff/Applicant has averred that he was awarded a part of the suit property and that the award of the said Tribunal was adopted as an order of the court in **Kajiado PMCC No. 67 of 2009**. As proof of this, he annexed a copy of Decree issued on 29th May 2012 with the following order:

"That the District Land Registrar to register ten (10) acres of the above quoted parcel of land in favour of the claimant."

This was in reference to the suit property and the claimant was the Plaintiff/Applicant. A further order was issued by the same court on 14th November 2012 to the following effect:

"That the Executive Officer of this court to sign on behalf of the Objector the consent of transfer in title no. KJA/KITENGELA/8506".

The parties in the Tribunal case and the subject matter thereof was the same as in this present suit. It is clear to me that this suit is *res judicata* owing to the proven fact that the issue before this court is the same as the issue that was before the Tribunal which was adopted in Kajiado **PMCC No. 67 of 2009**. The Plaintiff/Applicant already has the orders he requires to secure his claim over a portion of the suit property. It is not for this court to re-look at that decision as this is not an appeal.

In light of the foregoing, this Application and indeed the entire suit is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH

DAY OF AUGUST 2016.

MARY M. GITUMBI

JUDGE