



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. E123 of 2020

CHIRAG BUILDERS LIMITED.....PLAINTIFF

VERSUS

GEOFFERY KIPYEGON MOI.....DEFENDANT

RULING

1. Coming up for determination is a Preliminary objection by the defendant dated 13th November 2020 and a Notice of Motion application dated 24th February 2021 by the plaintiff.

2. The preliminary objection raises the following points:

i. This matter is res judicata to Nairobi ELC Case No. 1269 of 2014 Gideon Kipyegon Moi vs Linet Minagi Mshamba & Ano.

ii. The matter directly and substantially in issue herein have been directly and substantially in issue in Nairobi ELC Case No. 1269 of 2014 Gideon Kipyegon Moi vs Linet Minagi Mshamba & Ano as between the plaintiff and the defendant and another party.

iii. The said Nairobi ELC Case No. 1269 of 2014 Gideon Kipyegon Moi vs Linet Minagi Mshamba & Ano has a pending application that is yet to be determined.

3. The Plaintiff's application seeks the following orders:

i. Spent

ii. That the Defendant by himself, his employees, servants, agents and or proxies be restrained by way of an injunction from trespassing, excising, entering, constructing, building, dumping of any building materials or any other materials, erecting any advertising boards, alienating, selling, encroaching, encumbering, and/or interfering in whatsoever manner with the suit property (LR No. 209/12419), pending the hearing and determination of the suit herein.

iii. That pending the hearing of the instant application inter parties, there be an interim order in terms of prayer 2 herein-above.

iv. That the costs of this application be provided for.

4. This application supported by the sworn and undated affidavit of Suresh Fatania a director of the Plaintiff is premised on the grounds that the Plaintiff is the registered owner of LR No. 209/12419 having purchased it from the late Linet Minagi Mshamba on 17th December 2013 and the transfer was registered on 15th April 2014. After taking possession of the suit property in 2013, the Defendant invaded it, procured a title to the property and sued Linet Minagi Mshamba for declaration that the Defendant was the owner of the property. The defendant had put a perimeter wall on the suit property and the property risked being disposed off to their detriment.

5. The Applicant avers that in the suit ELC Case No. 1269 of 2014,

Justice Gacheru had on 2nd December 2016 granted orders to maintain status quo to the effect that no party was allowed to carry out any business on the property pending the hearing and determination of the suit. But the suit was dismissed on 27th January 2020 for want of prosecution. Before the dismissal, the Plaintiff had sought to be joined as an Interested Party. Following the dismissal, the Plaintiff filed the current suit so as to articulate its case and get appropriate orders.

6. Written submissions were to be filed by 14th January 2022 but none of the parties complied with these directions.

Analysis and Determination

7. This court will first determine the preliminary objection before embarking on to the application.

8. It has been stated time and again that a preliminary objection should be raised on a point of law and not on substantive issues from the pleadings which must be determined by court upon perusal of evidence. This was well elucidated on the *locus classicus* case of **Mukisa Biscuit Company – vs- West End Distributors Limited (1969) EA. 696:**

“... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

9. In the preliminary objection, the Defendant contends that this suit is *res judicata* to **ELC case No. 1269 of 2014**. The plaintiff on the other hand asserts that the aforementioned suit was dismissed for want prosecution. The Court of Appeal in the case of **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR** held as follows;

“ Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed...”

10. The Plaintiff has not denied that the subject matter in the two suits is the same and the parties are litigating under the same title. The Plaintiff takes issue with the fact that the suit was dismissed yet the court had given orders of status quo on 2.12.2016. However, I find that such orders lapsed with the dismissal of the suit. In the circumstances, I find that indeed the suit herein is *res-judicata* to **ELC 1269 of 2014** and the net effect is that the application dated 24.2.2021 too cannot be sustained.

Final Orders

1) The preliminary objection dated 13.11.2020 is found to have merits, thus the suit herein and the application dated 24.2.2021 are struck out.

2) The plaintiff is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mutinda for the Defendant

M/S Kimani for the Plaintiff

Court Assistant: Eddel Barasa