



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELC NO.198 OF 2014

LYDIA WANJIRU MWANGI.....1ST PLAINTIFF

PURITY WANGUI WANJIRU.....2ND PLAINTIFF

VERSUS

GATHU GATURA.....DEFENDANT

RULING

Background

1. By a plaint dated **22nd September, 2014** the plaintiffs brought the current suit to compel the defendant to register **L.R Nos. Maguti/Ragati 1516** and **1517** (hereinafter referred to as the suit properties) in their names.
2. It is the plaintiffs' case that the defendant, who is their father-in-law, divided **L.R Maguti/Ragati 1417** (hereinafter original parcel of land) into three portions to wit, **L.R Maguti/Ragati 1516, 1517** and **1518**; that the suit properties were to be registered in their names to hold in trust for their children. The plaintiffs contend that in breach of his promise and obligation to transfer the suit properties to them, the defendant without their consent sold the suit properties to third parties.
3. On or about **9th October, 2014** the plaintiffs filed the chamber summons of even date seeking a temporary injunction to restrain the defendant by himself, his relatives, servants, agents, assignees or any other person claiming under him from selling, transferring, disposing, alienating, transacting and/or entering into any deal over the suit properties. The plaintiffs also sought to prohibit the defendant from transferring or dealing with the suit properties pending the hearing and determination of the suit.
4. The application is premised on the grounds that the plaintiffs live on the suit properties and that the defendant has unlawfully entered into sale agreements with third parties who may at any time evict them from the suit properties causing them irreparable loss and damage.
5. In the affidavit sworn in support of the application, the plaintiffs have deposed that following the death of their husband, **Mwangi Gathu**, the defendant started harrasing them (brought suits against them). In 2012, the defendant sub-divided the original parcel of land into three portions as indicated herein above and promised the plaintiffs that the suit properties would be registered in their names (plaintiffs). This did not happen as he instead registered the suit properties in his name. The plaintiffs have further deposed that they learnt that the suit properties were to be unlawfully auctioned by Superview auctioneers.

6. The plaintiffs have further explained that they had entered into an agreement with the defendant to the effect that he would give them land. Explaining that the defendant's behaviour has put their lives and the lives of their families in jeopardy, the plaintiffs have maintained that unless the defendant is restrained by way of the orders sought in the application herein, there is real danger that the defendant may continue with his illegal activities and forcibly evict them from the suit properties.

7. In support of their claim, the plaintiffs have annexed the following documents to their supporting affidavit:-Copy of mutation; official search in respect of the suit properties; newspaper extract bearing the advertisement for sale of the original parcel of land by public auction; sale agreement executed between themselves and the defendant; charge sheet and plaint showing cases instituted against them and sale agreement executed between the defendant and a third party, John Mwaniki Kabia.

8. In reply, the defendant filed a replying affidavit sworn on **15th October, 2014** in which he has, *inter alia*, deposed that the application is bad in law for having been brought under unknown provisions of the law; that the mutations annexed to the plaintiffs supporting affidavit were made in error or fraudulently by the applicants who had no capacity to apply for the mutations; that he did not promise to give the plaintiffs the suit properties.

9. The defendant has further explained that in 2012 he fell into serious debts and after he was unable to meet his debt obligations, he was sued in Karatina Civil Cases No.71 of 2013 and 72 of 2013; that he was unable to settle the decree obtained against him in those cases and consequently the suit properties were sold by public auction to satisfy the decree obtained against him.

10. Explaining that he had no control over the order of the court, he points out that the plaintiffs unsuccessfully tried to stop the sale of the suit properties.

11. Reiterating that the suit properties were sold pursuant to an order of the court, he contends that he has no power to transact any business on the suit properties after they were auctioned.

12. The defendant has also pointed out that the plaintiffs have not enjoined the Auctioneer and/or the Court which issued the orders that led to the sale of the suit properties and argues that the plaintiffs have not satisfied the conditions for grant of an order of temporary injunction or demonstrated any sustainable case.

13. In support/proof of the averments contained in his replying affidavit, the defendant has annexed the following documents to the affidavit:-plaint filed in the Karatina Court; Certificate of sale of the suit properties and objection proceedings filed by the plaintiffs in the lower court.

14. During the pendency of the plaintiffs' application herein, **Mary Wanjiru Weru**, filed the notice of motion dated **14th January, 2015** seeking orders:-

- a. That she be added as an interested party in this suit;
- b. That pending the hearing of her application *inter partes* the *ex parte* injunction orders issued in favour of the plaintiffs on 9th October, 2014 be stayed and/or vacated;
- c. That the suit be struck out for being incompetent and a gross abuse of the process of the court; and
- d. The plaintiffs be ordered to pay the costs of the application and the suit.

15. The application is premised on the grounds that the suit properties were sold to the applicant in execution of decrees in Karatina PMCC Nos. 71 and 72 of 2013; that the plaintiffs had filed a similar application in the lower court which was dismissed; that the plaintiffs failed to disclose to the court that the suit properties had been attached and sold in execution of court orders.

16. In view of the foregoing, it is the applicant's case that the plaintiffs obtained the orders sought to be stayed or vacated through dishonesty, fraud and misrepresentation. Terming the application by the plaintiffs a conspiracy between the plaintiffs and the defendant to defeat the ends of justice, the applicant urges the court to grant the orders sought in order to uphold the dignity and authority of the court.

17. The application is supported by the affidavit of the applicant, Mary wanjiru Weru, in which the grounds thereon are reiterated. In support of her case, the applicant has annexed to her supporting affidavit the following documents:-

- i. Certificate of sale under Rule 15 of the Auctioneers Rules, 1997;
- ii. Copies of the applications filed by the plaintiffs in the lower court to stay the sale of the suit properties;
- iii. Orders obtained in the lower court, including the order of dismissal of the application for stay of execution of decree of the lower court;
- iv. Order obtained in the lower court decreeing that the applicant be put in possession of the suit property.

18. In reply, the plaintiffs filed their replying affidavit sworn on **22nd January, 2015** in which they reiterated their contention that the original parcel of land was sub-divided into three parcels out of which the defendant was to transfer to them the suit properties; that the defendant failed to register the suit properties in their name but instead registered them in his name; that they have been living in the suit properties for over 15 years and have nowhere else to go with their families.

19. The plaintiffs have admitted that they filed the applications referred to in the applicant's supporting affidavit and that the said applications were dismissed. They explain that because they had nowhere else to go, they filed the current suit to seek justice. In view of the foregoing, they argue that its fair and just that this case be heard orally to determine the rightful beneficiaries of the suit properties.

Submissions

20. When the two applications came up for hearing, the plaintiffs chose to rely on their affidavits for both applications. The defendant, as indicated earlier did not file a Replying affidavit to the application dated 14th January, 2015 as he did not intend to oppose it. In regards to the application dated 9th October, 2014, the defendant chose to rely on his replying affidavit. Counsel for the applicant, **Mr. Wahome**, urged the court to strike out the suit and in the event that the court was not inclined to do so, the applicant be added as an interested party to the suit.

21. Referring to the documents annexed to the applicant's supporting affidavit which showed that the plaintiffs' had tried in vain to block the sell of the suit property and pointing out that no appeal was preferred against the lower court's refusal to stay execution of the decree obtained against the defendant, Mr. Wahome faulted the plaintiffs for having failed to disclose to the court those facts. Maintaining that the plaintiffs are guilty of none- disclosure of material facts, he submitted that if the court was seized of those facts it would not have granted the orders sought to be vacated.

22. Arguing that the interim orders are embarrassing the court, he urged the court to dismiss the suit and/or set aside the orders to avoid bringing the court to disrepute.

23. On their part, the plaintiffs admitted having filed the applications to stop the sell of the suit properties in the lower court and explained that they filed a suit to this court upon advise by the lower court.

24. In a rejoinder, counsel for the applicant submitted that the applications filed in the lower court speak for themselves and urged the court to allow the application dated 14th January, 2015 as prayed and dismiss the chamber summons dated 9th october, 2014.

Analysis and determination:

25. The undisputed/uncontroverted facts of this case are as follows;

- a. The suit properties were sold in execution of decree(s) obtained against the defendant in the lower court;
- b. The plaintiffs had unsuccessfully tried to block the sale of the suit properties; See the orders of

dismissal issued on 17th December, 2014 annexed to the applicant's supporting affidavit marked as M/358/VI and M/358/VII.

- c. That there is an order issued by the lower court directing that the defendant, his agents/servants, relatives or anybody claiming right under him be evicted to give vacant possession to the applicant. See the order annexed the applicant's supporting affidavit as M/358/IX.
- d. That the orders of the lower court dismissing the applications by the plaintiffs seeking to block the sale of the suit properties and or the original parcel of land herein was not appealed from;
- e. That instead of lodging an appeal against the decisions of the lower court the plaintiffs decided to lodge a fresh suit.

26. It is clear from the foregoing, that the plaintiffs' application seeking to block the sell, disposal and/or alienation of the suit properties was raised and denied by a court of competent jurisdiction. As such, this suit and application by the plaintiffs is caught by the doctrine of res judicata. In this regard see **Section 7** of the Civil Procedure Act Cap 21 which provides:

“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”

27. The test in determining whether a matter is *res judicata* was summarized in the case of **Benard Mugo Ndegwa -VS- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that: 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.

28. In the case of **E.T VS Attorney General & Another (2012) eKLR** it was stated that:

“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. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001)EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

29. The suit herein, is in as far as it seeks the orders sought in the lower court and denied, res judicata the suit filed in the lower court. The lower court was a competent court for purposes of determining the issues raised in the suit herein. The lower court, in fact, considered the issues raised in this suit vide the plaintiffs application seeking to block the sale of the suit property.

30. **In the case of John Ochanda v. Telkom Kenya Ltd (2012) eKLR** it was stated:-

“The Plaintiffs claim for general damages was specifically denied for lack of evidence and therefore dismissed. None of their other claims were allowed, and they are therefore presumed dismissed. If the Plaintiffs were dissatisfied with the decision of the court regarding those claims that were not granted, they ought to have appealed against that part of the judgment and the decree. They cannot get what they were unable to get at the trial by seeking to litigate the same issues again by their present application.”

31. The suit herein, in as far it seeks to reintroduce the issue of the plaintiff entitlement to the suit properties, which they unsuccessfully brought in the lower court is bad in law. I say so because, the only

lawful way of challenging a decision of a court, if aggrieved by it, is to lodge an appeal but not to file a fresh suit as the plaintiffs have done.

32. Whilst this court appreciates the concerns and interest of the plaintiffs to protect their interest in the suit properties, it reiterates that the procedure used by the plaintiffs' to protect their interest therein is bad in law. I reiterate that the plaintiffs' should approach this court by way of appeal with the interim orders herein sought being sought in the appeal.

33. It is also regrettable that the orders sought in this suit cannot be issued in favour of the plaintiffs because doing so would contradict the order of the lower court directing that the applicant be put in possession of a portion of the suit property being Maguti/Ragati/1516.

34. In view of the foregoing, I agree with the defendant and with the submissions made by counsel for the applicant that the suit herein is bad in law and is for dismissal.

35. Being of the view that the plaintiffs who were unrepresented may not have appreciated the proper way of challenging the decision of the lower court, I dismiss the suit but with no orders as to costs.

36. In cognizance of the plaintiffs' concerns regarding the conduct of the defendant which is likely to expose them to unnecessary hardship, I advise them to consider pursuing a similar claim but in respect of any of the defendant's free property, if any.

Dated, Signed and delivered at Nyeri this 27th day of March, 2015.

L N WAITHAKA

JUDGE

In presence of:-

Mr. Kiminda holding brief for Mr. Wahome Gikonyo for the Applicant

Lydia Wanjiku Mwangi)

Purity Wangari Wanjiru).....Plaintiffs

No appearance for Defendant