



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 567 OF 2014

PATRICK MUTHYA MUTU.....1ST PLAINTIFF

JOSEP MUTHOKA 2ND PLAINTIFF

VERSUS

KINYANJUI MUNDIA...1ST DEFENDANT

THE LAND REGISTRAR KITUI

ZACHARIA K. MUTUA 2ND DEFENDANT

THE DISTRICT LAND SURVEYOR, KITUI

MUNUVE KATUTA3RD DEFENDANT

MUSEE MWALILI 4TH DEFENDANT

R U L I N G

The plaintiff's application dated 8th May 2014 seeks an order of temporary injunction restraining the Defendants by themselves their agents and servants and/or any persons acting under their authority from subdividing, selling, Alienating, disposing off, transferring, construction on or interfering in any manner whatever with all that properties known as **Kyangwithya/Msevani/475, 476, 477 and 478** and all subdivision of **Kyangwithya/Misembwani/477** pending the hearing and determination of the suit herein.

The plaintiff's application is grounded on the grounds that are set out on the body of the application and the supporting affidavit sworn on 8th May 2014 by **Patrick Muithya Mutua**. The plaintiff's/Applicants are the personal legal representatives of the estates of **Mutua Muimi** alias Joseph **Maingi Kitavi** (deceased) respectively. The plaintiffs application is principally grounds that:-

- (i) That Land Appeal case numbers **299 of 1980 and 300 of 1980** which were decided and dismissed respectively against the Applicant's deceased parents gave rise to a judicial review application in Nairobi **HC Misc. Application NO. 505 of 1986** where the applicants parents challenged the decision in the appeals.

(ii) That the High Court in **HC. Misc Application NO. 505 of 1986**, issued express orders that the implementation of the award in 299 of 1980 be stayed pending the hearing and determination of the High Court case which orders were registered in the encumbrance section of the green card of the property known as **Kyangwithya/Misewani/477**.

(iii) That the 1st Defendant/Respondent, with the knowledge of the existence of the order issued by the court, illegally and unlawfully lifted and/or removed the restriction in the absence of any court order or decree directing him to do so.

(iv) That the 2nd Defendant/Respondent, proceeded to implement the decision made in appeal number 299 of 1980, when he knew or ought to have known that the same was under challenge and that express orders had been issued by the court, by subdividing the property into four portions.

(v) The 1st Defendant/Respondent has since closed the record of the suit property known as **Kwangithya/Misewani/477** on account of subdivision and registered the subdivisions in favour of deceased persons.

(vi) The 3rd Defendant has without authority to do so, letter of Administration and with the knowledge that the property was not registered in his favour sold and/or disposed off part of the suit property to the 4th Defendant/Respondent.

(vii) The 4th Defendant/Respondent has entered thereon in the suit property and constructed a permanent structure.

The supporting affidavit by **Patrick Muithya Mutua** reiterates the grounds in support of the Applicants application and annexes various documents in support thereof and contends that the actions by the 1st defendant to remove the restriction and the 2nd defendant to implement the decision in appeal **NO. 299 of 1980** which was stayed by the High Court vide **HC Misc application NO. 299 of 1980** was unlawful and illegal and in utter disregard of the court's order.

One **James Moki Katuta** administrator of the 3rd Defendant/Respondent has filed a replying affidavit on behalf of the 3rd Defendant and the 4th Defendant in opposition to the plaintiffs application sworn on 3rd July 2014. The 3rd and 4th Defendants through the replying affidavit aver that the application by the plaintiffs is bad in law and an abuse of the process of the court and in support thereof claim there is misjoinder and non joinder of parties, material non-disclosure and concealment or dis-information that cannot entitle the applicants of the discretion of the court. The respondents further aver that the applicants are guilty of inordinate delay and that the suit is resjudicata the matters in issue having been determined by a court of competent jurisdiction.

The Respondents further aver that the subject property **Kyangwithya/Misewani/477** is non existent the same having been subdivided following the decision in the appeal cases and hence the orders sought are incapable of being granted. The Respondents further allege the Applicants are not the beneficiaries **Mutua Muimi and Maingi Kitavi** and that the letters of administration they exhibit are forgeries. The Respondents further allege the plaintiff/applicants are with unclean hands as they have used a forged judgment or finding of the Tribunal to support their application.

The Respondents aver the District Surveyor vide a letter of 19th June, 2013 advised the Director of Lands Adjudication and Settlement that the Judgment in Lands **Appeal case NO. 299 of 1980** had been implemented on 29th April 2013 which led to the subdivision of land parcel **NO. 477** being subdivided into 4 parcels thus:-

(i) Parcel NO. 475 of 0.22Ha to Kasani Mwanzia.

(ii) Parcel NO. 476 of 0.39Ha to Katuta Munuve.

(iii) Parcel NO. 477 of 0.30Ha to Makau Munuve

(iv) Parcel NO. 478 of 0.19Ha to Munyi Malundu.

The Respondents admit that the plaintiffs on 13th October 1986 filed a Judicial Review application **Misc. 505 of 1986** in the High Court and were granted leave to file proceedings to quash the decision in land case **NO. 299 of 1980** but the respondents state the applicants failed to pursue the judicial review proceedings to date.

On **Zaverio K. Mutua** District Land Surveyor, the 2nd Defendant herein swore a replying affidavit in opposition to the plaintiffs application dated 14th July 2014. The 2nd Defendant states that the subdivision and registration of the parcels of land was done following a unsuccessful land appeal to the Ministry of Lands (**Appeal NO. 299 of 1980**) rendered on 30/10/1985. The 2nd Defendant avers that the matter was first brought to their attention on 26th March 2013 and they initiated steps to implement the decision in the appeal and states that as the Applicants had lost in the appeal they were not invited for the follow up meetings called to implement the decision after the initial meeting aborted. The 2nd Defendant does not make any mention of the Judicial review **Misc. Application No. 505 of 1986** and in particular the order of stay which the Applicants state was violated yet he states that the plaintiffs application does not disclose a violation of any court orders and or proprietary rights.

The parties counsel filed written submissions as per the court's directions to ventilate their respective clients' positions in regard to the application by the plaintiffs. I have reviewed the pleadings, the application together with the affidavits filed in support and in opposition and the annexures thereto and the submissions by the parties and the issues that stand to be determined is firstly, whether the present suit is resjudicata by reason of the determination in **Appeal cases 299 of 1980 and 300 of 1980** and secondly, whether the 1st and 2nd Defendant/Respondents acted properly in executing and implementing the decision in the above referenced appeals before the determination of the Judicial Review in the **High Court Misc. Application NO. 505 of 1986**. Thirdly, the court is to determine whether there is any basis to grant the orders of injunction sought by the Plaintiff/Applicants.

Issue of Res judicata.

The 3rd & 4th respondents have submitted that this suit is res judicata as the same had been determined by a court of competent jurisdiction and concluded in Appeal case **NO. 299 of 1980 and 300 of 1980**. Counsel referred the court to the judgment of the Court of Appeal in the case of **Nicholas Njeru –vs- Attorney General & Others (2013) eKLR** where the court while considering the application of the doctrine of res judicata cited with approval the holding in **Reference NO. 1 of 2007, James Katabazi & 21 others –vs- The Attorney General of the Republic of Uganda EACJ** where the court held:-

- **The matter must be “directly and substantially” in issue in the two suits,**
- **The parties must be the same or parties under whom any of them claim, litigating under the same title, and**
- **The matter must have been finally decided in the previous suit (see Uhuru Highway Dev. Ltd –vs- Central Bank & 2 others C.A. NO. 36 of 1996)**

Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which embodies the res judicata doctrine 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”.

In the present matter the Appeal **NOS. 299 of 1980 and 300 of 1980** which it is alleged finally

determined the issue as between the present parties provoked an application by way of Judicial Review in the High court vide **Misc. Civil application NO. 505 of 1986** on the 13th October 1986 Honourable **Justice O'Connor** issued orders in the Judicial Review application in the following terms:-

- 1. That the applicant be and is hereby granted leave to apply for an order of certiorari to quash the decision of the District commissioner in appeals case Nos. 299 of 1980 at Kitui and appeal case NO. 300 of 1980 at Kitui which appeals were heard purportedly in conformity with the provisions of the Land Adjudication Act, Chapter 284 of the Laws of Kenya.**
- 2. Stay of execution granted until disposal of the application.**
- 3. That costs of the application to be in the cause.**

It is clear from the above order that the decisions made in appeals **Nos. 299 OF 1980 and 300 OF 1980** were the subject of challenge in the Judicial review application and the execution of the orders arising therefrom was stayed. In my view until the judicial review was heard and determined the question of the present suit being res judicata by reason of the determination in the appeals cannot arise. Those decisions having been challenged in the High Court cannot be said to be final determination of the issues as between the parties. The present suit therefore cannot be said to be res judicata as submitted by the 3rd and 4th Respondents.

Whether the execution of the decision in the appeal cases by the 1st and 2nd Respondent was ultra Vires their mandate.

It is not denied that High court **Misc. Civil Application NO. 505 of 1986** stayed execution of the decision following from the determination of **Appeal NO. 299 of 1980 and 300 of 1980** that had directed the subdivision of plot **NO. 477** into four parcels. The abstract of title annexed to the 3rd Respondent's replying affidavit shows in 1984 there was a restriction entered against title **NO. Kyangwithya/Misewani/477** by order of the Chief Land Registrar barring any dealings until the appeal to the Minister was finalized. Further on 10th March 1987 the Chief Land Registrar entered a further restriction which clearly stated "**No dealings should be registered on the title until the HCC NO. 505 of 1986 is determined**". The 1st and 2nd Respondents had notice of the pending judicial review application in the High Court and the orders issued therein by virtue of the restriction placed against the title which clearly cited the High Court order. It is unclear how the 1st Defendant proceeded to lift the restriction that was expressed to be valid until the High Court matter was determined. It is equally unclear what the present status of the High Court matter is and/or why the same has not been prosecuted and/or pursued to conclusion since being filed in 1986. While the Applicants had the obligation to ensure the matter before the High Court was expeditiously dealt with, the Respondents, particularly the 3rd Respondent equally had a duty, to have the matter prosecuted and/or dealt with otherwise. The Respondents had the choice to have the matter fixed for hearing, and/or they could have applied to have the matter dismissed for want of prosecution. The Respondents could not choose to ignore the High Court order since doing so would be a recipe for impugny where parties could choose to disobey or disregard court orders at will.

In the premises it is my view that the 1st and 2nd Respondents may knowingly and/or unknowingly have acted in contravention of the order of stay of execution given in the **HC MISC. Application NO. 505 of 1986** but until the status of the said matter is determined and established I am not prepared to hold that they infact acted ultra **vires** their mandate. In the circumstances of this case taking into account the totality of all the facts and evidence placed before the court the order that commends itself to the court is not one for injunction in the terms sought by the applicants but an order requiring the parties to maintain and observe the obtaining status quo until the suit herein is heard and finally determined. As the pendency of the High Court matter, if indeed it is pending, is one that poses a different dimension in this matter there is need for the parties to verify the status of the matter. The Applicants suit is predicated on the assumption that the High Court review application is pending and it is in that application where it will be determined whether or not the decision in **Appeal Nos. 299 of 1980 and 300 of 1980** will be quashed

or sustained. If the decision of the appeals was to be quashed there would be no decision to implement and if the decision is sustained then the plaintiffs instant suit may not stand.

To the extent that the present suit is predicated on the orders that were issued in Nairobi **HC Misc Application NO. 505 of 1986** I direct and order that this suit shall be stayed pending the hearing and determination of the aforesaid **HC MISC. Civil application NO. 505 of 1986** which the applicants shall cause to be fixed for hearing and determined within a period of 12 months from the date of this ruling failing which the order for status quo granted herein shall be discharged and the Respondents will be at liberty to deal with the suit properties in any manner. For the avoidance of any doubt the order for status quo granted herein shall mean:-

(i) The Respondents shall not make any further subdivisions of land parcels: **Kyangwithya/Miswani/475, 476, 477 and 478** until the suit is heard. And determined.

(ii) The Respondents shall not sell, transfer and/or effect any further developments of a permanent nature like constructing permanent houses on the properties until the suit is heard and determined.

(iii) Parties will remain in possession and occupation of the portions they presently occupy which they will be entitled to continue utilizing until the suit is heard and determined and/or until further orders of the Court.

(iv) Parties granted liberty to apply.

(v) Costs of the application shall in the cause.

Ruling dated, signed and delivered this.....**24th**...day of.....**April**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the Plaintiff

.....For the Defendants