



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 342 OF 2013

ABERDARE INVESTMENTS.....PLAINTIFF

VERSUS

BERNARD WACHIRA.....1ST DEFENDANT

CHRISPINUS WACHIRA.....2ND DEFENDANT

MARGARET WACHERA.....3RD DEFENDANT

JOHN KARANJA.....4TH DEFENDANT

AND

WILSON KIARIE KIMANI.....INTERESTED PARTY

AND

DAVID WAKIUMU KARANJA..... APPLICANT

RULING

The Transfer of this Suit

The ruling herein is on Preliminary Objections filed by the Plaintiff dated 12th June 2013 and 9th July 2013 objecting to applications made by the Interested Party and Applicant seeking to review various orders made by the Thika Chief Magistrate's Court in CMCC No. 180 of 2011. However before proceeding with a consideration of the said preliminary objections, it is necessary to give a background to the proceedings leading to the transfer of the suit herein from the Thika Chief Magistrate's Court, and to address and regularize certain procedural lapses I believe were committed by the subordinate court in forwarding this file to the High Court.

The Plaintiff herein filed a Notice of Motion dated 18th July 2012 in the subordinate court, wherein it sought orders that the said court declares that it has jurisdiction to hear and entertain this matter, and for a review and/or setting aside of its orders dated 29th March 2012. The Interested Party herein then filed a Notice of Preliminary objection to the said Notice of Motion on the ground that the said court had already made an order that it has no jurisdiction, and that the said Notice of Motion was an abuse of the process of court and should be dismissed with costs.

In his ruling on the said Notice of Motion delivered on 10/12/12, Ndeda P.M. stated as follows:

“MOST IMPORTANT does this court have jurisdiction to entertain this suit. I am convinced that court has jurisdiction to entertain the suit otherwise I would not have entertained arguments to be made before the court. I am convinced the interested party is being mischievous while the Plaintiff is abusing the due process ...Aforesaid considering that the issues in this matter are not resolved, it is hereby ordered that proceedings be typed and file be placed before a judge in the environment and land division in the high court”

The file was then sent to the Deputy Registrar of the High Court by Thika Chief Magistrate’s Court and given a new case number being ELC Suit No. 342 of 2013.

The applicable law on the transfer of civil suits from one court to another is in sections 17 and 18 of the Civil Procedure Act which provide as follows:

“17. Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

18. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter —

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

It is clear from those provisions that the court with jurisdiction to transfer a suit from or to a subordinate court is the High Court, or courts of similar status. Subordinate courts have no such jurisdiction either upon application, or of their own motion. In addition, no such application to transfer this suit was made in this case, and indeed the decision by Ndeda P. M in his ruling to place the file before an Environment and Land Court judge was procedurally *ultra vires*.

However, this irregularity notwithstanding, this court has inherent jurisdiction under section 3A of the Civil Procedure Act to make such orders that are necessary in the interests of justice. Section 18 of the said Act also gives this court power of its own motion to transfer a suit from a subordinate court to another court. I am in this regard cognizant of the fact that delaying these proceedings any further would prejudice the parties herein, and would not be in the interests of justice.

The present circumstances in this suit are therefore one of those instances where this court is obliged to dispense substantive justice without undue regard to procedural technicalities under Article 159 (2)(d) of

the Constitution, and also has to take into account the overriding principles in sections 1A and 1B of the Civil Procedure Act of providing just, expeditious, proportionate and affordable resolution of the civil disputes. I accordingly order the transfer the suit herein to this Court, and all the pleadings and proceedings herein conducted before the Thika CMCC No. 180 of 2011 shall be deemed to be pleadings and proceedings of this Court.

The Preliminary Objections

After this file had been brought before this court, the Interested Party subsequently filed a Notice of Motion dated 29th May 2013 seeking a review and/or setting aside of orders made by the subordinate court on 16th May 2011 and 5th March 2012, and stay of those orders. The Plaintiffs filed a Notice of Preliminary Objection dated 12th June 2013 objecting to the said Interested Party's Notice of Motion. The Applicant also filed a Notice of Motion dated 3rd July 2013 seeking similar orders as those sought by the Interested Party. The Plaintiff similarly filed a Notice of Preliminary Objection dated 9th July 2013 objecting to the Applicant's Notice of Motion. These two Preliminary Objections are the ones presently before this court for determination.

I note that the grounds of objection are similar in the two Notices of Preliminary of Objection, and are as follows:

1. The Interested Party and Applicant have no legal capacity to commence the current proceedings for or on behalf of the late Margaret Wangui Kimani prior to applying for and being issued with a Limited Grant of the Letters of Administration.
2. The people the Interested Party and Applicant are purporting to represent being Paul Nyanjui Kamochu, Lucy Waithera Minya, David Wakiuma Karanja, Julius Kimani Thuo, Samuel Njoroge Guchu and Petr Njuguna Muturo have already filed a constitutional petition being Nairobi High Court Petition No 7 of 2012 over the property known as LR NO. 4953/2157 which is the same subject matter herein.
3. The Interested Party and Applicant have no justiciable claim against the Plaintiff since the Applicant alleges that they bought the land from the late Margaret Wangui Kimani who is not a party to these proceedings and the Interested Party alleges that the mother sold all her interest in the suit property to third parties who are pursuing their rights (if any) in the constitutional court.
4. The applications dated 29th May 2013 and 3rd July 2013 are *res judicata*. A similar application dated 29th March 2012 seeking similar orders filed by the Interested Party herein was heard and determined, and no appeal was preferred against the decision of the court.

The parties were directed to file written submissions on the Preliminary Objections. The Plaintiff's counsel filed submissions dated 4th October 2013 wherein he argued that the Plaintiff is the registered owner of the suit property herein being L.R No 4953/2157 situated in Thika town, and that the Interested Party and Applicant have no proprietary or justiciable interest in the said property. Further, that the Interested Party's and Applicant's claims are based on the ground that the late Margaret Wangui Kimani sold the suit property to them, and they have not applied for Limited Grant of Letters of Administration and therefore have no legal capacity to bring these proceedings.

The Plaintiff also submitted that the orders being sought by the Interested Party and Applicant were the same orders sought in an application dated 28th January 2013 made in Nairobi H.C JR No. 7 of 2012 and were struck out by Korir J. on 17th April 2013.

The Interested Party's counsel filed submissions dated 7th October 2013 wherein he argued that he was joined as an interested party to this suit, and the said order is still in force. Further that the remedy of review is available where an appeal has not been filed and that the Interested Party was therefore properly before the court.

The Applicant's Advocate in submissions dated 7th October 2013 on his part argued that the Applicant

bought the suit property from one Wangui Kimani (deceased) and that his proprietary interest to the suit property therefore rivals that of the Plaintiff's. Further, that it is the Plaintiff who illegally and irregularly joined the Applicant and 34 others as parties to this suit and extended orders of eviction to them. Lastly, that the plea of *res judicata* cannot be raised in relation to the judicial review proceedings as the said proceedings challenge the administrative process but not the merits of a decision.

The Issues and Determination

I have read and carefully considered the pleadings, and submissions made herein. The main issues to be decided are whether the Plaintiff's preliminary objections raise pure points of law, and if so, whether the said preliminary objections have merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“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.”

The first set of the objections by the Plaintiff in grounds 1-3 as itemized hereinabove in my view are not pure points of law because they contain allegations that need to be established and therefore require ascertainments of certain facts. These are the facts of whether the Applicant and Interested Party are commencing these proceedings on behalf of other parties, whether there have been previous proceedings involving these other parties, and whether the property that is the subject matter has been sold to any purchaser.

In addition on the issue of the Interested Party's and Applicant's *locus standi* to file the Notices of Motion, it is indeed the case that the Interested Party was joined as a party in this case upon his application dated 29th March 2012, which orders were granted by the subordinate court on the same date. The Applicant was likewise among persons joined as parties herein by orders of the subordinate court on 5th March 2012 upon hearing an application by the dated 17th February 2012. They therefore have locus to bring their Notices of Motion as parties to this suit, and even if this were not to be so, this court has discretion to allow them to file a Notice of Motion under Order 45 Rule 1 of the Civil Procedure Rules, I therefore find that the said objections do not raise a pure point of law and are therefore dismissed.

The only pure point of law raised in my view is that in ground 4, being that the applications by the Interested Party and Applicant are *res judicata* as it has the effect if proved, of determining this suit. It is argued in this respect by the Plaintiff in his Notices of Preliminary Objection that a similar application dated 29th March 2012 seeking similar orders was filed by the Interested Party, and was heard and determined. The Plaintiff In his submissions introduces another application being one dated 28th January 2013 made in **Nairobi H.C JR No. 7 of 2012**, and which he claims was struck out by Korir J. on 17th April 2013.

Section 7 of the Civil Procedure Act provides as follows with regard to the doctrine of *res judicata*:

“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 requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit

c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

I have perused the court record and note that the Notice of Motion herein by the Interested Party dated 29th March 2013 sought orders for the joinder of the said interested party, and for the stay of execution and setting aside of the orders given on 5th March 2013. Further, that the application dated 17th February 2012 be set for interpartes hearing.

The application was first heard in the subordinate court by Mutuku P.M on 29th March 2012, and he granted the orders for stay of execution and joinder of the Interested party, and set the Notice of Motion for inter partes hearing on 16th April 2012. When the Notice of Motion came up for inter partes hearing on 16th April 2012, Ndeda P.M granted leave to the Interested Party to file a supplementary affidavit and extended the interim orders. The application then came up for hearing before Ndeda P.M on 21.5.2013, when he made the ruling that the subordinate court had no jurisdiction to hear the matter.

The Plaintiff then subsequently filed his Notice of Motion dated 18th July 2012 seeking among others a declaration that the court had jurisdiction, and a summary of the subsequent proceedings has already been outlined in this ruling, resulting in this file being placed before this court. It is thus obvious that not only was the jurisdiction of the court that was hearing the Notice of Motion dated 29th March 2013 contested, but that the said Notice of Motion has not been heard and determined, and is in fact one of the many Notices of Motion pending in this suit. The doctrine of *res judicata* does not therefore apply to the said Notice of Motion.

With regard to the Notice of Motion dated 28th January 2013 in **Nairobi H.C JR No. 7 of 2012**, the Plaintiff referred to the pleadings filed and order given in the said Notice of Motion annexed to the replying affidavit sworn on 12th June 2013 by John Njaaga Wango, the Plaintiff's Managing Director, in response to the Interested Party's Notice of Motion of 29th May 2013.

The Notice of Motion dated 28th January 2013 in **Nairobi H.C JR No. 7 of 2012** was filed by the Interested Party herein, and the Plaintiff and Defendants herein were parties as well. It sought orders of prohibition directed at the Thika Principal Magistrate prohibiting him from hearing any other proceedings in CMCC No. 180 of 2011, including execution of the orders of 16th May 2011, 5th March 2012 and 10th December 2012. It also sought an order of certiorari to quash all proceedings and orders given in the said proceedings. The order issued in that suit on 23rd April 2013 struck out the said application and ordered the parties to meet their own costs .

The Plaintiff did not provide a copy of the ruling of the court or of the proceedings during the hearing of the said Notice of Motion. It is therefore not possible for this court to determine if the said Notice of Motion was heard and determined on its merits, and if so, what the issues therein were. This court cannot in the circumstances make a finding that the Interested Party's and Applicant's Notices of Motion herein are *res judicata* the Notice of Motion dated 28th January 2013 in **Nairobi H.C JR No. 7 of 2012**.

Arising from the foregoing reasons I find the Plaintiff's preliminary objections dated 12th June 2013 and 9th July 2013 do not have merit, and the same are hereby dismissed. The Plaintiff shall bear the costs of the said preliminary objections.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of January , 2014.

P. NYAMWEYA

JUDGE