



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 563 OF 2011**

**NUR OLOW FARAH. ....APPLICANT/APPELLANT**

**VERSUS**

**MOHAMED MUDE ARALE. .... RESPONDENT**

**RULING**

The application before the court is a Notice of Motion dated 12<sup>th</sup> July, 2013 and filed by the appellant in this appeal. It seeks that pending the hearing and determination of this appeal, the Respondent, his agents and servant be restrained from interfering, constructing any structure, encroaching or wasting or intermingling with or occupying Plot No. R-2664, Wajir Town.

In the supporting affidavit, the Applicant/appellant asserts that the piece of land belongs to him and that he is in occupation of the same from prior to the suit being filed in court. He alleges that occupation of the land by the Respondent will cause loss and damage to him. He also asserts that there is no court order or any reason standing on his way barring him from occupying the piece of land and goes ahead to affirm that there is in particular, no court order barring him from occupying the land as orders earlier made restraining him, were temporary and had expired.

The Respondent however, contradicts the Applicants assertions. He depones that on 9<sup>th</sup> February, 2011, the lower court sitting in Wajir, issued an injunction against the Applicant and others claiming through him, restraining them from trespassing, constructing, alienating or otherwise interfering with the land No. R-2664, pending the hearing and final determination of the suit before the said court concerning the plot ownership and other rights thereon. That the said order still stands and that the Applicant/appellant did not appeal against the same to-date. That, thereafter the court ordered for the suit to proceed to hearing which is what led the Applicant/Appellant to file this appeal.

I have checked the lower court file record. I notice that on 27<sup>th</sup> June, 2011 the lower court, under a filed Preliminary Point of Objection also confirmed an order against the Applicant/Appellant herein who was the Defendant at that court, from trespassing, constructing, or alienating the plot no. R2664 pending the hearing and determination of the suit. The orders were made after the matter was argued inter partes on material facts filed by both sides.

I have carefully considered the issues and matters before me. I am satisfied that the lower court injunction orders against the Applicant/Appellant in relation to the plot land R-2664, Wajir Town, which are the subject of this application, are still in place and are still valid. I find and confirm that the injunction orders were not themselves appealed from and were to last until the lower court suit was heard

and finally determined, an event which has not taken place.

In the above circumstances, can the Applicant/Appellant, who is bound by those orders after he properly participated in the hearing and determination of the application or Preliminary Objection that led to the injunction orders being made, freshly file another similar application seeking similar orders between same parties? In other words, does this court have jurisdiction to hear this application for injunction, on its merit?

To start with, Section 7 of the Civil Procedure Act provides thus: -

***“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”***

Under the above provision, this court is prohibited from re-opening the subject of the prohibitory injunction since the lower court heard these parties inter partes and made the orders that still exist and are valid until the lower court suit is finally determined.

In this court’s view, the Applicant/Appellant herein is aware of that legal position otherwise known as *Res Judicata*. Furthermore the Applicant/appellant, notwithstanding that knowledge, deliberately filed this application now before the court in breach of the said principle of law. His intention in doing so, while not explained can be perceived by this court; it is to manouvre the court’s jurisdiction in a manner incompatible with the goals of justice. However, in the face of the law, such an attempt is so hopeless that it plainly and obviously discloses no reasonable cause of action. The application is therefore, beyond redemption, as stated in **Kenya Section of International Commission of Jurists Vs the Attorney General & 2 Others – Criminal Appeal No. 1 of 2012 [2012] eKLR.**

This court’s finding accordingly, is that this application is *Res Judicata* the similar application in the lower court and is clearly an abuse of the court process. The application is struck out and dismissed with costs to the Respondent. Orders accordingly.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of May, 2014.**

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**D A ONYANCHA**

**JUDGE**