



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 152 OF 2011

STANLEY KAHORO MWANGI

TIMOTHY NJOROGE

JOSEPH MWANGI (SUING ON THEIR OWN BEHALF AND ON

BEHALF OF MEMBERS OF TWENDANE COMPANY LIMITED PLAINTIFF

VERSUS

KANYAMWI TRADING COMPANY LIMITED DEFENDANT

RULING

1. There are two applications before this court. The first application is a Notice of Motion dated **22nd June, 2011**. It was brought by the Plaintiff against the Defendant and seeks the following orders:
 - a) That this application be certified urgent and service be dispensed with in the first instance.
 - b) That pending the hearing and determination of this application this Honorable court be pleased to restrain the respondent by itself, its agents, employees, servants or any person acting under its authority from using, occupying, surveying, subdividing, developing, clearing, claiming, or in any other manner interfering with the applicant's quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil.
 - c) That pending the hearing and determination of this suit this Honorable court be pleased to restrain the respondent by itself, its agents, employees, servants, or any persons acting under its authority from using occupying, surveying, subdividing, developing, clearing, claiming, or in any other manner interfering with the applicant's quiet and peaceful possession of parcel of land known as LR 3777/204 Gilgil.
 - d) That the costs of this application abide in the suit.
2. On **27th June, 2011 Ouko J.** (as he then was) certified the application as urgent and interim orders were granted pending the hearing and determination of the application inter parties. The

matter was set down for hearing.

3. On **11th July, 2011**, the matter did not proceed to hearing. **Mr. Mwangi**, the learned counsel for the Defendant, intimated to court that he wished to file an application for the Plaintiff to deposit security for costs. The said application is dated **26th October, 2011** and was premised on the ground that the plaintiff are squatters on the suit property without financial standing. **Omondi J.** delivered her ruling on the **27th July, 2012**. She held as follows:

“Although there is nothing to demonstrate that the Respondents are impecunious, doubt has been cast as regards their financial ability and they have not as a sign of good faith, offered anything to dispel these doubts. I think the applicants are justified on their apprehension. I direct that the Respondents pay by way of security for costs, a sum of Kshs. 100,000 (One Hundred Thousand only) to be deposited in an interest earning account in the names of the respective parties' counsel, at a financial institution to be agreed between themselves. The sum to be deposited within 30 (thirty) days from today's date.”

4. On **27th September, 2012** Counsel for the Respondent filed a Notice of Motion of even date. It is brought under **Order 2 Rule 15, Order 40 Rule 6 and 7** of the **Civil Procedure Rules** and **section 3 & 3A** of the **Civil Procedure Act, 2010**. He seeks the following prayers *inter alia*:

a) ...(spent)

b) **That the suit filed herein by the Plaintiff/Applicant be struck off as it is scandalous, frivolous, vexatious and is an abuse of the Court Process.**

c) **That the restraining Orders granted by this Honorable Court on 28th June, 2011 be deemed to have lapsed and therefore be set aside.**

d) **That the Costs of this application be provided for.**

5. The application is supported by the affidavit of **Ben Kanyi Waweru** and **Peter Kamurwa Mwangi** and is based on the following grounds; The Restraining orders granted by this Honorable Court against the Defendant on **28th June, 2011** have lapsed as it is now over one year since the Applicants were issued with the orders and their application has not been determined within one year since it was filed; The applicants have failed to deposit security for costs as ordered by this Honorable Court on **27th July, 2012** within thirty days from the date of the ruling; that the applicants suit is scandalous, frivolous and an abuse of the court process.

6. The matter was mentioned before me for directions. It emerged that a joint account had not been opened to deposit the money of security for costs as directed by the court. To enable the court do substantive justice, I directed that the security for costs being Kshs, 100,000/- be deposited in court and that the two pending applications be disposed off simultaneously by way of written submissions. A total sum of Kshs.100,000 was deposited in court on **14th March, 2013**.

7. The Defendant's submissions are dated **30th May, 2013** while those for the Plaintiff are dated **19th July, 2013**.

8. The defendant submits that the **Order 40 Rule 6** of the Civil Procedure Rules provides that where a suit in respect to an interlocutory injunction granted is not determined within twelve months, the injunction granted shall lapse unless for any sufficient reasons. According to counsel, the plaintiffs have not demonstrated any sufficient reasons why they failed to have the application heard despite having been filed under a certificate of urgency.

9. Secondly, counsel for the defendant submitted that the suit is scandalous, frivolous and abuse of the court process. He contends that the authority to plead, testify, swear affidavits and

generally act and represent contains names of persons whose signatories had been forged whilst others were deceased. He referred the court to one of the signatures to the authority alleged to have been signed by one **George Njachi Muhia** who is deceased. In addition, counsels contended that the report of the Forensic Documents examiner dated **16th January, 2012** shows that the signatures of those who gave authority to file suit were forged. Moreover some of the identification card numbers that had been used on the authority to plead had been used for more than one person thereby raising doubts as to the authenticity and legality of the person giving authority.

10. Counsel further submitted that the suit herein is *res judicata* as a similar suit involving the same parties and raising similar issues had been determined in **HCCC No. 156 of 1983**. It was his submissions that the plaintiffs failed to disclose this fact as required under **Order 4 Rule 1(1)** of the **Civil Procedure Rules**. He thus urged the court not to admit the suit as the issues had been directly and substantially dealt with in the former suit. He relied on the decision in **Yat tung Investment Co. Ltd V Dao Heng Bank Limited & Another (1975) AC, Kanorera River Farm Limited & Another V National Bank of Kenya** and **Pop Inn (Kenya Limited V Habib Bank AG Zurich Civil Appeal No. 80 of 1988.**

11. In response, counsel for the plaintiffs submitted that this suit is filed for own behalf and on behalf of other members of Twendane Farmers Company Limited. According to counsel this is not the company's suit as submitted by the Defendant and therefore it was not necessary to file a resolution from the company. He further submitted that if it was established that any signature giving authority to plead and act in the matter is fraudulent, the suit should be struck off only against that person. The suit should survive for the majority who gave authority .

12. Further, counsel submitted that the parties herein are different to the parties in **HCCC 156 OF 1983**. The Plaintiff in the former suit is a Limited Liability Company which is a different legal person from the plaintiffs herein. According to counsel, it is therefore not tenable for the defendant to claim that the plaintiff did not disclose the former suit.

13. Counsel then supported his application for interlocutory injunction against the Defendant pending the hearing and determination of the suit. He submitted that the plaintiffs who were members of Twendane Company Limited entered into an agreement for the purchase of 811 acres of the suit property. Notwithstanding the lapse of the agreement, the plaintiff have continued to occupy the suit property. No party have fulfilled its contractual obligation. Further, their occupation has been without interruption, without force and without permission from the Respondent for a period exceeding twelve years.

14. It was his submissions that the defendant is using its agents to demand money from the plaintiffs and has started surveying and putting beacons on the suit land. According to counsel the plaintiffs are apprehensive their homes will be destroyed and eventually evicted from the suit land. They therefore seek the court to issue interlocutory injunction against the Defendants.

15. I will consider both applications together because I find them intertwined. I will start by considering the ground raised in the application dated **27th September, 2012** that this suit is *resjudicata*. This is because should I find this to be so then there will be no need for further consideration of the matter.

16. It is the defendant's contention that the current suit herein is *res judicata* as a similar suit involving the same parties and raising similar issues had been determined in **HCCC No. 156 of 1983**. It was his submissions that the plaintiffs failed to disclose this fact as required under **Order 4 Rule 1(1)** of the **Civil Procedure Rules**.

17. In the current suit, the plaintiffs describing themselves as members of Twendane Company Limited filed this suit and prayed that the court finds that they are entitled by adverse possession to 811 acres of the suit property and if the court so finds, the title in the respondent's name be

cancelled and the applicants be registered as the absolute proprietors of the suit property.

18. The facts in **HCCC No. 156 of 1983** can be summarised as follows; The defendant company (Twendane Farmers Company Limited had entered into an agreement with the plaintiff company (Kanyamwi Trading Company Ltd) to purchase some land from them. The defendant paid a deposit of Kshs. 360,000 but failed to raise the balance of 640,000. There was no written agreement between the parties, no land control board consent was obtained nor presidential exemption in accordance with the provisions of land Control Act Cap 302. An application for chamber summons was filed by the plaintiff (Kanyamwi Trading Company Ltd) seeking injunctive orders against the defendants (Twendane Farmers Company Limited) because some of the defendant's members had started moving into the suit property and some had even started erecting houses and cultivating therein.

19. **O'Kubasu J** (as he then was) allowed the plaintiffs application and granted a temporary injunction against the defendant Company, its servants and shareholders restraining them from entering or remaining on the suit premises until the final disposal of the suit or until further orders of the court.

20. My understanding of this court order is that the applicants in the current suit who describe themselves as members of Twendane Company Limited are among those members referred to in the ruling of **4th February, 1983**. Having being restrained from entering or remaining on the suit premises meant they had no legal right being in occupation of the suit premises unless that order had been vacated or set aside. If the applicants are the same members who were so restrained then they can only be deemed to be trespassers who are also in disobedience of the court order issued on **4th February, 1983**. Any rights that the defendant and its members thought they had over the suit premises were to be determined while they were out of the suit premises.

21. The Applicants filed the current suit by Originating Summons on **27th June, 2011** and simultaneously filed a Notice of Motion dated **22 June, 2011** under certificate of urgency seeking a temporary order against the respondent. They were granted interim orders at *ex parte* stage. The applicants did not disclose to this court, either in their Originating summons or during the arguments that were made in the application for injunctive orders at the *ex parte* stage about **HCCC No. 156 of 1983**. The advocate also failed to inform the court that an earlier court had issued injunction orders in favour of the defendant herein.

22. I have perused the ruling in **HCCC NO. 156 of 1983** and the orders issued therein were to remain in force "**until the final disposal of the suit or until further orders of the court.**" The *ex parte* orders which were issued on **27th June, 2011** and extended severally were in direct conflict with the order issued in **HCCC NO. 156 of 1983**. The applicants chose to deliberately conceal these material facts from the court which had they been disclosed may have led the court to reach a different conclusion/ decision at interlocutory stage.

23. It was the duty of the applicants to disclose to the court the existence of **HCCC NO. 156 of 1983** as was held by **RSC Omolo JA** in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 others CA Civil Application No. NAI 140 of 1995** (65/95 UR), at page 2 of his ruling:

“Once the learned judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the court.”

24. In Nyanja Holdings Limited vs. City Finance Bank Ltd Nairobi HCCC No. 1965 of 1991 (unreported), Nambuye J cited with approval the decision of the Court of Appeal in Lilian S vs. Caltex Oil K Ltd [1989] LLR 1653 (CAK) which clearly laid out the action courts should take once a party fails to make full and frank disclosure. At page 32 of her ruling she set out the principles to be considered by the court in determining whether a party had been guilty of non-disclosure of material facts to the court. She held;

“the material facts are those which it is material for the judge to know in dealing with the application was made, materiality is to be decided by the court and not by the assessment of the (applicant) or his legal advisor ... if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage he may derive by that breach of duty ... Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issue which were to be decided by the judge on the application...”.

25. In the present application, it is clear that failure by the plaintiffs to disclose the existence of a previous suit filed against Twendane Company Limited point to no other conclusion than that the plaintiffs deliberately failed to disclose the said facts so as to mislead the court into granting them interim *ex parte* orders of injunction pending the hearing of the application *inter partes*. It is further evident that the plaintiff came to court, not to canvass his suit in good faith, but rather to take advantage of the civil process to secure orders in their favour and to the detriment of the defendant. It was obvious that the plaintiff abused the due process of the court.

26. I do not agree with submissions by the plaintiffs counsel that the two suits are not related and that parties are different. It is evident that the present suit is *res judicata*. The parties in the present suit and those in previous suit are similar. I say this because the defendant in **HCCC No. 156 of 1983** being a Limited Liability Company was ordered together with its members not to enter or remain in the suit premises until the suit was determined. The plaintiffs in the current suit are those same members so ordered by the court. The subject matter of the suit is also the same.

27. Under **Section 7 of the Civil Procedure Act**, this court cannot try any matter that was directly or substantially in issue in a previous suit between the same parties or between parties under whom they or any of them are litigating under the same title. The defendant in the previous suit was litigating under the same title. The issues raised by the plaintiffs for determination by this court are the same issues which were considered by the court in the previous suit. I therefore hold that the present suit is *res judicata*.

28. In the circumstances of this application, I will adopt the words of Warsame J in Gimalu Estates Limited & Anor. Vs. International Finance Corporation & Anor. Nairobi HCCC No.65 of 2007 (unreported). At page 12 of his ruling, he stated as follows:

“The central vein that runs through all the suits is that the plaintiffs are bent on frustrating the defendants to certain despair. The whole purpose of filing the present suit when other suits are pending for determination on the same subject matter is merely to get an injunction to stop or postpone the sale of the suit properties and not to have the issues allegedly raised in the different suits determined. Prima facie that is a contrived attempt to subvert the cause of justice. In my view the actions of the plaintiffs is a contemptuous game to contaminate the due process of the court with a view to create a conundrum or contagious disease within the corridors of justice.”

29. Having found that the plaintiffs abused the due process of the court by failing to disclose material facts to the court and further having held that the plaintiffs suit is *res judicata*, it is clear from the foregoing that the plaintiff’s application together with the suit must be summarily dealt with by the court.

30. The plaintiffs application for injunction together with the suit herein are hereby struck out with costs to the defendant.

It is so ordered.

Dated and Signed at Nakuru this 20th day of June 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Kabaiko for the defendant

Mr Kazwene holding brief for Mr Njuguna for the plaintiff

Emmanuel Maelo : Court Clerk

L N WAITHAKA

JUDGE