



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 152 of 2012

**FRANCIS THUKU GAKUMO.....1ST
PLAINTIFF/APPLICANT**

**STEPHENSON KARUCHI KAGO.....2ND
PLAINTIFF/APPLICANT**

VERSUS

**JOSEPH GITAU NJOKI..... 1ST
DEFENDANT**

**PAULINE NJOKI IGOGO..... 2ND
DEFENDANT/RESPONDENT**

**HANNAH NJAMBI NDIRO.....
3RD DEFENDANT/RESPONDENT**

**ROBERT WANG'ENDO NDIRO.....4TH
DEFENDANT/RESPONDENT**

RULING

The Applicants herein Francis Thuku Gakumo and Stephen Karuchi Kago have brought this Notice of Motion dated 22/3/2012 against the Defendants, Joseph Gitau Njoki, Pauline Njoki Igogo, Hannah Njambi Ndiro and Robert Wangendo Ndiro. The application is brought under Order 40 Rule 1, 2, 3 and 9 of the Civil Procedure Rules and Section 1A, 1B and 3A and 63 (C) and E of the Civil Procedure Act for Orders that

- a) Pending the hearing and determination of this suit, an injunction do issue restricting the Defendant whether jointly and/or severally by themselves or through their officials, agents, servants and/or employees or any other person from occupying, issuing, selling, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise howsoever dealing with and/or constructing any building on the suit premises herein namely LR No.Kiambaa/Ruaka/611 and Kiambaa/Ruaka 1075.
- b) A mandatory injunction do issue to compel the Defendant/Respondents to forthwith pull down and or demolish all constructions and/or structures built or erected on the Plaintiff's/Applicant's property namely LR No. Kiambaa/Ruaka/611 and Kiambaa/Ruaka 1075.
- c) Costs of the application be provided for.

The application is grounded on the following grounds and on the supporting affidavit of **Stephenson Karuchi Kago**.

The Plaintiffs stated that they are the owners of the suit premises.

That the Defendants have unilaterally and without any consent whatsoever from the Plaintiffs/applicants forcefully commenced construction works on the 1st Plaintiffs/Applicants suit premises.

That the Defendants/Respondents have no proprietary right over the suit premises herein and their acts in paragraph (ii) above are not only mischievous but the same are highhanded and constitute unlawful deprivation of private property.

That unless the Defendants/Respondents are restrained by this honourable Court, the Plaintiffs/Applicants are likely to suffer irreparable harm.

The 2nd Applicant in his affidavit stated the 1st plaintiff and himself are the owners of the suit premises herein namely **LR No.Kiambaa/Ruaka/611** and **Kiambaa.Ruaka 1075** as per annexure **SKK (a) & (b)**

That the Defendants have trespassed on the stated parcel of land and have constructed on the said land as per annexure **SKK (a) & (g)**.

The Applicant further averred that the acts of the Defendants are illegal, highhanded, oppressive, wrongful and that the same constitute unlawful deprivation of private property.

He further deponed that unless the honourable Court intervenes to stop the construction and/or order the demolition thereof as the case may be, the plaintiffs stand to suffer irreparably as they will lose land acquired painfully over the years from their humble earnings and savings. That the two attach a lot of sentimental value to the said land and they are likely to be deprived of a constitutionally venerated right/safeguard as to ownership and non-interference/deprivation of private property.

The Respondents herein opposed the Applicant's application. 1st Respondent **Joseph Gitau Njuki** filed his replying affidavit on 10th May 2012 and averred that the instant application and the main suit is **an abuse of the Court process** as there exist before the Court another suit **HCC No.1995 of 1998** which is about the ownership of the suit properties.

He further stated that he lives on the suit property and he has constructed a temporary structures that the Plaintiffs herein complained of. That the suit land has been ancestral land and he was not aware that he was committing any wrong. That he has since halted the said construction.

That the Applicants will not lose their rights to the suit property since the issue of ownership will be determined by the Court and the rightful owner will be declared once the **ELC 1995 of 1998**, is heard and determined. He promised to maintain the status quo until the hearing and determination of **ELC 1995 of 1998**.

1st Applicant asked the Court to order for expeditious hearing of ELC 1995 of 1998 that the proper owner of the suit property can be determined.

The 2nd and 3rd Respondents also filed their Replying Affidavits and maintained that this application and main suit is an abuse Court process as there exist another suit, **ELC 1995 of 1998**, on the same subject matter. That they have not constructed any new structure on the land but 2nd Defendant lives with his family on the suit property as interim orders were issued in ELC 1995 of 1998 and 3rd Defendant farms on the suit land that the parties to this suit are the same as in ELC 1995 of 1998. The 2nd and 3rd Defendant urged the Court to conclude ELC 1995 of 1998 and determine the proper owners of the suit property.

The 4th Defendant on his part also filed a Replying affidavit and averred that the instant application and

main suit is an issue of the Court process as the parties herein are the same as the pending ELC 1995 of 1998. He further averred that he does not live on the suit property and urged the Court to expedite ELC 1995 of 1998 so that the issues of ownership of the suit properties can be determined. 4th Defendant prayed for dismissal of the application.

The parties herein filed written submissions and they retaliated what they had stated in their pleadings.

In the submissions the plaintiffs reconfirmed that they are the registered owners of the suit parcel LR No Kiambaa/Ruaka/611 and Kiambaa/Ruaka/1075. The Plaintiffs further submitted that for 14 years, the Defendants have attempted to challenge the Plaintiffs' **title** and **interest** to the said suit land and the Defendants have been sleeping on some interim orders for status quo vide number HCC 1995 of 1998. That the said order lapsed automatically by virtue of order 40 Rule 6 which came into effect on 22/12/2010 and the Defendants have not made any attempt to regularize the said position.

That 1st Defendant has confirmed erection of a permanent structure on the suit land claiming it was his ancestral land. They further submitted that the Plaintiffs have singly and severally and/or conspired to encroach on the Plaintiffs/Applicants private parcels of land and are hell-bent to permanently dispose the Plaintiffs of their lawful title and interest on the said premises. That the said parcels of land are registered in the name of Plaintiffs and the Plaintiffs prayed that the Court should allow their application.

The 1st Defendant also filed his written submissions and retaliated that there exist ELC 1995 of 1998 which is essentially between the same parties over the same subject matter. That the ownership by the Plaintiffs herein is disputed by the Defendants in ELC 1995 of 1998. That the orders being sought herein have the effect of varying and/or reviewing the Courts orders in ELC 1995 of 1998. That there was no justifiable reason why the applicants chose to file a new suit before the existing one could be finalized.

The 2nd and 3rd Defendants also filed their written submissions and submitted that this matter is Res-subjudice as there exist ELC 1995 of 1998. They referred to the case of **Abdul Kassum Hassanch -vs- Southern Credit Banking Coporation Ltd.**

The 4th Defendant also filed his written submissions and repeated what the 1st, 2nd and 3rd Defendants stated in their written submissions.

I have considered the pleadings herein and the written submissions filed by the parties and annexures therein. It is evident from the annexures that **SKKa** and **SKKb** that the Plaintiffs/applicants herein are the registered owners of **LR No. Kiambaa/Ruaka/611 and LR Kiambaa/Ruaka/1075.**

From the pleadings also it is evident that the parties herein are entangled in Nairobi HCC No.1995 of 1998. I have perused the said suit which was brought through an originating summon and I have noted that suit land LR Kiambaa/Ruaka/611 and LR Kiambaa/Ruaka/1075 are among the various parcels of land reflected to in HCC No.1995 of 1998. Some of the Defendants herein that is **Pauline Njoki Igogo** and **Hannah Njambi Ndiro** are the Plaintiffs in HCC 1995 of 1998. The parties are the same and the parcels of land are also the same.

I have also noted that ELC 1995 OF 1998 is ongoing and has not been finalized. There was interim orders issued on 2/8/1999 by J. Onyango Otieno (as he then was).

The matter therefore touching on the two parcels of land has not been finalized. The Defendants alleged that the matter falls under the doctrine of Res-subjudice Rule and the Court should dismiss it with costs. The Plaintiff/applicants averred that the Interim Orders were issued in 1999 and by virtue of Order 40 of Civil Procedure Rules 2010, the said orders automatically lapsed when the new Civil Procedure Act came into force in December 2010. Even if the said **interim** orders did lapse as averred by the Plaintiffs the main suit HCC 1995 of 1998 is still pending. The applicants should have filed the instant application in 1995 of 1998 instead of filing a new suit. I will concur with the Defendants that this is a misuse of the Court process. There is a danger of the Court's issuing two conflicting orders which would be embarrassing.

From the pleading herein, it is evident that the Defendants have been in occupation of the two parcels of land and the Plaintiffs are the registered owners. However in **HCC 1995 of 1998**, the Defendants herein (who are the Plaintiffs in that suit) have disputed the Plaintiffs' ownership of the two parcels of land. The Plaintiffs herein should have ensured that HCC 1995 of 1998 is heard expeditiously so that the ownership of these parcels of land can be determined once and for all.

The 1st defendant has confirmed that he was the one who was putting up temporary structure but halted the construction as soon as he was advised by his Advocate. He promised to maintain the status quo till the suit is determined.

However, it was not clear the 1st Defendant had constructed the structures on which parcels of land. If the 1st Defendant has halted the construction and HCC 1995 of 1998 is determined in favour of the Plaintiffs/Applicants herein, it would not be difficult for the 1st Defendant to demolish the said structure.

There is no evidence that the Plaintiffs/Applicants herein have ever been in occupation of the two parcels of land. There is no evidence that if orders sought are not issued they will suffer irreparable loss which cannot be compensated by way of damages. However some other Defendants have been in occupation of the two parcels of land and the prayers sought herein is to injunct them from occupying and using the two parcels of land. That would mean that the some Defendants will have to move out of the two parcels of land. That is before HCC 1995 of 1998 is determined and the issue of ownership solved. The Defendants would suffer irreparable loss if in future HCC 1995 of 1998 is determined in their favour.

I find that the applicants have not demonstrated to this Court why they filed a new suit instead of filing the instant application in HCC 1995 of 1998. I will concur with the Respondents that this application is an abuse of the Court process.

The applicants have not satisfied this Court that they are likely to suffer irreparable loss if temporary injunction is not granted. In the event that HCC 1995 of 1998 is determined in favour of the Plaintiffs/Applicants their loss can be quantified and adequately compensated by an award of damages. All that the parties in HCC 1995 of 1998 need to do is to have the matter heard and determined expeditiously. If any party is guilty of laches in that suit, then the Applicants herein can file relevant application in HCC 1995 of 1998.

In the circumstances of this case, it would not be appropriate to grant the prayers sought by the Applicants herein. The Applicants' Notice of Motion dated 23rd March 2012 is disallowed with costs to the Respondents.

**GACHERU
JUDGE
26/2/2013**

26/2/2013
Before L. Gacheru
Court clerk Anne
Plaintiffs – absent
Defendant – absent

Kbuthu holding brief for Omwega for 2nd, 3rd Defendants

No appearance for Plaintiff/Applicant through aware of the ruling date.

**GACHERU
JUDGE
26/2/2013**

Court:

Ruling read in open Court in the presence of Mr. Kibuthu holding brief for Omwega for 2nd and 3rd

Respondents and absence of the other parties.

Dated and delivered this 26th day of February 2013

**GACHERU
JUDGE
26/2/2013**