



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT
ELC CASE NO. 151 OF 2013

MICHAEL MUNENE NJOGU1ST PLAINTIFF

DAVID MURAGE NJOGU2ND PLAINTIFF

JOHN KARANGU NJOGU3RD PLAINTIFF

VERSUS

BERNARD GITHINJI1ST DEFENDANT

MUNENE GATHENGE2ND DEFENDANT

JOYCE KARIITHI NJERU3RD DEFENDANT

RULING

On 4th December 2012, Lady Justice Ong'udi delivered a ruling dismissing the plaintiffs/ applicants application dated 3rd May 2012. That application sought the following orders:-

1. ***Consolidation of this suit with Embu H.C.CC No. 21 of 2012 (now Kerugoya E.L.C Case No. 55 of 2012)***
2. ***Leave to the applicants to amend their pleadings to enjoin LAWRENCE WACHIRA NGIRIGACHA the defendant in Embu HCCC No. 21 of 2012 (now Kerugoya ELC Case No. 55 of 2012) as the 4th defendant***
3. ***Temporary injunction to restrain LAWRENCE WACHIRA NGIRIGACHA, his agents workmen, servants or any persons claiming through them or otherwise from dealing, interfering, alienating or otherwise demolishing, occupying or trespassing forthwith with property No. leasehold INOI/KERUGOYA/250/16 within Kerugoya Township and all structures or buildings erected thereon pending the hearing and determination of this application and until the determination of this suit.***
4. ***Stay of HCCC No. 21 of 2012 (Now Kerugoya ELC Case No. 55 of 2012) or giving of necessary and proper directions as shall be necessary for the conduct of this said consolidation.***

In dismissing the said application, Lady Justice Ong'udi made the following findings:-

- a. ***That there was no attachment of the draft of the amendments to be effected***
- b. ***The issues for determination in the two suits sought to be consolidated were not similar***

- c. *The prayer for temporary injunction against LAWRENCE WACHIRA NGIRIGACHA could not issue as he was not a party*
- d. *No basis had been laid for staying the proceedings in Embu HCCC No. 21 of 2012 (now Kerugoya ELC Case NO. 55 of 2012).*

The Judge ended her ruling by advising the applicants to make a “*proper application*” for amendment or consider withdrawing the two suits altogether and file fresh suit.

On 12th June 2012, the plaintiffs/applicants filed a similar application to the one dismissed on 4th December 2012 and sought the same remedies. This second application was also supported by the affidavit of the 1st plaintiff/applicant MICHAEL MUNENE NJOGU raising the same issues as he did in the previous application.

When this application came up on 2nd July 2013, it was agreed that it be canvassed by way of written submissions which have been filed.

I have considered the application, the grounds of opposition and the submissions by counsels. I have also considered the earlier ruling on the matter as delivered by Lady Justice Ong’udi on 4th December 2012.

It is clear that this application is res-judicata. As I have illustrated above, this same application was canvassed before Lady Justice Ong’udi and she delivered a ruling on 4th December 2012 dismissing the same. It is also clear from the Court of Appeal decision in *MBURU KINYUA VS GACHINI TUTI 1978 K.L.R. 69* that the principle of res-judicata as defined in *Section 7 of the Civil Procedure Act* applies equally to applications.

It is clear to my mind that this application now before me is res-judicata as a similar application was dismissed by Lady Justice Ong’udi on 4th December 2012. It matters not that this Court or any other Court may have arrived at a different decision. This application is for dismissal. To do otherwise would amount to sitting on an appeal over a decision of a Court of equal jurisdiction.

Even if this Court were to be magnanimous to the applicants and take the view that they have taken the advise of Lady Justice Ong’udi to file a proper application which this Court should now consider, no such proper application was filed. Instead, the applicants filed the same application annexing to it the same plaint that had been annexed to the earlier application with no “*draft of the amendment*” to be effected as was found by Lady Justice Ong’udi in her earlier ruling which the plaintiffs/applicants did not appeal against.

That being my view of the matter, I find that this application is res-judicata. The same is hereby dismissed with costs.

B.N. OLAO

JUDGE

19TH SEPTEMBER, 2012

19/9/2013

Coram

B.N. OLao – Judge

CC – Muriithi

Mr. Mbichire for Applicant – absent

Mr. Ngigi for Respondent – present

Mr. Njage for interested party - present

COURT: Ruling delivered this 19th day of September 2013 in open Court.

B.N.OLAO

JUDGE

19TH SEPTEMBER, 2013