



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1017 OF 2013

ALOIS MUIA.....PLAINTIFF

VERSUS

EDWARD MUTINDA NDETEI.....DEFENDANT

RULING

The Plaintiff filed the suit herein on 22nd August 2013 by way of a Plaint of even date, and on the same date also filed a Notice of Motion seeking injunction orders against the Defendant to restrain him from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the property known as Emali Township Block 1/198 (hereinafter referred to as the suit property), pending the hearing and determination of his application and suit. The grounds for his Notice of Motion were that he is the legal owner of the suit property, and that the Defendant has trespassed thereupon and erected permanent structures thereon, thus denying the Plaintiff access to and use of the said property. The Plaintiff attached a copy of certificate of lease issued to him with respect to the suit property on 17th July 2001 to his supporting affidavit sworn on 22nd August 2013.

The Defendant then filed a Notice of Preliminary Objection dated 3rd September 2013 and a replying affidavit sworn on the same date. He objects to the Plaintiff's Notice of Motion on the ground that it is *res judicata* and has been filed in the wrong forum, the proper forum being the Machakos High Court under whose jurisdiction he suit property is located. He stated in his replying affidavit that the Plaintiff had made similar applications and sought the same orders in the **Makueni Principal Magistrate's Court Civil Case Number 39 of 2012 Alois Muia versus Sammy Nzwili Nzyoki and 4 others**, in **Machakos Senior Principal Magistrate's Court Number 847 of 2002** and in **Machakos Chief Magistrate's Court number 988 of 2003**. He attached a copy of the ruling in Principal Magistrate's Court at Makueni in Civil Case Number 39 of 2012 delivered on 3rd July 2012, which ruling he stated has not been challenged or appealed against.

The Defendant further stated that the parcel of land on which his building stands is Plot Number 556 at Emali Market which he acquired from one Agnes N. Katalimu, and he attached a copy of the sale agreement they entered into dated 7th September 2012. Further, that the said parcel of land forms one of the plots of land which were excised from Land Title Number Email Township Block 1/198, and that the said Agnes N. Katalimu was one of the parties and Defendants in the numerous suits that the Plaintiff has filed in this matter.

The Plaintiff in a supplementary affidavit sworn on 19th September 2013 responded by stating that he filed Makueni PMCC NO. 30 of 2012 whereof the parties were **Alois Muia- versus- Sammy Nzwili Nzyoka & 4 others**. Further, that the suit and application filed therein were not heard and finally determined on merit, and the same were dismissed on a preliminary point of law on grounds that it was an abuse of the court process. The Defendant also stated that the Defendant herein was not a party in the said suit and neither had he unlawfully entered and/or trespassed into the land parcel number Emali Township Block 1/198 when the suit was filed, and thus no cause of action existed as against the Defendant.

The Plaintiff further stated that Machakos Senior Principal Magistrate's Court No 847 of 2002 was between himself and one Pius Ndambuki, and that the Defendant was not a party therein. Lastly, that in Machakos Senior Principal Magistrates Court No. 988 of 2003 he was the 1st Defendant whilst the Plaintiff was one Nzwili Nzioka, and the subject matter of the suit was plot no. 555 and not Emali Township Block 1/198. The Plaintiff averred that the principle of *res judicata* cannot in the circumstances prevailing be applied to this suit in that no matter between himself and the Defendant nor anyone claiming under him, litigating under the same title has been heard on merit and finally decided with regard to the suit property. Further, that save for Makueni PMCC NO. 30 of 2012 which was dismissed on a technicality, the Defendant had not furnished the court with any evidence to that effect.

The parties were directed to file written submissions on the preliminary objection in which they reiterated the arguments made in the foregoing, and cited various statutory provisions and judicial authorities in support of their respective cases.

I have read and carefully considered the pleadings, evidence and submissions made herein. The main issue to be decided is whether the Plaintiff's Notice of Motion should be struck out for being *res judicata*. I will not belabor with the issue raised of this court's jurisdiction since the Machakos High Court does not have jurisdiction to hear land matters, which jurisdiction is exclusively given to Environment and Land Courts under Article 162 (2) and 165 (5) of the Constitution, and which courts are established by the Environment and Land Courts Act. This court is one of the Environment and Land Courts established under the said Act.

On the issue raised of whether the application herein is *res judicata*, section 7 of the Civil Procedure Act provides as follows:

“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 Defendant provided evidence of a ruling in Makueni Principal Magistrate's Court Civil Case No. 30 of 2012, one of the cases he cited as having been filed by the Plaintiff herein over the same subject matter and seeking the same orders. I note that the Defendant is not a party in the said case. However he claims that he bought the property that is the subject of the Plaintiff's Notice of Motion from one of the Defendants in the prior suit namely Agnes N. Katalimu. It is thus possible that the Defendant herein could be litigating under the same title as the Defendant in the previous suit. I also note that the subject matter of the application made and that of the current Notice of Motion is the same namely Emali Township Block 1/198.

However, I find that the previous suit and application in Makueni Principal Magistrate's Court Civil Case No. 30 of 2012 was not heard and determined on its merits, as the reason for dismissing the suit and application in was stated as follows:

“Clearly, the Plaintiff's averment in clause 10 of his plaint that there is no other suit or previous proceedings pending before any other court between himself and the defendant in respect of the same cause of action is untrue and misleading. The Plaintiff certainly did not

bring this suit with clear hands and in good faith. It is I agree with the 1s and 4th Defendants, an abuse of the court process.”

There has thus been no definitive determination that the Plot Number 556 which was sold to the Defendant is excised from Emali Township Block 1/198 as alleged, and no final substantive determination as to whether the Plaintiff is entitled to the injunctions he seeks. While in normal circumstances this court would have required the Plaintiff to proceed by way of review of, and/or appeal the ruling in Makueni Principal Magistrate’s Court Civil Case No. 30 of 2012, I recognize that the Defendant herein was not a party in the said suit, neither had the cause of action against him accrued at the time of the said ruling. The Plaintiff in the circumstances could only proceed against the Defendant herein by way of a new suit.

In addition, the Defendant did not provide any evidence of rulings and/or orders in the other cases he cited as having decided on the prayers sought herein by the Plaintiff. I therefore find for the foregoing reasons that the Plaintiff’s Notice of Motion filed herein is not *res judicata*, and the Defendant’s Preliminary Objection cannot consequently be upheld.

The costs of the Defendant’s Preliminary Objection dated 3rd September 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____27th__ day of ____November____, 2013.

P. NYAMWEYA

JUDGE