



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court Case*

LAND

- 3.1 *LR Dagoretti/Riruta 3882*
- 3.2 *LR Dagoretti/Riruta/1115*
- 3.3 *Appellant/original plaintiff in CMCC 7448/03 filed on 28th July 2003.*
- 3.4 *Application seeking orders of injunction to restrain respondent/original defendant from trespassing on land.*
- 3.5 *Preliminary Objection raised.*
- 3.6 *Subordinate court no jurisdiction to hear case.*
- 3.7 *Application for injunction 28th July 2003 struck out by Hon. Magistrate on 25th August 2003.*
- 3.8 *Applicant/Appellant files appeal on 28th August 2003 (3 days later)*
- 3.9 *Applicant/appellant Notice of Motion*
(1st September 2003 seeking injunction orders Same as in application 28th July 2003)
- 3.10 *Ransley J dismissed application 1st September 2003 seeking injunction.*
- 3.11 *Tenant admits no service made. On earlier orders of 14th June 2011.*
- 3.12 *New application filed dated 20th November 2003 seeking orders of review of injunction of 1st September 2003 by Ransley J.*
- 3.13 *Nyamu J (20th November 2003) declines to certify it as right .*
- 3.14 *16th March 2004*
Ransley J – declines to review orders. The Respondent in possession since 1991.
- 3.15 *No action on appeal file.*
- 3.16 *New application filed 29th November 2011.*
- 3.17 *Seeks identical orders to 1st September 2003 (1st October 2003)*
- 3.18 *In opposing orders identical. Res Judicata 23rd October 2003 orders dismissed.*
Application for review dismissed 30th June 2004.
- 3.19 *Annexures/photograph to application identical.*

4. *Held:*

i) *Application Res Judicata*

ii) *Dismissed with costs to respondent/ original defendant*

5. *Case Law:*

6. *Advocates :*

i) *S O Oyugi instructed by M/s Oyugi & Co Advocates for appellant/applicant*

ii) *G J Kahuthu instructed by for M/s Kahuthu & Kahuthu & Co Advocates for respondent/respondent*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 566 OF 2003

JOSEPH NJUGUNA KARIUKIAPPELLANT/ APPLICANT

VERSUS

JOSEPH KAGAI MACHUA RESPONDENT

R U L I N G

Application dated 29th November 2011

For Injunction

I. BACKGROUND

1. This is a land matter. There are multiplicity of suits. Whereas the subordinate court file is not before this High Court, I rely on the various affidavit filed by the parties.
2. On the 28th August 2003, the appellant Joseph Njuguna Kariuki who is represented by M/s Oyugi & Co Advocates was originally the plaintiff in civil suit 7448/03. He filed that said case against one Joseph Kagai Machua, the respondent herein who is represented by M/s Kahuthu and Kahuthu advocates the original defendant in the civil suit 7448/03 in the subordinate court case.
3. In brief the appellant/applicant filed an application for injunction to restrain the said respondent from trespassing on the parcel of land known as LR Dagoretti/Riruta/3882 (0.1047 Ha). When this application dated 1st September 2003 came before the Hon. Magistrate, a Preliminary Objection was raised in which the jurisdiction of the court was questioned due to the monetary value of the land.
4. The Hon. Magistrate struck out the whole suit. The appellant/applicant filed appeal to this High court on 28th August 2003 against the said ruling of 25th August 2003. This was three days later.
5. Together with the appeal, an application dated 1st September 2003 came before Ransley J.
6. The application was dismissed on 23rd October 2003 on grounds that the respondent had been on the

land since 1991. That no prima facie case had been made out.

7. The applicant/appellant filed an application dated 26th November 2003 seeking for a review of the orders by Ransley J

8. This application was heard on 16th march 2004. The Hon. Judge held that there was nothing to review. No new matter had arisen. The application was dismissed on 6th April 2004.

9. For 8 years, this file lay in court registry and no action by the deputy registrar nor the parties had been taken. It was dormant.

10. On 8th December 2011, the appellant filed a new application dated 29th November 2011 seeking orders for injunction. The dates were taken ex parte for hearing on 15th February 2012.

APPLICATION 29TH NOVEMBER 2011

11. The applicant/appellant stated that the respondent was interfering with his quiet possession and prayed that an injunction do issue. That the appellant to the registered owner of the property. Prayed that an injunction do issue.

12. In reply the respondent stated the application was res judicata. The facts are similar to the earlier orders dismissed on 23rd October 2003, 20th November 2003 and the dismissed application for review of 30th June 2004.

13. That the amenities to the application are the same photographs used in the earlier application.

14. The respondent prayed that the application being res judicata it be dismissed.

II OPINION

15. Section 7 of the Civil Procedure Act states:

“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 on the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

Explanation No. 1 ___

Explanation No. 2 ___

Explanation No.3 ___

Explanation No.4 ___

Explanation No. 5 ___

Explanation No. 6 ___”

16. In this application of 29th November 2011 before me, it seeks orders of injunction and reads:-

“17.1 That the Hon. Court may be pleased to issue an interim injunction restraining the respondent by himself, his agents, servants and/or employees from trespassing, committing acts of waste, constructing a pathway and/or road destroying properties, threatening and or uttering

threats and or dealing in any manner whatsoever with the appellant's/applicant's property known as Dagoretti/Riruta/3882 pending the hearing and determination of the appeal filed herein.

17.2 That the respondent to pay the costs of this application.”

17. The grounds being that:

a) The respondent committed acts of waste by cutting down food crops planted on the suit premises.

b) The respondent has further expanded the foot path leading to his house without the applicant's consent.

c) The respondent has threatened further acts of waste against the suit premises.

18. In the application before the Chief Magistrate's Court HCC 7448/03 Milimani Court at Nairobi, the chamber summons for injunction read:

“That the Hon. Court be pleased to issue an interim injunction restraining the defendant [now respondent] by himself, his agent, servants and/or employees from trespassing, constructing a permanent building and or any structure whatsoever and or dealing in any manner with the plaintiff's quiet possession of the premises known as Land Reference No. Dagoretti/Riruta/3882 until the hearing and determination of the suit”.

19. The above application and suit of 28th July 2003 was struck out on Preliminary Objecting being the matter in question on appeal.

20. The application dated 1st September 2003 was filed within the appeal on the 1st September 2003 and read:

“20.1 That the Honourable court be pleased to issue an interim injunction restraining the defendant by himself, his agents, servants and or employees from trespassing, constructing, erecting a permanent building and or any structure whatsoever and or interfering and or dealing applicants in any manner with the quiet and peaceful possession of all that piece of [land] known as Land Reference No. Dagoretti/Riruta 3882 until the hearing determination of appeal.

20.2 That the respondent do pay the costs of this application.”

21. The grounds being that

a) The respondent has trespassed into and is committing acts of trespass in the appellant/applicant's Land Reference No. Dagoretti/Riruta 3882.

b) The applicant is the registered proprietor of the said piece of land.

c) The applicants stands to suffer substantial loss.

22. Comparing this application of 1st September 2003 with the present one before me dated 29th November 2011, the same is identical in form and substance. Section 7 of the Civil Procedure Act would come into play herein in that the same issue in which the matter is already and substantially in issue was heard and determined on 23rd October 2003, and including a review.

23. I would therefore agree that the application before me is Res judicata and cannot therefore not be granted. The reasons being that Ransley J heard a similar application upon the same issue. He refused to grant an injunction. He refused further to review his orders. The alternative from the refusal of the review

would have been an appeal to the Court of Appeal.

24. I have perused this file and there has been no appeal filed to the Court of Appeal since October 2004.

25. As such, the application of 29th November 2011 stands dismissed with costs to the respondent original defendant.

26. I would further direct that the deputy registrar do comply with Section 79B of the Civil Procedure Rules and call for the lower court file for purposes of the admission or rejection by the Hon. Judge of the appeal.

DATED THIS 28TH DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) S O Oyugi instructed by M/s Oyugi & Co Advocates for appellant/applicant

ii) G J Kahuthu instructed by for M/s Kahuthu & Kahuthu & Co Advocates for respondent/respondent