



**Waweru v Ngware (Environment & Land Case E001 of 2022)
[2022] KEELC 2899 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E001 OF 2022**

**YM ANGIMA, J
JUNE 30, 2022**

BETWEEN

FREDRICK WAWERU PLAINTIFF

AND

JOSEPH NGWARE DEFENDANT

RULING

1. By a plaint dated 17.01.2022 the Plaintiff sought the following reliefs against the Defendant:
 - a. A declaration that the Plaintiff is the sole owner of all that parcel of land being Plot No. 856, Ndemi Settlement Scheme, Ol'Kalou.
 - b. An order of permanent injunction restraining the Defendant by himself, by his servants, agents and/or whomsoever in any means howsoever from further encroaching, invading, sub-dividing, alienating and/or disposing off, transferring, leasing, letting out, charging, constructing, processing Title and/or in any other way interfering with the parcel of land being Plot No. 856, Ndemi Settlement Scheme, Ol'Kalou.
 - c. An order that the Defendant as well as any 3rd party purchasers be forthwith forcefully evicted from all that parcel of land being Plot No. 856, Ndemi Settlement Scheme, Ol'Kalou and demolition of all developments made therein at the Defendant's costs.
 - d. Damages for trespass.
 - e. An order that O.C.S., Kipipiri Police Station do oversee the enforcement of court orders.
 - f. Costs and interest of this suit.
 - g. Any other relief that this Honorable court may deem fit and just to grant.



2. The Plaintiff pleaded that he was the legitimate owner of Plot No.865, Ndemi Settlement Scheme, in Ol Kalou (Plot No.856) measuring about 20 acres which he claimed was allocated to him in 1982. He further pleaded that in 1992 he sought approval from the concerned authorities for allocation of additional acreage to increase its size to 50 acres and which approval was allegedly granted.
3. The Plaintiff further pleaded that in 1992 he discovered that the Defendant's late father Duncan Nganga Ngware (the deceased) had invaded parcel 856 by grazing his livestock thereon in consequence whereof he filed NBI HCCC No.1988 of 1992 against him. He pleaded that the said suit was subsequently transferred to Nakuru and designated as Nakuru HCCC No.346 of 2008 – Fredrick Waweru –vs- Duncan Ng'ang'a Ngware. The Plaintiff further pleaded that upon hearing of the said suit, judgment was entered in his favour on 29.03.2011.
4. It was the Plaintiff's case that sometime in 2021 he sought the assistance of the Judiciary to execute the decree but he then discovered that the Defendant had invaded Plot 856 sub-divided the same and sold portions thereof to unsuspecting members of the public, some of whom had commenced constructing thereon.
5. Simultaneously with the filing of the suit the Plaintiff filed a notice of motion dated 17.01.2022 seeking, inter alia, an interim injunction to restrain the Defendant, his servants or agents from further encroaching, invading, sub-dividing, alienating, disposing of, transferring, leasing, charging, constructing, or interfering with Plot No. 856 pending the hearing and determination of the suit. The Plaintiff also sought an order for the eviction of the Defendant from Plot. 856 and demolition of the structures thereon.
6. The Defendant filed a replying affidavit on 21.03.2022 in opposition to the application. In the said affidavit the Defendant contended that the instant suit was res judicata as the Plaintiff had previously filed Nakuru HCCC. No. 346 of 2008 against the deceased over the suit property and the same was determined vide a judgment dated 29.03.2011. It was contended that the Plaintiff was required either to execute the resultant decree or appeal against it but not to file a fresh suit over the same subject matter.
7. The Defendant disputed that the Plaintiff was the owner of Plot No. 856 and stated that the same belonged to the deceased. It was further contended that the suit property was divided into 11 portions vide Succession proceedings for the estate of the deceased. The Defendant denied that the Plaintiff has been in possession of Plot No.856 and stated that the same was occupied by over 80 third parties who had purchased the same over the years.
8. The Defendant also disputed that he had invaded the suit land and stated that it was the deceased who had lawfully sold part of the land during his lifetime and that the remainder was lawfully distributed amongst the entitled beneficiaries in Nakuru High Court Succession Cause No. 113 of 1999. It was the Defendant's contention that the application was misconceived and an abuse of the court process and that, in any event, the Plaintiff has failed to satisfy the principles for the grant of the orders sought.
9. The Defendant filed a notice of preliminary objection dated 23.02.2022 to the suit on the basis that it was res judicata and in contravention of Section 7 of the *Civil Procedure Act* (Cap.21). The Defendant further contended that the instant suit was a waste of judicial time and an abuse of the court process.
10. The Plaintiff filed a further affidavit sworn on 22.03.2022. He disputed that the deceased was the owner of Plot No. 856 and asserted that the deceased's property was Plot No. 1241. The Plaintiff disputed that res judicata was applicable to the instant suit. He pointed out that the parties in the previous suit were not the same as those in the instant suit; that the previous suit had abated by reason of the death



- of the deceased; that the judgment in the previous was incapable of execution; and that, in any event, there was no law preventing him from filing a fresh suit over Plot No. 856.
11. When the application was listed for inter partes hearing it was directed that both the Plaintiff's application and the Defendant's notice of preliminary objection shall be canvassed together through written submissions. The record shows that the Defendant filed his submissions on 07.04.2022 whereas the Plaintiff filed his on 21.04.2022.
 12. The court has considered the Plaintiff's notice of motion dated 17.01.2022, the Defendant's replying affidavit and the notice of preliminary objection, the Plaintiff's further affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the instant suit is res judicata or otherwise an abuse of the court process.
 - b. Whether the Plaintiff has made out a case for the grant of the interim injunction sought.
 - c. Whether the Plaintiff has made out a case for the grant of the eviction order sought.
 - d. Who shall bear costs of the application.
 - a. Whether the instant suit is res judicata or otherwise an abuse of the court process
 13. The court has considered the material and submissions on record on this issue. Whereas the Defendant submitted that the instant suit was res judicata and an abuse of the court process, the Plaintiff contended otherwise. Whereas the Plaintiff pleaded in his plaint that the judgment and decree in the previous suit determined has ownership of Plot No.856 in his favor and that it was still a valid judgment, he changed tact in his further affidavit and trashed the judgment. He contended in the affidavit that the previous suit had already abated by reason of the demise of the deceased hence the resultant judgment was a nullity. The Plaintiff further contended that the parties in the previous suit were different from those in the instant suit hence res judicata did not apply.
 14. The test for res judicata was summarized in the case of *Kamunye & Others -vs- Pioneer General Assurance Society Ltd* [1971] EA 263 at 265 as follows:

“The test as to whether or not a suit is barred by res judicata seems to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action a transaction which has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. The subject matter in the subject suit must be covered by the previous suit for res judicata to apply.”
 15. Although the subject matter of the previous suit and the instant suit is the very same Plot No.856, and although the cause of action in the previous suit and the instant suit is essentially the same the court is of the opinion that the elements of res judicata as set out in Section 7 of the *Civil Procedure Act* have not been satisfied in the circumstances of this case for at least two reasons: First, the parties in the previous suit and in the instant suit are not the same. Second, whereas the Defendant in the instant suit has been sued in his personal capacity, it would appear that he was joined in the previous suit as a personal representative of the deceased.
 16. The court is, however, of the opinion that the instant suit is an abuse of the court process because the Plaintiff obtained a judgment and decree in the previous suit against the Defendant's deceased father



over essentially the same cause of action. The Plaintiff pleaded in paragraph 17 of his plaint that the said decree was still valid since it had not been overturned on appeal or review. The Plaintiff also exhibited a copy of a letter dated 25.03.2021 to the Judiciary Ombudsman seeking assistance in executing the decree in the previous suit. In those circumstances, the Plaintiff cannot turn around and trash the said decree and file a fresh suit to vindicate his property rights over Plot No. 856. It was the duty of the Plaintiff to take all necessary legal steps to execute the decree he obtained against the Defendant's late father in the previous suit. It was also the duty of the Plaintiff to seek executable prayers in his previous suit. A party should not be allowed to litigate by instalments and to harass his adversaries endlessly. In the premises, the court is inclined to strike out the instant suit as being an abuse of the court process.

b. Whether the Plaintiff has made out a case for the grant of the interim injunction sought

17. In view of the court's finding that the instant suit is an abuse of the court process, it is not necessary to consider this issue. However, even if the court were to consider the same, the court finds no material on record to demonstrate that the Plaintiff has a prima facie case with a probability of success at the trial. The material on record shows that the Plaintiff was allocated 20 acres only at Ndemi Settlement Scheme. There is no letter of allotment for the claimed acreage of 50. The material on record further shows that Plot No.856 was the subject of Succession proceedings and the same was distributed amongst various persons under a certificate of confirmation of grant. It is thus not clear if the 50 acres claimed by the Plaintiff are still in existence.

18. The material on record further shows that the said Plot No. 856 was subdivided and portions thereof sold to third parties who were not joined in the proceedings. The Plaintiff seems to be well aware of such sub-division and sale since that was one of the grounds listed in his application for interim orders. It is trite law that a court of law ought not to grant adverse orders against a party without giving him an opportunity of being heard. One of the reliefs sought in the plaint is an order for the Defendant "as well as any 3rd party purchasers" to be evicted from Plot No. 856.

c. Whether the Plaintiff has made out a case for the grant of the eviction order sought

19. Even if the court were to consider this order on merit, it is evident that the eviction order sought in the application is the same eviction order sought in the plaint. The court is of the opinion that in the circumstances of this suit an eviction order ought not to issue at the interlocutory stage and without a hearing of the suit on the merits. An eviction order is usually a final relief granted upon determination of a suit. Accordingly, the Plaintiff has not made out a case for the grant of an eviction order at the interlocutory stage.

d. Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Defendant shall be awarded costs of the application.

Conclusion and disposal

21. The upshot of the foregoing is that the court finds merit in the Defendant's preliminary objection but finds no merit in the Plaintiff's application for interim orders. Accordingly, the court makes the following orders for disposal of the notice of motion dated 17.01.2022 and the Defendant's notice of preliminary objection dated 23.02.2022:



- a. The Plaintiff's suit be and is hereby struck out with costs to the Defendant for being an abuse of the court process.
- b. The Plaintiff's notice of motion dated 17.01.2022 for interim orders is hereby struck out with costs to the Defendant.
- c. For the avoidance of doubt, any interim orders in force are hereby vacated.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF JUNE, 2022.

In the presence of:

Mr. Kariuki for the Plaintiff

Mr. Kimure holding brief for Mr. Ikua for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

