REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Case 110 of 2010

JOSEPH WAMBAYA……..….APPLICANT

VERSUS

FRANSICA OWUOR……..…..……..1ST DEFENDANT
RODA JEBIAMA KARAN……....…….…..……...2ND DEFENDANT
KIPKENY ARAP ABWAO…….....…….3RD DEFENDANT
ESTHER ACHIENG MUSUMBA…….....…….4TH DEFENDANT

R U L I N G

By his notice of motion dated 23-5-2012 the applicant subsequently prays for a temporary order of injunction to restrain the 4th defendant from constructing a borehole on land parcel No. Nandi/Kapsengere/162 pending the hearing and determination of the suit. The same is supported by his affidavit sworn on 23-5-2012.

The gist of his application is that his mother bought the suit property from one Kipkering Arap Abwao on 23-1-1995. He has attached a hand written sale agreement. He further asserted that the land registrar infact has registered the entries and he has further attached the copy of the green card.

The 2nd and 4th respondents have filed a preliminary objection stating that the same is res judicata. They argue that this court entertained a similar application dated 8-2-2011 with similar prayers and had it dismissed. There is no such application in the court file dated 8-2-2011 but instead that dated 25-3-2011 which this court dismissed on 19-10-2011.
Prayer 2 of the said application prays for:-
"Orders of injunction do issue, directed at the 2nd and 4th defendants restraining them by themselves, their servants, agents or other persons purporting to derive authority from them or any of them from entering into, developing, remaining in or in any other manner interfering with the plaintiff's quiet possession and enjoyment of land parcel number Nandi/Kapsengre/150 and 162".

The point to be determined is whether the issue in which the applicant is seeking to be granted has been determined. The gist of the applicant's prayer is to stop the 4th respondent from constructing a borehole at the suit property. This in my opinion is part of the development which was contained in the prayers earlier on alluded and which the court had determined when dismissing the application.

The trial court found that there was no proof that the applicant had purchased the land or was in actual occupation thereof. Although the applicant has annexed a copy of the sale agreement, one is left wondering why he did not do so in the earlier application. I do not find what new thing the applicant has discovered that the court did not consider in the earlier ruling.

The applicant has argued that what he intends to achieve is the preservation of the suit property pending the determination of the suit. If that be so then the court did so by granting prayer 3 of the application dated 25-3-2011 by placing restriction on the suit titles pending the determination of the suits.

For the foregoing reasons, I do agree with the respondents' preliminary point of law that this application is res judicata as envisaged by section 7 of the Civil Procedure Act which states:-
"No court shall try any suit or issue in which the matter directly and subsequently 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 court".

I need not add more. This suit should be allowed to proceed to full trial. The application is otherwise dismissed with costs.

Dated, signed and delivered at Kisumu this 26th day of July, 2012.

H.K. CHEMITEI
JUDGE

In the presence of:
…….for the applicant
…….for the respondents
HKC/va