



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL SUIT NO. 28 OF 2008.

MESHACK WAFULA SITIALO)
MARY WACHANA WAFULA) ::: PLAINTIFFS.

VERSUS
DIANA JILL ONGUKO)
JAMES B. ONGUKO) ::: DEFENDANTS.

R U L I N G.

1. The original suit herein was filed in March 2008 against the 1st and 2nd defendants. The record shows that the 1st and 2nd defendants did not enter appearance or file a defence and an interlocutory judgment was entered against them on 28th August 2008. On the 25th of March 2011, the plaintiffs filed an amended plaint in which Joseph Owidi and Raili Owidi, the 3rd and 4th defendants were added as parties. On filing the amended plaint the applicants filed a Notice of Motion dated 28th March, 2011. They seek for an order of stay of their eviction from a portion of land known as **Title Number Trans Nzoia/Makutano/47** on which their matrimonial home stands until the determination of the suit.
2. This application is premised on the grounds that the applicants are threatened with eviction and they are the registered proprietors of the title. It is further contended that the 2nd and 3rd respondents are laying a claim on a portion of their title measuring 0.528 hectares, thus it is necessary for the District Surveyor to ascertain the boundaries of Plot No. 31 and 47 to determine if there is any encroachment. This is because the applicants are contending they are innocent purchasers for value.
3. This application is supported by the affidavit of **Meshack Wafula Sitialo** sworn on 28th March, 2011 which elaborates the above grounds. In further arguments, to support of the above grounds, **Mr. Wanyonyi**, learned counsel for the applicants submitted that the 3rd and 4th defendant filed a suit being **Kitale HCC No. 131 of 2000** in which the 3rd and 4th defendants claimed that the plaintiff's had encroached on a portion of their land. Following the decision in that suit, there was a survey done and the court ordered the plaintiff to vacate a portion of the land. That is the portion of land the applicants claim they have occupied for ten (10) years and built their matrimonial home.
4. Counsel for the applicant further argued that this matter is not *res-judicata* and in this regard he referred to the Court of Appeal case of **Nguruman Limited & others vs. Turana Ole Kumaru CA No. 73 of 2004** especially the reference made in that case an English case of **Hadkison vs. Hadkison (1952) 2 ALL ER 567 Denning L.J stated at page 572.**

"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of

itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

5. This application was opposed; Mr. **Wanjala** learned counsel for the 3rd and 4th respondents relied on a point of law stated in the nature of preliminary objection which was argued in reply. The 2nd respondent also filed a replying affidavit sworn on 4th April, 2011 in which he confirms that he sold to the 3rd and 4th Defendant six (6) acres, and he later sold 3 acres to the plaintiffs. He urged the court to order a resurvey of the suit premises. I find this reply by the 2nd respondent of no consequence since summary judgment was entered against him in this case. On the part of the 3rd and 4th defendants, **Mr. Wanjala** argued that the 3rd and 4th Defendants were irregularly added as parties to this suit. The manner in which his clients were added in this suit was not in accordance with the provisions of the provisions of order 1 rule 10 of the CPR which provides that if a party has to be joined in an existing suit, this should be pursuant to an order made after an application to amend the suit.

6. In this case the plaintiff’s merely amended the plaint without informing the 3rd and 4th defendants and this was done 3 years after the suit had been filed. The second ground why this application was opposed by the 3rd and 4th defendant is because the same issues raised in this application were determined in **Kitale H.C.C. No. 131 of 2000**. Counsel annexed a copy of judgment delivered by **Karanja – J.** on 3rd November, 2004 in which the court made a finding that the plaintiffs had encroached on the 3rd and 4th defendants’ parcel of land, thus the suit against the 3rd and 4th defendants is *res judicata*.

7. In analyzing the issues raised in this application, first of all this application seeks for stay of an eviction of the applicants from a suit property. Although the applicants do not say so candidly in this application, it is common ground the order of eviction that the applicants are seeking to stay was made in **Kitale HCCC No. 131 of 2000** which suit was between the 3rd and 4th defendants against the 1st plaintiff. That suit was determined; can the applicants now seek for an order of stay of eviction of an order made in another suit via another suit? That suit was in respect of the same subject matter. The issue raised by the 3rd and 4th defendants regarding the claim of the same suit land being *res-judicata* is a valid point. The plaintiffs cannot re-open the same issue that was litigated upon in another suit and judgment was passed.

8. The other issue for consideration is the manner in which the 3rd and 4th defendants were enjoined in this suit. The authority cited by the plaintiffs in the case of **Nguruman Ltd. (Suppra)** is distinguishable from the present case. In the **Nguruman case**, the suit against the appellant was struck out, on the grounds that the appellants defence did not raise any reasonable cause of action. Thus the principle that were espoused in that case as I understand it, is what guides the court to determine whether or not to strike out a suit that does not raise a reasonable cause of action. The application before me is seeking for a stay of eviction, thus the provisions of order 42 of the CPR which makes provisions for stay are relevant. However, in this case the stay sought is in respect of an order made in another suit. That explains why counsel for the applicant conveniently invoked the provisions of order 22 rules 25 of the Civil Procedure Rules.

9. For proper administration of justice, a party cannot be allowed to file a multiplicity of suits or to litigate in installments for that matter. That is why the provisions of section 7 of the Civil Procedure Act bar a party in the following terms:-

“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.”

10. In summary, I find the amendment to include the 3rd and 4th defendants was irregularly made without the leave of court. The dispute over the suit premises as between the plaintiffs and the 3rd and 4th defendants is **res judicata** following the decision of **Karanja- J in Kitale HCC No. 131 of 2000**. If the plaintiffs wished to pursue an order of stay of execution against the 3rd and 4th defendants, they should have done so in that suit but not to initiate the same proceedings in another suit.. The 3rd and 4th defendants cannot be subjected to the same proceedings over the same subject matter in another suit.

In the upshot, I find this application that seeks for stay of an eviction order issued in another suit bad in law. It is hereby disallowed, and the names of the 3rd and 4th defendant were irregularly added by an Amendment that was not sanctioned by court, after 3 years since the suit was filed.

Costs of this application are awarded to the 3rd and 4th defendant.

Ruling read and signed on 24th day of June, 2011.

**MARTHA KOOME.
JUDGE.**