



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 318 of 2008**

**LANGATA DEVELOPMENT CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES MAINA WANJOHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ZAKARIAH GATHOGA NDUNGU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOHN KARANJA KAMANDE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This suit was commenced on the 7/07/2008 by the filing of a plaint dated 4/07/2008. The Plaintiff avers that it is the registered owner of LR No. 8401 situated in Njiru Kasarani area of Nairobi measuring about 200 acres or thereabouts. The Plaintiff also says that by an agreement dated 7/07/006, it licensed the Defendant to collect some hardcore that is above the ground within 6 (six) months in order to clear the ground for development on payment of agreed consideration. The Plaintiff says that in or about August 2007 the Plaintiff discovered that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were strangers to the Plaintiff were collecting the hardcore from the Plaintiff's land under a secret contract with the 1<sup>st</sup> Defendant.

2. The Plaintiff avers that consequently, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed Milimani CMCC No. 10465 of 2007 and obtained orders allowing them to access and collect the hardcore on the Plaintiff's land without the authority and consent of the Plaintiff herein. It is the Plaintiffs claim that the Defendants are trespassers on the Plaintiff's property (the suit property) and accordingly prays for judgment against the Defendants jointly and severally or in the alternative for:—

(a) *An injunction restraining the Defendants, their servants or agents from entering, remaining or carrying out and quarrying or activity on the Defendant's property known as LR No.8401 situate in Njiru Kasarani of Nairobi Province or to carry out any stones, chipstones or any materials therefrom (sic).*

(b) *Eviction of the Defendants from LR No. 8401 situate in Njiru Kasarani.*

(c) *General damages for trespass.*

(d) *Mesne profits from the illegal quarrying*

(e) *Costs of the suit.*

3. Together with the plaint, the Plaintiff filed a Chamber Summons application under Certificate of Urgency seeking ORDERS:-

(a) *That this application be certified urgent and be heard ex parte in the first instance.*

(b) *That the defendants/respondents by themselves, their servants, employees, agents and/or representatives be restrained from quarrying for and/or carrying away the stones already quarried from L.R Number 8401, Njiru Kasarani or entering or remaining on the property pending the hearing and determination of this application inter partes.*

(c) *That the defendants/respondents by themselves, their servants, employees, agents and/or representatives restrained from quarrying for and/or carrying away the stones already quarried from L.R. Number 8401, Njiru Kasarani or entering or remaining on the property pending the hearing and determination of this suit.*

(d) *That the costs of this application be in the cause.*

4. The application is premised on the grounds that the Defendants, who are strangers to the Plaintiff are abusing the authority given by the Plaintiff to carry away the loose hardcore/chips from the suit property by quarrying and carrying away building stones. The application is also supported by the sworn affidavit of **Festus Munene Mbogori** dated 4/07/2008.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to enter appearance and file defence within the stipulated time. Accordingly, the Plaintiff applied for and obtained interlocutory judgment against the said Defendants on the 13/02/2009. The 3<sup>rd</sup> Defendant, John Karanja Kamande filed his defence dated 25/07/2008 on the 30/07/2008. The 3<sup>rd</sup> Defendant denied the Plaintiff's claims and pleaded that this suit is res judicata as the issues raised in the plaint have already been determined by a court of competent jurisdiction, and further that the suit is res subjudice in light of Milimani CMCC No. 10465 of 2007 which is pending in a court of competent jurisdiction and which suit relates directly and substantially to the present suit.

6. As a result of the 3<sup>rd</sup> Defendant's defence, he (3<sup>rd</sup> Defendant) filed a Notice of Preliminary Objection on 21/07/2008. The Preliminary Objection which is dated 18/07/2005 is premised on the grounds:—

1. **THAT** *the Plaintiff's application dated 21/07/2005 is scandalous, frivolous, vexatious and may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the court process.*

2. **THAT** *the Plaintiff's application and suit is fatally defective as it contravenes clearly laid out laws.*

3. **THAT** *the Plaintiff's suit does not disclose any reasonable cause of action.*

4. **THAT** *the Plaintiff's application should be dismissed with costs to the Defendant.*

8. This ruling is in respect of the 3<sup>rd</sup> Defendant's Preliminary Objection. The Preliminary Objection proceeded by way of written submissions. The 3<sup>rd</sup> Defendant filed his submissions dated 27/07/09 on the same date. The main argument by the 3<sup>rd</sup> Defendant is that there is pending before a court of competent jurisdiction CMCC No. 10465 of 2007 in which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant sued the Plaintiff and the 1<sup>st</sup> Defendant and obtained orders restraining the said Defendants from evicting the 3<sup>rd</sup> and 1<sup>st</sup> Defendant herein from the suit property. The 3<sup>rd</sup> Defendant submitted that in the absence of an appeal or review against the lower court's restraining orders, the instant suit is an abuse of the court process.

9. The 3<sup>rd</sup> Defendant further submitted that the issues brought out in the instant suit are similar to the issues in the lower court case and that by dint of section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, this suit is res judicata. Counsel for the 3<sup>rd</sup> Defendant, M/s Ndemo

Mokaya & Co. Advocates relied on the case of **Njagu –vs- Wambugu, HCCC No. 2340 of 1991** (unreported) at Nairobi in which the issue of res judicata had been raised by the Defendants. Basing his views on the provisions of section 7 of the Civil Procedure Act Kuloba J (as he then was) said the following among other statements:—

*“If a litigant had to be allowed to go on forever relitigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he comes to court then I don’t see what use the doctrine of res judicata plays”*

10. Counsel for the 3<sup>rd</sup> Defendant also relied on appeal case No. 82 of 2004 – **Ali K. Ahmed t/a Sky Club Restaurant –vs- Kabundu Holdings Ltd. [2005] e KLR**. In the **Kabundu case**, the court (Maraga J) found that there were special circumstances which dictated against the application of the doctrine of res judicata (see the dictum of Wigram VC in **Henderson –vs- Henderson** (1843) 67 ER 313, 319). Maraga J borrowed from the Privy Council decision in **Yat Tung Investment Co. Ltd. –vs- Doo Heng Bank Ltd. (1975) AC 581, 590** where the court said *“--- where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case, the plea res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

11. The suit in the lower court in the instant matter was filed on 29/11/2007, praying for among other reliefs, an order of permanent injunction against the Defendants, their agents, servants, employees and/or representatives from stopping the Plaintiff’s company Sirembo Construction from accessing the hardcore and more particularly on the plot known as Njiru Kasarani Area LR 8401. After hearing the application that was filed simultaneously with the plaint the lower court decided in favour of the Plaintiffs on a balance of convenience which the trial court said tilted in favour of the Plaintiffs. The rest of the issues raised in that suit are yet to be canvassed.

12. It is on the basis of the above ruling that the 3<sup>rd</sup> Defendant says that the instant application is res judicata and that the whole suit is an abuse of the court process. Counsel for the 3<sup>rd</sup> Defendant says that the Plaintiff’s suit herein together with the application is effectively an appeal against the lower court’s findings, but coming to the court through the back door. Counsel cited two authorities on this point, one of which is **United Insurance Company Ltd. –vs- Lawrence Musyoka Wambua t/a Wambua & Co. Advocates Nairobi – HCCC No. 1427 of 2000**. I have considered the said authority.

13. For the Plaintiff, M/s Riunga Raiji, counsel appearing submitted that the basis of the suit before the lower court was authority granted by the Plaintiff herein to the 1<sup>st</sup> Defendant to cart away loose hardcore and not to quarry stones from the suit property. Counsel also argued that by quarrying stones from the suit land, the Defendants herein became trespassers, hence the instant application. Counsel also submitted that the orders sought by the Plaintiffs in the case in the lower court were based on the Plaintiffs’ (in lower court) averment that they were beneficial owners of the hardcore and therefore that the issues in the lower court are different from the issues in the instant suit.

14. Finally, counsel for the Plaintiff argued that the present Preliminary Objection does not meet the yardstick for Preliminary Objections as set in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1968] EA 696** at page 701 paragraph B where the court held that —

*“A Preliminary Objection is in the nature of a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised, if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

15. In reply the 3<sup>rd</sup> Defendant submitted that the Preliminary Objection herein is based on the fact that there was a case of exact nature in regard to the suit property as the present one and

that the same was determined at the interlocutory stage. Counsel also submitted that the issues raised by the Plaintiff in the present suit are only of a cosmetic nature since they are the very same issues before the court in CMCC No. 10465 of 2007. On the issue of a judgment having been obtained against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Counsel for the 3<sup>rd</sup> Defendant submitted that such a judgment is not necessarily a bar to the 3<sup>rd</sup> Defendant's Preliminary Objection. Finally, counsel for the 3<sup>rd</sup> Defendant submitted that the best course of action which should have been adopted by the Plaintiff herein was to file an appeal against or apply for a review of the ruling of the lower court.

16. The court has now considered the submissions made. On the basis of the consideration, I have reached the conclusion that the Preliminary Objection raised by the 3<sup>rd</sup> Defendant has merit. First it is not in dispute that on 20/03/2007, the lower court granted an order of injunction against the Plaintiff herein together with the 1<sup>st</sup> Defendant herein. It is also not in dispute that the issues raised in the lower court case are the very same issues that are in dispute in the instant case. As far as the instant application is concerned, there is no doubt that the same is res judicata because of the orders granted by the lower court on 20/03/2008. Section 7 of Civil Procedure Act is in my view applicable in this case.

17. As for the suit, it is admitted that CMCC No. 10465/07 is still pending before the lower court. The parties litigating in this and that suit are the same. The subject of the suit property is the same and for this reason, section 6 of the Civil Procedure Act is applicable in this case. The Plaintiff's contention that the issues in the lower court case are different from the issues in the instant suit is not correct. I am persuaded by the 3<sup>rd</sup> Defendant's argument that the Plaintiff herein is trying to revisit the lower court case but is doing so in the wrong way. If the Plaintiff was aggrieved by the orders of the lower court made on 20/03/2008, he should have appealed and not filed a fresh suit. In the alternative he should have applied for a review of the said orders. By adopting the procedure of filing a fresh suit and a fresh application, I am satisfied that the application is scandalous, frivolous and vexatious and amounts to an abuse of the court process.

18. In the premises, the 3<sup>rd</sup> Defendants Preliminary Objection is upheld. The Plaintiff's Chamber Summons application dated 21/07/2008 is hereby struck out with costs to the 3<sup>rd</sup> Defendant.

Orders accordingly.

**Delivered and Dated at Nairobi this 25<sup>th</sup> day of January, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Kiura (present) for the Plaintiff/Applicant

M/s Ndemo Mokaya (absent) for the 3<sup>rd</sup> Defendant/Respondent/Objector

Weche – court clerk