



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 340 of 2003

SAMUEL THACHI WANGI.....PLAINTIFF

VERSUS

1. ALEX RIGAGA
2. LOISE WANJIRU THAMA
3. RACHEAL WARUGURU GICHERU
4. AGNESS WAIRIMU MUNENE.....DEFENDANT

RULING

The background information is that there is a plaint dated 11th day of April 2003 and filed the same date. Vide paragraph 3 thereof it was averred that at all material times the plaintiff was the registered owner of land parcel number Kiambaa/Kihara /427. Vide an application dated 28th May 2004, and filed the same date, brought by chamber summons, under order VIA rule 3 and 5 of the CPR, and section 3A of the CPA, the applicant sought leave to amend the plaint in the manner shown and the annexed plaint to be treated as being duly filed and served. Those orders were granted on 2/7/2004. The material amendment introduced showed that the title called Kiambaa/Kihara/427 had been dismantled and the same had given birth to other titles namely Kiambaa/Kihara 3101 to 3110.

On the basis of that amended plaint, the plaintiff/applicant anchored an application dated 18th May 2006 and filed the same date. Prayer 2 and 3 thereof sought restraint orders under order 39 rules 1,2 and 3 CPR seeking temporary restraint orders to restrain the defendants, their servants or any other person from any further digging of tranches, dumping of stones, sand and or construction material and/or construction of any building premises in LR NO. Kiambaa/Kihara/427 (and now known as Kiambaa/Kihara 3101- to 3110 pending the hearing and determination of the application in the first instance and the suit in the second instance.

The court has been informed that the said application was canvassed and this resulted in a ruling delivered by Osiemo J on the 5th day of July 2006. At page 2 of the said ruling line 7 from the top, it is observed by the learned judge thus:-

“The application is opposed on the grounds that the suit premises for which injunction is sought LR No. Kiambaa/Kihara/427, does not exist, as the same had been subdivided and the new titles issued namely Kiambaa/Kihara/3101 to 3110. This is supported by official search which show that the new titles are in the names of the defendants and others. This is conceded by the plaintiff in paragraph 3 of the plaint where he admits that land parcel LR No. Kiambaa/Kihara/427 was subdivided into LR NO. Kiambaa/Kihara/3103 to 3110 and new titles have been issued. That being the case the prayer sought by the plaintiff is not tenable. An order of injunction cannot issue to restrain the defendant, from dumping building materials, on a non existent premises, LR NO. Kiambaa/Kihara/427, having been subdivided and new titles, created and issued. The plaintiffs application is therefore dismissed with costs to the defendants”

The plaintiff has once more presented an application by way of chamber summons, brought under order 39 rules 1, 2 and 3 of the CPR, sections 3 and 3A of the CPA and all other enabling provisions of the law. It is dated 25th June 2009

and filed on 26th June 2009. Vide prayers 2 and 3 they seek a temporary order of injunction restraining the defendants, their servants and or agents or any other person from any further constructions of any building premises on LR NO. Kiambaa/Kihara 3108, 3109 and 3110 pending the hearing and determination of the application in the first instance, and the suit in the second instance pending the hearing and determination of the suit.

The defendant has raised a preliminary objection to that application dated 1st day of July 2009 and filed the same date. By this preliminary objection, the defendants seek to have the pending application dismissed in limine on the grounds that the application is:-

(i). *Resjudicata*

(ii). *An abuse of the process of court, and has been brought to court with un clean hands.*

(iii). *Fatally defective and incompetent.”*

The preliminary objection has was inter parties on the 17th day of July 2009. The sum total of the objection is that this current application is similar to the application dated 25/5/2006 which was dismissed by Osiemo J on 5/7/2006, because it had addressed itself to the old title which had been dismantled, and new titles given among them the three titles subject of these proceedings.

-Since the learned judge did not strike out the application, but dismissed it, no new application can be brought in respect of the same subject matter.

In response counsel for the plaintiff/applicant has stated that the application of 25/5/2006 was not heard on merit. It was dismissed because this application was moving the court, to restrain activities on a title which had become non existend and therefore extinct.

-That, that ruling does not bar him from coming to this court, to prohibit further activities distinct from those which had formed the basis of the previous application

This court, has given due consideration to this rival arguments in the light of the content of the application dated 25/5/2006 and the content of the learned judges' ruling of 5/7/2006 and the court, proceeds to make the following findings:-

1. The principle of Resjudicata is a well known principle in the civil process and civil jurisprudence within this jurisdiction. It is available to a litigant who satisfies the ingredients in section 7 of the CPA, which reads:-

“No court, shall try any suit or issue in which the matter directly and substantially in issue had 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 sequently raised and has been heard and finally decided by such court”

These ingredients are:-

(i). Existence of a court-Indeed there is one which is seized of the subject matter of these proceedings.

(ii). There must be in existence a matter or issue –Indeed there is in existence a matter in issue subject of these proceeding.

(iii). The addressee of the command is the current court seized of the matter.

(iv). The prohibition also issues to the current court not to try a suit or issue which has been a suit or issue between the same parties or others litigating through them or under them.

(v). The suit and or issue may be the same or substantially the same.

(vi). The suit and issue must have been finally determined by the former court.

2. The above ingredients have been applied to the arguments herein and the court finds that, there is no dispute that the parties who were litigating in the application of 28/5/2006 are still the same parties litigating in the same capacity as the

application of 26/6/2009.

3. Indeed both applications relate to injunctive relief. It is to be noted however that the injunctive relief in the application dated 25/5/2009 had been intended to prohibit activities on land parcel number Kimbaa/Kihara/427 (now registered as 3101-3110)
4. The issue in controversy was the issuance or non issuance of the said injunctive relief.
5. A reading of the ruling of the learned judge, reveals that the issue of whether an injunctive relief was to issue or not to issue was not interrogated by the learned judge. The reason for declining to so interrogate, was because the applicant had cited land parcel number Kiambaa/Kihara /427 which was not in existence. This being the case, it is the considered opinion of this court, that the issue of issuance and or non issuance of the injunctive relief was not finally determined by that court.
6. As regards the framing of the relief, this court, has compared the two framings and finds that they are not framed in the same manner as land parcel number Kiambaa/Kihara/427 has not been cited. Indeed parcel number 3108-3110 had been included in the previous citing, but since no merits was pronounced on the issue of the injunction sought, their current citing is in order.
7. It is further the finding of this court, that there is nothing in order 39 CPR which precludes a party from coming to court, on account of fresh activities on premises subject of proceedings which have been subject of a previous application of an injunction which injunction may have been refused and or granted. It therefore follows that since the applicant herein alleges that activities sought to be enjoined are fresh, and since the issue of injunction was not determined on merit, by the ruling of 5/7/2006, the applicant is free to pursue the same.

For the reasons given in the assessment, the preliminary objection is dismissed because of the following reasons:

1. The ruling of 5/7/2007 although it dismissed the application dated 25/5/2006, that dismissal was not on merit but on a point of technicality which arose out of the applicant citing a title number which was extinct.
2. It is accepted that parcel number LR NO. Kiambaa/Kihara 3108-3110 were indeed among the parcels which had been cited in the previous application. It is also accepted that indeed an injunction was sought in the previous application to restrain activities on those parcels as well. However since the issue as to whether those activities were to be restrained or not, was not determined by the court, the court, is not precluded from revisiting that issue subsequently. The applicant is entitled to request the court to interrogate that issue.
3. There is nothing in order 39 CPR that precludes a litigant from seeking an injunctive relief over the same suit premises in respect of subsequent activities other than the previous activities which were subject of previous injunctive relief request.
4. The injunctive relief sought in the application of 25/5/2006 was not finally determined, as such, Resjudicata, does not apply.
5. The plaintiff who was respondent to the application will have costs of the preliminary objection.

DATED, READ AND DELIVERD AT NAIROBI THIS 24TH DAY OF JULY 2009.

R.N. NAMBUYE

JUDGE