



Njiriri & 5 others v County Government of Nairobi & another (Environment and Land Case Civil Suit E187 of 2021) [2022] KEELC 13767 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E187 OF 2021
SO OKONG'O, J
OCTOBER 27, 2022**

BETWEEN

**GEORGE NGACHA NJIRIRI 1ST PLAINTIFF
KELLYANN WANJIKU NJIRIRI 2ND PLAINTIFF
SUSAN NJOKI NJIRIRI 3RD PLAINTIFF
HANNAH WANGARE NJIRIRI 4TH PLAINTIFF
SAMUEL NGACHA NJIRIRI 5TH PLAINTIFF
JOSEPH NGACHA NJIRIRI 6TH PLAINTIFF**

AND

**COUNTY GOVERNMENT OF NAIROBI 1ST DEFENDANT
ROBERT MBATIA 2ND DEFENDANT**

RULING

1 I have two applications before me. The first application has been brought by the plaintiffs by way of Notice of Motion dated May 27, 2021. In the application, the plaintiffs are seeking the following orders;

1 That a temporary injunction be issued restraining the Defendants by themselves, their agents, servants and/or employees or any person acting on their instructions from encroaching, occupying, trespassing, developing, dumping any building materials or intending to allocate portions to third parties and/or dealing in any manner whatsoever or interfering with the peaceful occupation, ownership, use and enjoyment of all those parcels of land known as Plot Numbers 34/3 A, B, C, D, E, F, and G (hereinafter referred to as 'the suit properties') pending the hearing and determination of the suit herein.



2. That the OCS Buruburu Police Station be ordered to enforce, supervise and implement the order for the purposes of maintaining peace and security on the suit properties.
 3. That the costs of the application be provided for.
- 2 The plaintiffs' application is brought on the grounds set out on the face thereof and on the affidavit of the 1st plaintiff, George Ngacha Njiriri. The plaintiffs have averred that they are the lawful allottees of the suit properties. The plaintiffs have averred that the suit properties were allocated to them by the defunct City Council of Nairobi through various letters of allotment dated November 15, 2002. The plaintiffs have averred that as the owners of the suit properties, they are entitled to exclusive possession and occupation thereof. The plaintiffs have averred that on July 22, 2019, the defendants illegally entered the suit properties without the plaintiffs' permission and erected a sign post indicating that they intended to construct a car park thereon. The plaintiffs have averred that on July 25, 2019, the defendants commenced illegal construction of the purported car park. The plaintiffs have averred that the 2nd defendant is using his political influence and position in the Nairobi City County Assembly to instigate the officers of the 1st defendant to grab the suit properties.
- 3 The plaintiffs have averred that the defendants' said unlawful activities have interfered with the plaintiffs' constitutional right to use, enjoy and occupy the suit properties and that the plaintiffs are apprehensive that the defendants will continue with the said illegal activities on the suit properties unless restrained by the court. The plaintiffs have averred that they have never acquiesced to the said acts of trespass by the defendants. The plaintiffs have averred that when the defendants refused to stop the said activities, they filed a suit against them in the lower court namely, Milimani CMCC No 5542 of 2019 and obtained a temporary injunction against the defendants restraining them from interfering with the suit properties. The plaintiffs have averred that the said lower court suit was struck out on May 24, 2021 for want of jurisdiction. The plaintiffs have averred that it is fair and just for the orders sought to be granted so as to preserve the substratum of the suit.
- 4 The application is opposed by the defendants. The 1st defendant has opposed the application through a replying affidavit sworn by Abwao Erick Odhiambo on June 17, 2021. The 1st defendant has averred that the plaintiffs' suit is an abuse of the process of the court and res judicata and should be struck out summarily. The 1st defendant has averred that this is just one in a series of suits that the plaintiffs have filed against the defendants over the suit property. The 1st defendant has averred that in 2011, the plaintiffs filed Nairobi CMCC NO 5271 of 2011, Samuel Ngacha Njiriri & 7 others v Robert Mbatia & another (hereinafter referred to as 'the first suit') in which the plaintiffs obtained a temporary injunction on April 4, 2012. The 1st defendant has averred that the first suit was dismissed for want of prosecution.
- 5 The 1st defendant has averred that on July 29, 2019, the plaintiffs commenced yet another suit namely, Nairobi CMCC No 5542 of 2019, George Ngacha Njiriri & 5 others v County Government of Nairobi & Another (hereinafter referred to as 'the second suit'). The 1st defendant has averred that the second suit involved the same parties herein and the same was dismissed for want of jurisdiction and for being res judicata. The 1st defendant has averred that the reliefs sought in the present suit and the orders sought in the application before the court are a cut and paste version of the reliefs and orders that were sought in the second suit. The 1st defendant has averred that in a ruling delivered on May 21, 2021 in the second suit, the lower court found that the dispute between the plaintiffs and the defendants herein is res judicata the same having been determined in the first suit since the dismissal of the first suit amounted to a judgment in favour of 2nd defendant herein. The 1st defendant has averred that the plaintiffs herein did not appeal the decision of the lower court in the second suit. The 1st defendant has



- averred that instead, the plaintiffs decided to file a fresh suit. The 1st defendant has averred that failure to appeal the said decision means that the dispute between the plaintiffs herein and the defendants is res judicata.
- 6 The 1st defendant has averred that the plaintiffs' remedy if any lay in filing an application to reinstate the first suit but not in filing a new suit. The 1st defendant has averred that the dismissal of the first suit having not been set aside it remains as a judgment in the matter on merits. The 1st defendant has averred further that the affidavit in support of the plaintiffs' application offended the mandatory provisions of Rule 9 of the Oaths and Statutory Declarations Rules in that the annexures referred to in the affidavit as exhibits are not marked and sealed with the seal of the Commissioner for Oaths. The 1st defendant has averred further that the plaintiffs did not comply with the terms of the letters of allotment that were issued to them and as such the offers contained therein lapsed. The 1st defendant has averred further that the suit properties were reserved as open space for use as a bus terminus and as such was not available for allocation to the plaintiffs for residential or commercial use. The 1st defendant has averred further that the plaintiffs have not satisfied the conditions for granting a temporary injunction.
 - 7 The 2nd defendant has opposed the application through a replying affidavit sworn on June 17, 2021. The 2nd defendant has adopted the affidavit filed by the 1st defendant in opposition to the plaintiffs' application. The 2nd defendant has averred that it would serve the interest of justice if the plaintiffs' application is dismissed.
 - 8 The second application has been brought by the defendants by way of Notice of Motion dated June 17, 2021. In the application, the defendants have sought an order that the plaintiffs' suit together with the application anchored thereon be struck out with costs. The application is brought on the grounds set out on the face thereof and on the affidavit of Abwao Erick Odhiambo sworn on June 17, 2021. The defendants have contended that the reliefs sought in this suit and the application before the court are word for word with the reliefs and orders that were sought by the plaintiffs in the second suit. The defendants have contended that the suit is an abuse of the process of the court since it amounts to multiplicity of suits by the plaintiffs.
 - 9 The defendants have averred that the suit is also res judicata in that the ownership dispute between the plaintiffs and the defendants over the suit property was determined in the first suit. The defendants have averred that the first suit involved the same parties herein and the same subject matter. The defendants have averred that in a ruling that was made in the second suit on May 21, 2021 mentioned earlier, the lower court found that the dispute between the parties was res judicata. The defendants have averred that that decision was not appealed. The defendants have averred that a suit dismissed for want of prosecution is deemed heard and determined on merits. The defendants have averred that to try to resuscitate the said suit through a fresh suit offends the doctrine of res judicata. The defendants have averred that the plaintiffs should have applied for the reinstatement of the first suit instead of filing a fresh suit.
 - 10 The defendants' application is opposed by the plaintiffs through a replying affidavit sworn by the 1st plaintiff on November 15, 2021. The plaintiffs have admitted filing the first suit. The plaintiffs have however contended that the first suit involved different parties and that the 1st defendant herein was not a party to the suit. The plaintiffs have averred further that a suit which is dismissed for want of prosecution is not deemed as having been heard and determined on merit. The plaintiffs have averred that they had a right to institute a fresh suit against different parties seeking similar orders the first suit having been dismissed for want of prosecution. The plaintiffs have averred that it would be in the interest of justice to have the dispute between the parties determined on merit once and for all.



Determination:

11 On June 21, 2021, the court directed that the two applications be heard together by way of written submissions. The plaintiffs filed submissions dated July 30, 2021 in support of their application and submissions dated November 15, 2021 in opposition to the defendants' application. The defendants on the other hand filed submissions dated September 2, 2021 in support of their application and submissions dated August 4, 2021 in opposition to the plaintiffs' application. I have considered the two applications before me together with the affidavits filed in support thereof and in opposition thereto. I have also considered the submissions filed by the advocates for the parties and the authorities cited in support thereof. Since the defendants' application is in the nature of a preliminary objection to the plaintiffs' suit and application, I will deal with the same first because if it succeeds, it will not be necessary to consider the plaintiffs' application.

12 The defendants' application was brought under Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 2 Rule 15(1)(d) of the *Civil Procedure Rules*. Section 7 of the Civil Procedure Rules provides as follows:

' 7. 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.'

13 Order 2 Rule 15(1)(d) of the Civil Procedure Rules provides as follows:

' 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) ...; or
 - (b) ...; or
 - (c) ...; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.'

14 What I need to determine in this application is the effect of dismissal of a suit for want of prosecution. Is such dismissal a determination of a suit and can a fresh suit be brought against the same parties on the same issues and for the same reliefs that had been sought in the dismissed suit? I believe the Civil Procedure Rules and some of the cases that were cited by the defendants give some answers to these questions. Order 17 of the Civil Procedure Rules gives the court power to dismiss a suit for want of prosecution. Order 17 Rule 2(1), (2) and (3) of the Civil Procedure Rules 2010 provides as follows:

' 2.



- (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.'

15 Unlike in the repealed Civil Procedure Rules, there is no provision in the Civil Procedure Rules 2010 allowing a party whose suit has been dismissed for want of prosecution to bring a fresh suit. In *Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR*, the Court of Appeal faced with a similar question stated as follows:

' (1) The question that implores an answer in this appeal is whether, a matter dismissed for want of prosecution can give rise to application of the doctrine of res judicata if it is filed afresh in a new suit by the same parties.

(17) As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1st respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st respondent could do was to invoke the appellate process and not filling a fresh suit.'

16 The lower court dismissed the second suit for want of pecuniary jurisdiction and for being res judicata. The suit was found to be res judicata in that the issues raised therein were determined in the first suit that was dismissed for want of prosecution. That decision was correct and in line with the decision of the Court of Appeal that I have cited above. It is common ground that the parties, the cause of action and the reliefs sought in the present suit are the same as in the second suit that was dismissed for among others being res judicata. The decision of the lower court was not appealed and as such is binding upon the plaintiffs. I am in agreement with the defendants that a finding having been made that the plaintiffs' claim against the defendants in the second suit was res judicata, it was not open to the plaintiffs to file a fresh suit against the same parties over the same cause of action. It is my finding therefore that the present suit like the second suit is res judicata. The suit is also an abuse of the process of the court in that the court having made a finding that the plaintiffs' claim against the defendants herein is res judicata, the plaintiffs could not file a fresh suit without having that finding reversed on appeal. I have also noted that in their plaint filed herein, the plaintiffs have not disclosed the existence of the first suit and the fact that the second suit was dismissed for among others that the suit was res judicata. I have said enough to show that the defendants' application has merit.

17 Having made a finding that the plaintiffs' application and suit are for striking out, it is not necessary for me to consider the merit of plaintiffs' in junction application. However, I wish to state that if I was



to consider the application, I would not have allowed the same. The principles upon which this court exercises its discretion in applications for interlocutory injunction are settled. In *Giella v Cassman Brown & Co Ltd [1973]EA 358*, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

18 In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal stated as follows:

' The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.'

19 From the material before me, the plaintiff has not established a prima facie case with a probability of success against the defendants. The plaintiffs have contended that the suit properties were allocated to them by the City Council of Nairobi in 2002. The plaintiffs have not placed any valid evidence before the court in proof of the alleged allotment. As correctly submitted by the defendants, the plaintiffs' affidavit in support of the application for injunction is defective as concerns the exhibits. The letters of allotment were mentioned in the affidavit but the same were not identified and sealed by the Commissioner of Oaths as required under Rule 9 of the Oaths and Statutory Declarations Rules. This court cannot therefore take cognizance of them as part of the affidavit evidence. In the absence of evidence that the suit properties were allocated to the plaintiffs and that the plaintiffs met the conditions for the allotment, a case for trespass has not been established. Even if I had found that a prima facie case has been established, I would still not have granted the injunction sought. The plaintiffs have not persuaded me that they will suffer irreparable harm if the orders sought are not granted. From the material before me, it appears that the suit properties were created from land that was reserved as an open space for parking. The plaintiffs seem not to have developed the suit properties since the same were allocated to them on November 15, 2002. The plaintiffs have not denied the defendants' contention that the suit properties are in use at the moment as a public bus terminus. In the circumstances, I am not convinced that the plaintiffs would suffer irreparable harm if the status quo is maintained.

Conclusion:

20 In conclusion, I hereby make the following orders;

1. The defendants' application dated June 17, 2021 is allowed. The plaintiffs' plaint dated May 27, 2021 and application dated May 27, 2021 are struck out.
2. The defendants shall have the costs of the suit and the two applications.



Dated and Delivered at Kisumu this 27th day of October 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wanjiku for Mr. Gachie for the Plaintiffs

Mr. Mokuu for the Defendants

Ms. J. Omondi-Court Assistant

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