



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Case 87 of 2007**

**MBEU KITHAKWA ..... PLAINTIFF**

*Versus*

**PHILLIP MUCHIRI MUGO ..... DEFENDANT**

**RULING**

The plaintiff instituted these proceedings against the defendant seeking a permanent injunction restraining the defendant from burying the remains of the deceased **Mugo Kithakwa** on Parcel No. **INOI/KERUGOYA/768** and **769**. Before the final determination of the suit the plaintiff brought a chamber summons dated 9<sup>th</sup> November 2007. By that chamber summons the plaintiff sought temporary injunction to restrain the defendant from burying the remains of Mugo Kithakwa deceased on parcel No. INOI/ KERUGOYA /769. In the affidavit in support of the application the plaintiff deponed that the deceased Mugo Kithakwa lost a case relating to the property INOI/ KERUGOYA/769. The plaintiff stated that he was declared the owner of the property by the judgment in case No. **High Court Civil Case No. 111 of 1990**. That the defendant is making arrangements to bury the deceased on the said land. The application was opposed by the defendant. The defendant refuted the contention that Mugo Kithakwa deceased had lost parcel no. 769 through High Court Case No. 111 of 1990. The defendant deponed that the plaintiff had not shown evidence of his ownership of the said parcel. He then stated that the plaintiff had by a **Miscellaneous Application No. 39 of 2006** obtained orders to stop the burial of Mugo Kithakwa in the lower court. That Miscellaneous Application was dated 30<sup>th</sup> May 2006. The defendant filed an appeal against the lower court's orders before this court and by a judgment of this court dated 13<sup>th</sup> November 2007 the appeal succeeded and the orders of the lower court were set aside. The defendant therefore argued that the present action is *res judicata*. He further deponed that parcel no. 769 is registered in the name of the deceased. To this end he annexed a certificate of official search which reflected the deceased as the owner. The plaintiff on 6<sup>th</sup> December 1997 registered a caution under that property.

What the plaintiff seeks from the court is interlocutory injunction pending the hearing and determination of this suit. The plaintiff needed to satisfy the court that he had met the principles of granting an injunction. Those principles were reinstated in the case of **FINA BANK LTD vs SPARES AND INDUSTRIES LTD (2000) 1 EA 52** as follows:-

*“The conditions for the grant of an interlocutory injunction were:-*

- i That the applicant had to show a prima facie case with a probability of success.*
- ii The injunction would not normally be granted unless the applicant stood to suffer irreparable*

***injury or loss which could not be adequately compensated by an award of damages, and ,***

***iii If the court was in doubt, the application would be decided on the balance of convenience.”***

In considering the first principle it is noted that the plaintiff at first said that he was the owner of the aforesaid parcel of land. He subsequently by his further affidavit stated that the same is not registered in his name. Order XXXIX of the Civil Procedure Rules, for an order of injunction to be issued the applicant has to prove that he has an interest in the land the subject of injunction, that is, he is an owner of the property. The court has no jurisdiction to grant a relief by way of interlocutory injunction where it cannot grant such relief in the main suit. The plaintiff fails to show that he has a prima facie case with a probability of success because the property he seeks an injunction over is registered in another person's name. Indeed the property is registered in the name of Mugo Kithakwa – (deceased). The plaintiff did not also argue that any loss suffered by him would not be adequately compensated by damages. The plaintiff having failed to satisfy the first two principles of granting an injunction, I will not proceed to consider where the balance of convenience lies. In the lower court the plaintiff moved by way of Miscellaneous Application and sought the following order:-

***“That Philip Muchiri Mugo the respondent herein or any one else in the family of the above named deceased MUGO KITHAKWA be restrained from burying the said deceased on land parcel No. INOI/KERUGOYA/769 which lawfully belongs to the applicant MBEU KITHAKWA on 31<sup>st</sup> May, 2006 or any other time till the further orders of this honourable court.”***

In the affidavit in support of that lower court case the plaintiff deponed that the defendant, herein, and his family members intended to bury Mugo Kithakwa on Parcel No. INOI/KERUGOYA/769 which land he had occupied since the time of land demarcation. The lower court by its ruling delivered on 29<sup>th</sup> August 2006 granted the plaintiff an injunction barring the defendant from burying the deceased on the aforesaid parcel of land. The defendant appealed against that ruling. The High Court by its judgment in Civil Appeal No. 4 of 2007 set aside the injunction order of the lower court. The plaintiff did not pursue the lower court case but instead filed this present action which action prayed for identical reliefs as had been sought in the lower court case. The defendant in opposing the present application for injunction argued that it is *res judicata*. That application dated 19<sup>th</sup> November the subject of this ruling seeks, just like the lower court one, an order for temporary injunction to stop the defendant from burying the remains of Mugo Kithakwa deceased on parcel No. INOI/KERUGOYA/ 769. In his affidavit in support of that application the plaintiff without indicating when deceased died stated:-

***“That the father of the defendant has passed away and his remains are being preserved at the District Hospital Kerugoya” (underlining mine)***

In the affidavit in support of the lower courts application the plaintiff stated:-

***“That I have now learnt and verily belief (sic) the same to be true that the said plaintiff in High Court Case (MUGO KITHAKWA Deceased) passed away on 17<sup>th</sup> May 2006, at District Hospital Kerugoya and is now in the mortuary.”***

It is clear from those two statements that the plaintiff, perhaps in the hope of obtaining *ex parte* injunction order deliberately failed to state the date of the death of Kithakwa deceased in the present application. However, much more than that, it should by now be clear that the plaintiff in filing this case replicated the lower court's case. **Section 7** of the Civil Procedure Act forbids the court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent court. The doctrine of *res judicata* related to a matter adjudicated upon or a matter upon which a judgment has been pronounced. The plaintiff in opposing the defendant's argument that the application is caught by that doctrine was heard to say that since the High Court in its judgment in the appeal of the lower court case found that the lower court suit was incompetent for having been initiated by way of miscellaneous application, that the plaintiff was entitled to file this fresh action. Such an argument goes contrary to the practice of law and public policy, that is, there must be finality of litigation. The question whether or not the decision in the

previous action was right or erroneous has no bearing on whether it operates as *res judicata* or not. The converse would take legal practice to a ridiculous heights because every decision would be impugned as erroneous and there would be no finality of cases. The doctrine of *res judicata* contains the rule of conclusiveness of judgment based on maxim of Roman jurisprudence '*interest reipublicae ut sit finis litium*' (that is, it concerns the state that there be an end to law suits). **See Mulla The Code of Civil Procedure 16<sup>th</sup> Edition.**

The plaintiff's chamber summons dated 19<sup>th</sup> November 2007 and this entire suit are *res judicata*. The orders of the court are that the chamber summons dated 19<sup>th</sup> November 2007 is hereby dismissed with costs to the defendant. This case is hereby struck out for being *res judicata*.

**MARY KASANGO**

**JUDGE**

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JUNE 2008**

**M. S. A. MAKHANDIA**

**JUDGE**