



Ng'ang'a & another v Embakasi Ranching Company Limited & 4 others (Environment & Land Case 703 of 2017) [2022] KEELC 15382 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 703 OF 2017
JO MBOYA, J
NOVEMBER 21, 2022**

BETWEEN

DAVID MUIGAI NG'ANG'A 1ST APPLICANT

JECINTA NJERI NG'ANG'A 2ND APPLICANT

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST RESPONDENT

SAMUEL MWANGI THUITA 2ND RESPONDENT

DIRECTOR OF SURVEYS-NAIROBI 3RD RESPONDENT

CHIEF LAND REGISTRAR-NAIROBI 4TH RESPONDENT

DIRECTOR OF PHYSICAL PLANNING-NAIROBI 5TH RESPONDENT

RULING

Introduction and Background

1. *Vide* notice of motion application dated the October 25, 2022, the plaintiffs/applicants have sought for the following reliefs;
 - i. That this matter be certified urgent and be heard ex-parte in the first instance.
 - ii. That the 4th defendant/respondent do issue a certificate of Lease for Parcel No 8529 on Nairobi/Block 136 Folio Register 399/60 in accordance with the decree issued on November 12, 2022 to the 1st plaintiff/applicant.
 - iii. That the 4th defendant/respondent does revoke the certificate of lease issued on August 14, 2020 to Benjamin Kamau Gitegi for Nairobi/Block 136/8529.
 - iv. That costs of the application be provided for.



2. The subject application is anchored and premised on the various, albeit numerous grounds that have been enumerated at the foot of the application and same is further supported by the affidavit of David Muigai Ng'ang'a, sworn on the October 25, 2022. For clarity, the deponent has attached/annexed a total of six (6) annexures to the said supporting affidavit.
3. Suffice it to point out that despite being served with the instant application, none of the defendants/respondents filed any response, either *vide* replying affidavit or grounds of opposition. Consequently, the application is otherwise unopposed.
4. Notwithstanding the foregoing, it is trite and established that even when an application/suit is unopposed, the claimant/applicant is still enjoined to prove the claims at the foot of the application.
5. Premised on the need and necessity to prove the claims at the foot of the instant application, counsel for the plaintiffs/applicants canvassed the Application *vide* oral submissions, details whereof form/constitutes the body of the next segment of this ruling.

Submissions by the Parties:

a. Plaintiffs/Applicants Submissions:

6. Learned counsel for the plaintiffs/applicants canvassed and ventilated the instant application *vide* oral submissions.
7. Suffice it to point out that counsel raised and amplified three issues for consideration by the honourable court.
8. First and foremost, learned counsel for the plaintiffs/applicants invited the court to grant unto the applicants liberty and leave to amend the date when the decree in respect of the subject matter was issued. In this regard, counsel pointed out that the date of the decree has erroneously been shown in terms of prayer 2 to be the November 12, 2022.
9. Nevertheless, counsel pointed out that the decree in respect of the subject matter was issued and handed down on the November 12, 2020 and not otherwise.
10. Based on the foregoing, counsel implored the court to correct the date of the decree alluded to in terms of prayer 2 of the application and to deem same as November 12, 2020 and not November 12, 2022.
11. Secondly, counsel for the plaintiffs/applicants submitted that the 4th defendant/respondent herein was ordered and directed to issue the requisite certificate of title in respect of LR No Nairobi/Block 136/8529 to the 1st plaintiff/applicant herein. However, instead of complying with the said orders/decree, the 4th defendant has proceeded to and issued the Title to and in respect of the named property to a third party.
12. In view of the foregoing, learned counsel for the Plaintiffs implored the court to reiterate the import and tenor of limb three of the decree issued on the November 12, 2020 and to direct the 4th defendant to issue the requisite certificate of title to the 1st plaintiff/applicant.
13. Thirdly, counsel for the plaintiffs has invited the honourable court to revoke and cancel the certificate of title/lease issued in favor of one Benjamin Kamau Gitegi, pertaining to and concerning LR No Nairobi/Block 136/8529.
14. In this respect, counsel for the plaintiffs/applicants has submitted that the said certificate of lease was issued in contravention of the terms of the decree of the court rendered on November 12, 2020.



15. In a nutshell, counsel submitted that the instant Application is meritorious and thus same ought to be granted and or allowed as prayed.

b. Submissions by the Defendants/Respondents:

16. Suffice it to point out that despite having been duly served with the instant application, none of the defendants/respondents filed any response to the application at all.
17. Additionally, none of the defendants/respondents attended court or made any submissions in opposition to the instant application at all.
18. In a nutshell, the only submissions on record and pertaining to the instant application, are the submissions that were rendered by and on behalf of the plaintiffs/applicants, whose details have been alluded to *vide* the preceding paragraphs.

Issues for Determination

19. Having reviewed and evaluated the application dated the October 25, 2022, together with the supporting affidavit thereto and having considered the oral submissions that were rendered on behalf of the plaintiffs/applicants, the following issues are pertinent and worthy of determination:
- i. Whether the prayer seeking to compel the 4th defendant/respondent to issue a certificate of lease in respect of LR No Nairobi/Block 136/8529 is *Res-judicata*.
 - ii. Whether this honourable court is seized of the requisite jurisdiction to revoke the certificate of lease issued on the August 14, 2020 to Benjamin Kamau Gitegi without same being a party to the subject application and without being heard in respect of the instant application.

Analysis and Determination

Issue Number 1 Whether the prayer seeking to compel the 4th Defendant/Respondent to issue a certificate of lease in respect of LR No Nairobi/Block 136/8529 is Res-judicata.

20. It is common ground that the plaintiffs/applicants herein hitherto filed and lodged the current suit as against the named defendants/respondents.
21. It is also common ground that the subject suit was thereafter compromised *vide* a consent entered into and executed by and on behalf of the various Parties. For clarity, the consent is contained at the foot of the documents/ Letter duly executed and signed on the September 17, 2020.
22. Suffice it to point out that the consent under reference was thereafter adopted and endorsed by the Honourable court in terms of the orders made on November 12, 2020.
23. Given the relevance of the terms of the decree, it is appropriate and imperative to reproduce the said terms. In this regard, the terms of the decree of the court issued on the November 12, 2020 are reproduced as hereunder:
- i. That it is hereby declared that the parcels of land known as Plot No V 3677, V 3678, V 3679, V 3680, V 3681, V 3682, V 3683, V 3684, V 3685, V 3686, V 4019 and V 4023 are now known as Parcel No 8529,8512, 8513, 8514, on Block/36 Block/136 (Embakasi Ranching) on Folio Register 399/60.



- ii. That the 1st plaintiff is hereby declared as the legal owner of all that parcel of land known as parcel No 8529,8512,8513 and 8514 on Nairobi/Block 136(Embakasi Ranching) located in Ruai.
 - iii. That the 4th defendant is hereby ordered to issue certificates of titles in the names of the 1st plaintiff in regards to Parcel No 8529, 8512,8513 and 8514 on Nairobi/Block 136(Embakasi Ranching) and on Folio Register 399/60.
 - iv. That each party bears its own costs.
24. From the decree, whose terms/clauses have been reproduced in the preceding paragraph, it is evident and apparent that the 4th defendant was ordered and directed to issue a certificate of title to and in favor of the 1st plaintiff/applicant herein relating to inter-alia LR No Nairobi/Block 136/8529.
 25. My understanding of limb three of the decree issued on the November 12, 2020, is that the 1st plaintiff already has a standing and existing order against the 4th defendant/respondent.
 26. To the extent that the Plaintiffs already have standing and existing orders directing the 4th defendant to issue a certificate of title/lease, over and in respect of the named property, no further order is required to fortify an order that is already existing.
 27. Conversely, once a court has previously issued a binding and effective order in respect of a particular dispute/property, the court cannot be re-invited to come back on the same matter and seek or make similar orders.
 28. In this respect, the limb of the application where the plaintiffs are inviting the court to order and direct the 4th defendant/respondent to issue a certificate of title in respect of the named property, is bad for duplicity.
 29. Additionally, to the extent that there is already an existing and standing order speaking to the issues, the court cannot be invited to have a second bite on the same issue.
 30. In this respect, I am of the humble and considered view that the limb of the Application that is seeking for issuance of an order which is already in existence, is similarly, barred and prohibited by the doctrine of *Res-judicata* as well as *functus officio*.
 31. To underscore the import and tenor of the doctrine of *Res-judicata* and its applicability to the subject Application, it is appropriate to take cognizance of the holding in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR. For coherence, the Court of Appeal stated and observed as hereunder;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves.

Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”



32. Additionally, it is also important to state and underscore that to the extent that this very court had pronounced itself on the issue of the issuance of a certificate of title in favor of the 1st plaintiff/applicant, then the said issue cannot be reagitated once again.
33. To this end, the doctrine of *functus officio* bars and prohibit the court from entertaining and adjudicating upon a similar issue that the honourable court has already pronounced itself upon.
34. For coherence, the scope of the doctrine of *functus officio* was elaborately explained and underscored in the holding in the case of *Telcom Kenya Ltd v John Ochanda (suing on behalf of 996 former employees of Telkom Kenya Ltd)* (2014) eKLR, where the court stated as hereunder:
- “The respondents are seeking umbrage under Article 159 (2) (d) of the *Constitution* which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice.”
35. In a nutshell, it is my finding and holding that what is sought for *vide* prayer two of the instant application dated the October 25, 2022, is barred by the twin doctrines of *Res-judicata* and *functus officio*.

Issue Number 2 Whether this Honourable court is seized of the requisite Jurisdiction to revoke the certificate of lease issued on the August 14, 2020 to Benjamin Kamau Gitegi without same being a Party to the subject Application and without being heard in respect of the instant Application.

36. The second limb of the instant application seeks to have a certificate of title which was issued in favor of one Benjamin Kamau Gitegi, be revoked and cancelled.
37. Suffice it to state that the said Benjamin Kamau Gitegi, whose Title over and in respect of LR No Nairobi/Block 136/8529 is sought to be cancelled, was never a party to the instant suit.
38. Additionally, it is also important to state that the certificate of lease, which was issued to and in favor of the said Benjamin Kamau Gitegi, is stated to have been issued on the August 14, 2020.
39. From the record and the totality of the evidence beforehand, it is apparent that the impugned certificate of lease was clearly issued prior to and before the decree of the court. For clarity, the decree of the court was issued on the November 12, 2020.
40. Based on the foregoing, what comes out clearly is that by the time the decree of the court was being issued, the title to and in respect of one of the properties in contest, had already been issued to a third party.
41. Despite the fact that the title in respect of the named property had already been issued to a third party, the plaintiffs/applicants herein did not find it appropriate to amend their pleadings and to implead the said third party.
42. In any event, even after discovery that the Title in respect of LR No Nairobi/Block 136/8529 was issued to a third party, the plaintiffs/applicants herein have neither impleaded nor served the named third party in the current application.



43. Evidently, the plaintiffs/applicants are keen to procure and obtain adverse orders against the said Benjamin Kamau Gitegi, albeit without notice to and involvement of the said party.
44. To my mind, no adverse order can issue and be granted against a third party, without the said 3rd party being notified of the intended adverse proceedings and being served with the requisite proceedings, to enable same participate therein.
45. Put differently, it is contrary to the rule of natural justice to make an order which will adversely affect a party who has neither been served with the proceedings nor afforded an opportunity to respond to the impugned proceedings.
46. On the other hand, I am also alive to the provisions of Articles 47 and 50(1) of the Constitution 2010. For convenience, the provisions of the said Articles are reproduced as hereunder:
47. Fair administrative action
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
50. Fair hearing
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
47. Notwithstanding the foregoing, the importance and significance of the right to fair hearing and the tenets of natural justice, have also been underscored and amplified in various decisions of the court.
48. Without belaboring the point, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others [2019] eKLR, where the court stated as hereunder:
27. It is trite that one of the tenets of the rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with actualization of this right that the provisions for summons to enter appearance and service thereof come into play. The essence of such summons is to give notice to the party sued of the existence of the suit and invite him/her to enter appearance and defend the suit if she/he so wishes. This requirement has been reinforced in a number of decisions of this court namely, *Giro Commercial Bank Ltd v Ali Swaleb Mwangula* [2016] eKLR & *Babs Security Services Ltd v Mwarua Yawa Nzao & 19 Others* [2019] eKLR.



49. Additionally, the significance of the right to be heard and the rule of natural justice was also emphasized by the Court of Appeal in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court stated as hereunder:

72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our *Constitution*, it is a constitutional imperative.

73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v Government of Malaya*:

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

50. Duly nourished and guided by the observation enunciated in the decisions alluded to, it is common ground that the Certificate of Title issued in favor of Benjamin Kamau Gitegi, over and in respect of LR No Nairobi/Block 136/8529, cannot be cancelled or revoked without due notice being served upon same.

51. To do so, this honourable court would be going against and acting contrary to the right to fair hearing and the rule of natural justice.

52. In a nutshell, I am afraid that the limb of the instant application that seeks to invite the honourable court to revoke the impugned certificate of lease, cannot be granted in the manner sought.

Final Disposition:

53. Based on the analysis contained in the preceding paragraphs, it is apparent and evident that the application by and on behalf of the plaintiffs/applicants is devoid and bereft of merits.

54. Consequently, and in the premises, the application dated the October 25, 2022 be and is hereby dismissed, albeit with no orders as to costs.

55. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2022.

OGUTTU MBOYA,

JUDGE



In the Presence of;

Benson - Court Assistant.

Mr. Wachira for the Plaintiffs/Applicants.

N/A for the 1st Defendant/Respondent.

N/A for the 2nd Defendants/Respondent.

N/A for the 3rd, 4th & 5th Defendants/Respondents

