



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 292 of 2004

GATHANGU GATANDUGU.....PLAINTIFF

VERSUS

PETER NGUGI.....DEFENDANT

RULING

The Plaintiff, Gathangu Gatandugu, filed suit against the Defendant, Peter Ngugi seeking the following orders:-

- (i) A declaration that the Plaintiff is the registered and absolute owner of *Nyandarua/Geta/1340* measuring 2.3 hectares.
- (ii) A permanent order of injunction restraining the Defendant by himself, his agents and or servants from entering, encroaching, interfering or in any way dealing with all that parcel of land known as *Nyandarua/Geta/1340*.

The Plaintiff, when he filed this suit swore a verifying affidavit to the effect;

“3. *THAT there is no other suit pending and there has been no previous proceedings in any court between the Plaintiff and the Defendant over the subject matter of this suit except Criminal Case No. 1160 of 2002 which was dismissed, Criminal Appeal No. 175 which is still pending and CMCCC No. 2040 which was withdrawn.*”

When the Defendant was served he filed a defence and a Notice of Preliminary Objection. In the said Notice, the Defendant contended that the suit filed by the Plaintiff was *Res judicata*. The Defendant further contended that the Plaintiff had deliberately misled the court by swearing a false verifying affidavit by not disclosing all the material aspects of the case to the court. The Defendant further stated that the dispute between the Plaintiff and the Defendant had been resolved by the Nyandarua District Land Registrar who had determined the boundaries between the Plaintiff’s and the Defendant’s parcel of land.

The Preliminary Objection was argued by Mr Kaburu on behalf of the Defendant. He submitted that the real issues in controversy between the Plaintiff and the Defendant involves a land dispute. Learned

Counsel submitted that the dispute was resolved by the **Land Disputes Tribunal Case No. 60 of 1999** and the award adopted by the court (*vide Nyahururu PMLC No. 15 of 2000*). The Defendant argued that the adoption of the said award was not challenged. He submitted that there was no reason why the said case should be reopened. The Defendant further submitted that the Plaintiff had sworn a false verifying affidavit. According to the verifying affidavit, the Plaintiff claimed that he was charged in Criminal Case No. 1160 of 2002 which case he allege was dismissed. The Plaintiff also alleged that he had appealed against the said dismissal. Mr Kaburu submitted that such a case did not exist. He submitted that the Plaintiff had been convicted in Criminal Case No. 2826 of 2002 and was accordingly convicted for trespass, forceable detainer and interference with boundary features. Learned Counsel argued that the Plaintiff had not disclosed this material facts to the court. He further argued that the Land Registrar, had pursuant to the provisions of **Section 22 of the Registered Land Act** fixed the boundaries between the parcels of land belonging to the Plaintiff and the Defendant on the 28th of March 2002 and thus resolving the dispute. It was further contended on behalf of the Defendant that no appeal was filed against the determination of the boundaries by the Land Registrar. Learned Counsel submitted that the Plaintiff's suit was thus incurably defective and should be struck out with costs.

In response, Mr Machafu, Learned Counsel for the Plaintiff submitted that the suit filed was not *Res judicata*. He further submitted that the Defendant was a stranger to the Plaintiff according to the findings of **Land Disputes Tribunal No. 60 of 1999**. It was submitted on behalf of the Plaintiff that the Plaintiff was discharged in Criminal Case No. 1160 of 2002. The Plaintiff however appealed from the decision of the lower court in Criminal Case No. 2826 of 2002 in Criminal Appeal No. 175 of 2004. The Plaintiff submitted that the Defendant did not own any parcel of land as he did not have any title to land. The Plaintiff further submitted that no boundaries were determined on the 28th of March 2002. When the Land Registrar visited the suit land because the entire exercise was disrupted by a fracas which ensued. Learned Counsel submitted that no evidence had been placed before court to support the submission that the boundaries had been fixed by the Land Registrar. Learned Counsel further submitted that according to the Land Disputes Tribunal the boundary that existed between the Plaintiff's and the Defendant's parcel of land was a public road and therefore the boundaries between the two parcels of land could not be said to have been determined by the Land Registrar. The Plaintiff submitted that his suit was competent and ought to be heard and determined on merits. The Plaintiff urged the court to dismiss the preliminary objection raised with costs.

I have read the entire pleadings filed by the parties to this suit in this case. I have considered the preliminary objection raised and the rival arguments made by the parties to this application. It has not been disputed that the dispute between the Plaintiff and the Defendant has had a long chequered past. The dispute was referred to the Nyandarua District Land Disputes Tribunal in Case No. 60 of 1999 and an award made. The said award was adopted as the judgment of the court by the Nyahururu Principal Magistrate's Court in Land Case No. 15 of 2000. No appeal was filed against the said decision of the Land Disputes Tribunal. Later the District Land Registrar, Nyandarua, in exercise of his powers under **Section 22 of the Registered Land Act** determined the boundaries between the parcels of land belonging to the Plaintiff and the Defendant on the 28th of March 2002. The decision of the Land Registrar in fixing the boundaries has not been appealed against. It is further not disputed that the Plaintiff as a result of his refusal to accept the verdict of the Land Disputes Tribunal and the District Land Registrar interfered with the fixed boundaries as a result of which he was charged in Criminal Case No. 2826 of 2002 where he was convicted. The Plaintiff has filed appeal No. 175 of 2004 before this court which Appeal is pending for determination.

Now, when the Plaintiff filed this suit, he did not disclose these facts to the court. Indeed when he swore his verifying affidavit on the 28th of October 2004 he concealed this fact. Having considered the arguments made, it is my opinion that the Plaintiff's suit is incompetent and an abuse of the due process of the court. The dispute between the Plaintiff and the Defendant over the suit land was heard and determined more than four years ago. The boundary dispute between the Plaintiff and the Defendant was resolved by the Land Registrar, Nyandarua when he fixed the boundaries on the 28th of March 2002. The Plaintiff has used all means, including illegal ones, to thwart the Defendant from enjoying the fruits of the judgment that he obtained when the decision was made. The Plaintiff has been charged severally with criminal offences related to the interference of land boundaries. In the circumstances of this case the preliminary objection raised by the Defendant that the dispute between the Plaintiff and the Defendant is

Res judicata has merit. The same is upheld. Further the Plaintiff deliberately choose to conceal the fact of the existence of the case which had determined the dispute between himself and the Defendant when he swore the verifying affidavit to his plaint. The Plaintiff accordingly swore a false verifying affidavit. Under the provisions of **Order VII Rule 1(e) and 3 of the Civil Procedure Rules** this court may strike out the suit if it is of the opinion that the said verifying affidavit made false averments. In the circumstances of this case, I do find that the Plaintiff having sworn a false verifying affidavit, his suit cannot stand.

I consequently uphold the preliminary objection raised and strike out the suit filed by the Plaintiff. The Defendant shall have the costs of the suit.

DATED at NAKURU this 17 TH day of February 2005.

L. KIMARU

JUDGE