



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 51 of 2003

GEORGE MUNIU KAIRA.....PLAINTIFF

VERSUS

PETER KARANJA MBUGUA.....DEFENDANT

RULING

The Defendant through his advocate Mr. Njau Kayai raised a preliminary objection to the Plaintiff's suit saying that it was an abuse of the court process and should be struck out. He stated that he was not the original allottee and/or proprietor of land reference Naivasha Kikuyu Farmers Co-operative Society Ltd. **Plot No. 607** that was later subdivided into two portions, one of them now being **L.R. No. Gilgil/Karunga Block 6/837**; but he bought one of the sub-divisions of the said **Plot No. 607** from one Lucy Wanjiru. The said Lucy Wanjiru, although she had been allocated **Plot No. 607**, she was in actual physical possession of **Plot No. 608**.

The Defendant filed a suit at Naivasha Law Courts, SRMCC No.76 of 1994 against Lucy Wanjiru seeking to evict her from **Plot No. 608** and the matter was referred to the Gilgil Division Land Disputes Tribunal.

The tribunal dealt with the dispute and involved the said Lucy Wanjiru and the parties herein and it eventually determined that the Defendant was the rightful owner of **Plots No. 608** and 609 and that the Plaintiff and the said Lucy Wanjiru had to remain on their rightful **Plot No. 607** and avoid interfering with **Plots Nos. 608** and **609**.

The Tribunal's award was adopted as a judgment of the court and thereafter the Naivasha court issued eviction orders against Lucy Wanjiru by herself, her servants and/or agents to vacate from **Plot No. 608** and the order was executed. No appeal was ever lodged against the said determination. He therefore argued that the matter was res judicata since the Plaintiff was claiming under the said Lucy Wanjiru.

The Plaintiff opposed the application saying that the main issue was a boundary dispute between the parties. He also stated that the suit in Naivasha related to different parties and the parcels of land in dispute were different as his suit related to a parcel of land known as Gilgil/Karunga Block 6/837. However, in his affidavit sworn on 16/12/2003 he admitted that the said parcel was formerly known as Plot No. 607. He also said that he never testified before the Land Disputes Tribunal.

The Plaintiff did not dispute the fact that execution of the eviction orders aforesaid had been done.

The plaintiff's suit was filed on 11/4/2003 and the Plaintiff therein prayed for a declaration that the suit

property known as **L.R. Gilgil/Karunga Block 6/837** (formerly known as Plot No. 607) belongs to him. He also prayed for a permanent injunction to restrain the Defendant, his servants and/or agents from alienating, cultivating or dealing in any manner with the said property.

He claimed that the Defendant trespassed into his said parcel of land in April 2000. However, the Land Disputes Tribunal award had been filed in court on 26th June, 1999 and adopted as a judgment of the court on 13th March, 2000.

The defendant denied having trespassed into the Plaintiff's parcel of land and stated that he was lawfully occupying Parcel No. **Gilgil/Karunga Block 6/608** formerly known as **Plot No.608**. Section 7 of the Civil Procedure Act states as follows:-

“No court shall try any suit or issue in which the matter 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”.

The plea of res judicata applies not only to points upon which the court was actually required to determine but also to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time; see **GREENFIELD INVESTMENTS LIMITED VS BABER ALIBHAI MAWJI** Civil Appeal No. 160 of 1997 (unreported).

In SRMCC No.76 of 1994 at Naivasha which was eventually referred to the area Land Disputes Tribunal, the issue of ownership of the original **Plots Nos. 607, 608 and 609** was dealt with and a full determination made as earlier stated.

None of the parties therein filed an appeal after the said determination. The Defendant was put in occupation of the parcel of land which he is occupying now, **Gilgil/Karunga Block 6/608** (formerly Plot No. 608) and the Plaintiff is occupying his rightful parcel of land, **Gilgil/Karunga Block 6/837** (formerly Plot No. 607) although he is now claiming that the defendant has encroached into a portion of his parcel of land but the Defendant denies that.

In that case, this court cannot begin to conduct proceedings with a view to making a declaration that the suit property, L.R. **Gilgil/Karunga Block 6/837** belongs to the Plaintiff as sought in the plaint since there is no dispute on the issue in light of the earlier determination. The matter is clearly res judicata.

With regard to the alleged trespass or boundary dispute, the provisions of Section 21(2) of the Registered Land Act Cap 300 of the Laws of Kenya are very clear. It states as follows:-

“where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.”

And sub-section (4) thereof states that:-

“No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”

In my view, the bone of contention between the parties herein is the boundary that separates or ought to separate their respective parcels of land and the Plaintiff has precisely deposed in paragraph 7 of his replying affidavit that:-

“THAT this is a question of boundary dispute and the actual and physical situate of the aforesaid plots (land) on the ground.”

I uphold the preliminary objection and strike out with costs the Plaintiff’s suit as being res judicata and an abuse of the court process.

However, to bring a lasting solution to the boundary dispute between the parties herein, I direct that they avail themselves before the Land Registrar, Nakuru District on 10th January, 2005 and present to him such evidence and/or documents as he may require as to enable him determine the position of the disputed boundary. It is so ordered.

DATED, SIGNED & DELIVERED at Nakuru this 17th day of December, 2004.

DANIEL MUSINGA

JUDGE

17/12/2004