



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. NO. 05 OF 2020

BENJAMIN NJUGI GITHUKU.....PLAINTIFF

VERSUS

MARGARET WAITHIRA GITICHE.....1ST DEFENDANT

ROSE WAMBUI MWANGI.....2ND DEFENDANT

WANJIRU MWANGI GICHUHL.....3RD DEFENDANT

RULING

A. INTRODUCTION

1. By a plaint dated 7th February, 2020 the Plaintiff sought various reliefs against the Defendants among them a declaration that he was entitled to be registered as proprietor of 3 acres out of *Nyandarua/Silibwet/4749 (parcel 4749)* as a bonafide purchaser; an alternative prayer that he was entitled to be registered as proprietor of the same portion of 3 acres out of parcel 4749 on account of adverse possession; an order of permanent injunction; and damages for malicious damage to property.

2. The Plaintiff pleaded that he was a bonafide purchaser of 3 acres of land from the late Tabitha Njoki Mwangi (the deceased), which he purchased on diverse dates between 2002 and 2005 to be exercised out of a larger parcel of land known as *Nyandarua/Silibwet/525*. The latter parcel was later on subdivided into parcel Nos. 4949, 4750 and 4751 whereupon the deceased remained with parcel 4949.

3. It was the Plaintiff's case that even though the deceased put him in possession during her lifetime, the Defendants had in February 2020 unlawfully entered his portion of 3 acres, demolished his houses, evicted him therefrom, and looted his belongings hence the suit.

B. THE PLAINTIFF'S APPLICATION

4. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 7th February 2020 brought under **Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 (the Rules), Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** seeking interim orders in the following terms:

(a) Spent.

(b) Spent.

(c) *That pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the Respondents, at their sole cost, to return the building materials and erect back the three semi-permanent buildings belonging to the Applicant and otherwise return the buildings in the condition they were in before their illegal demolition and in any event within 30 days or such other period as the court may deem fit to grant.*

(d) *That thereafter, pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents from interfering with, entering, trespassing on, taking custody of, occupying, taking and remaining in possession, deploying and/or stationing their employees, servants, agents and/or any other person claiming from them and/or acting in any manner which interferes with the occupation and possession of all that parcel known as Land Ref. *Nyandarua/Silibwet/4749*.*

(e) *That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the*

circumstances of this case.

(f) That the costs of this application be borne by the Respondents.

5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 7th February, 2020. Those grounds were essentially the same grounds pleaded in the plaint. The Plaintiff contended that a result of the eviction and destruction of his houses, he and his family had been rendered homeless and destitute courtesy of the Defendant's actions.

C. THE DEFENDANT'S PRELIMINARY OBJECTION

6. The 1st and 2nd Defendants filed a replying affidavit sworn by Margaret Waithira Gitiche, on 28th February, 2020 in opposition to the said application for interim orders. They also filed a notice of preliminary objection dated 28th February, 2020 objecting to the application and the entire suit on the following grounds:

(a) *The Plaintiff's suit was res judicata by reason of Nakuru HCCC No. 105 of 2003 and Nyahururu SPMCC No. 98 of 2014.*

(b) *The Plaintiff had no locus standi to file suit since the subject property was registered in the name of the deceased.*

(c) *The suit was an abuse of the court process.*

D. DIRECTIONS ON SUBMISSIONS

7. It would appear that when the matter was mentioned for directions on 20th July, 2020 it was directed that the 1st and 2nd Defendants' preliminary objection shall be canvassed through written submissions and the parties were granted timelines within which to file and exchange their respective submissions. The material on record indicates that the 1st and 2nd Defendants filed their submissions on 2nd September, 2020 whereas the Plaintiff filed his on or about 27th October, 2020.

E. THE QUESTIONS FOR DETERMINATION

8. This being a ruling on the 1st and 2nd Defendants' notice of preliminary objection dated 28th February, 2020 the court is of the opinion that the following questions arise for determination:

(a) *Whether the Plaintiff's suit is res judicata.*

(b) *Whether the Plaintiff has locus standi to file suit.*

(c) *Whether the suit is an abuse of the court process.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff's suit is res judicata

9. The court has considered the material and submissions on record on this issue. It was the 1st and 2nd Defendants' submission that the instant suit was *res judicata* on account of **Nakuru HCCC No. 105 of 2003 – Wanjiru Mwangi Gichuhi & Margaret Waithira Gitiche v Tabitha Njoki Mwangi** and **Nyahururu CMCC No. 98 of 2014 Margaret Waithira Gitiche v Benjamin Njagi Githuku & 7 Others.**

10. The Plaintiff, on the other hand, submitted that the parties and issues directly and substantially in issue in **Nakuru HCCC No. 105 of 2003** were not the same as those in the instant suit. He contended that he was not even party to the said suit. With respect to **Nyahururu CMCC No. 98 of 2014**, the Plaintiff contended that the said suit was filed by the 1st Defendant with respect to parcel No. 4750 which was awarded to her pursuant to the decree in **Nakuru HCCC No. 105 of 2003**. It was his case that the suit had nothing to do with parcel 4749 which is the subject of the instant suit.

11. **Black's Law Dictionary (10th Edition)** defines *res judicata* as follows:

"1. An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issues, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties..."

12. The doctrine of *res judicata* is codified in **Section 7 of the Civil Procedure Act Cap. 21** as follows:

"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. So, is the instant suit *res judicata* within the meaning of **Section 7 of the Civil Procedure Act**? Although the 1st and 2nd Defendants did not exhibit copies of the pleadings in **Nakuru HCCC No. 105 of 2003**, they annexed a copy of the judgment in the said suit. It would appear that the Plaintiffs in that suit had sued the deceased claiming that she was holding parcel 525 in trust for the three households of her deceased husband and not as absolute proprietor thereof. It is pertinent to note that the Plaintiff was not party to that suit.

14. The court is of the opinion that all the requirements of **Section 7** ought to be satisfied before the plea of *res judicata* can become applicable. It is not sufficient if only some of the requirements are satisfied. The matters directly and substantially in issue in that previous suit are not the same ones which are directly and substantially in issue in the instant suit. It could not be said that the Plaintiff ought to have raised his issues in the previous suit when he was not even a party thereto.

15. The court has considered the pleadings in **Nyahururu CMCC No. 98 of 2014** in which the Plaintiff was the 1st Defendant. That was a suit filed by the 1st Defendant herein to vindicate her rights over parcel 4750. It was pleaded that the Defendants (including the Plaintiff herein) had wrongfully occupied parcel 4750 without lawful justification or excuse. There was no claim relating to parcel 4749 in that suit. The court is unable to appreciate how the instant suit could be said to be *res judicata* whereas the 1st Defendant's claim therein was restricted to parcel 4750. The court is also unable to appreciate how the Plaintiff in the instant suit could have articulated his claim for 3 acres out of parcel 4749 in a suit claiming parcel 4750 unless there was an overlap between the two parcels or, may be, both parcels occupied the same spot on the ground.

16. The mere fact that both parcels 4749 and 4750 were subdivisions of parcel 525 does not mean that a determination on one subdivision of parcel 525 would automatically apply to all other subdivisions regardless of the nature of the issues directly and substantially in issue in such previous suit. The court is thus far from satisfied that the instant suit is *res judicata* on account of the material on record.

(b) Whether the Plaintiff has locus standi to file the instant suit

17. The 1st and 2nd Defendants contended and submitted that the Plaintiff had no *locus standi* to file suit with respect to parcel 4749 because it was registered in the name of the deceased and that he was not the personal representative of the deceased. It was further contended that only the personal representative of the deceased was allowed to file suit with respect to parcel 4749.

18. The Plaintiff's contention was that he did not file the suit on behalf of the estate of the deceased and that he filed it on his own behalf to vindicate his own property rights. He further contended that he sued the Defendants in their own capacities for having unlawfully evicted him and demolished his house and not as administrators of the estate of the deceased. He conceded, however, that he needed to join the personal representative of the deceased for the purpose of pursuing the first two reliefs sought in the plaint. He was, however, of the opinion that he could still seek to amend the plaint at any stage of the proceedings to regularize the position.

19. The court has considered the rival submissions of the parties. The court is not persuaded that the Plaintiff had no *locus standi* to file the instant suit. He has clearly indicated that the suit was not filed on behalf of the estate of the deceased. In deed, he is seeking to acquire only 3 acres out of the parcel 4749 which is said to belong to the deceased. He has also not sued the Defendants as administrators of the estate of the deceased. He sued them in their personal capacities on account of the conduct alleged against them in the plaint.

20. The only omission which the Plaintiff may have committed was his failure to join the personal representative of the deceased owner of parcel 4749 with respect to prayers (a) and (b) of the plaint. The court is of the opinion that such omission is curable and the same can be cured by the Plaintiff being accorded a limited period within which to do the needful.

(c) Whether the suit is an abuse of the court process

21. It would appear from the material on record and the 1st and 2nd Defendants' submissions that it was contended that the suit was an abuse of the court process only because the Defendants considered the suit *res judicata* and that the Plaintiff lacked *locus standi*. In view of the fact that the court is of a contrary opinion on both *res judicata* and *locus standi*, it would follow that the instant suit is not an abuse of the court process.

G. CONCLUSION AND DISPOSAL

22. The upshot of the foregoing is that the court finds no merit in the notice of preliminary objection dated 28th February, 2020. Accordingly, the court makes the following orders for disposal thereof:

(a) The 1st and 2nd Defendants' notice of preliminary objection dated 28th February, 2020 is hereby overruled.

(b) The Plaintiff is further granted 60 days within which to join the personal representative of Tabitha Njoki Mwangi (deceased) as a Defendant in the suit.

(c) Costs shall be in the cause.

RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of February, 2021.

In the presence of:

Ms. Mwaniki for the Plaintiff

Mr. Kinyua Njogu for the 1st and 2nd Defendants

No appearance for the 3rd Defendant

Court Assistant – Carol

Y.M. ANGIMA

JUDGE

18.02.2021