



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. NO. 08 OF 2017

(FORMERLY NKR. ELC 55 OF 2012)

MARY WAIRIMU MWANGI.....PLAINTIFF

VERSUS

MARY WANJA KAMIRA.....1ST DEFENDANT

MICHAEL MACHARIA WACHIRA.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

A. INTRODUCTION

1. By its judgment dated 5th November, 2019 the trial court dismissed the Plaintiff's suit against the Defendants with respect to Title No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku) 865 (the suit property). Among the reliefs sought in the suit were an order of inhibition and a perpetual injunction against the Defendants, their agents, servants, employees, relatives or any other persons claiming through them.

2. Being dissatisfied with the said judgment the Plaintiff filed a notice of appeal against the same indicating his intention to appeal to the Court of Appeal. In the meantime, the Plaintiff filed the instant application expressed to be brought under **Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 68 & 69 of the Land Registration Act, 2012, Section 13 (7) (a) of the Environment and Land Court Act 2011 and all other enabling provisions of the law** seeking, *inter alia*, the following orders:

(a) Spent

(b) Spent

(c) Spent

(d) *That pending the hearing and determination of the appeal, an order of inhibition be made and issued to inhibit any and all dealings with and involving Title No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku) 865.*

(e) *That pending the hearing and determination of the appeal, an order of an injunction do issue to restrain the 1st Defendant by herself, agents, relatives, servants employees and/or any other individual, individuals or persons claiming authority through or by her from evicting, ejecting, hindering, denying access to, desecrating the toms or burial grounds or in any other manner whatsoever or howsoever interfering with the Plaintiff's peaceful, quiet use, enjoyment, occupation and possession of a portion of Title No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku) 865 and/or leasing or disposing of or parting with possession or selling either the whole or a part of the said parcel of land.*

(f) *That costs of this application be provided for.*

B. THE PLAINTIFF'S CASE

3. The said application was based on the grounds set out on the face of the application and the contents of the supporting affidavit sworn by

the Plaintiff on 15th November, 2019. It was contended that the suit property was in danger of being alienated or dealt with the risk that the intended appeal might be rendered nugatory should it be successful. It was further contended that the Plaintiff shall suffer irreparable harm and damage should she be evicted from the suit property before her intended appeal is heard and concluded.

C. THE 1ST DEFENDANT'S PRELIMINARY OBJECTION

4. Before the application could be heard, the 1st Defendant filed a notice of preliminary objection dated 16th December, 2019 to the application on two main grounds. First, that court was *functus officio* hence it had no jurisdiction to entertain the application. Second, that the application was *res judicata* hence it should not be entertained.

D. DIRECTIONS ON SUBMISSIONS

5. The record shows that on 20th May, 2020 it was directed that the preliminary objection shall be canvassed through written submissions. The record shows that the 1st Defendant filed her submissions on 22nd July, 2020 whereas the Plaintiff filed hers on 3rd August, 2020.

E. THE ISSUES FOR DETERMINATION

6. The court has considered the 1st Defendant's notice of preliminary objection and the material on record. The court is of the opinion that the main questions for determination are as follows:

- (a) Whether the court has become *functus officio* with respect to the application for interim orders.
- (b) Whether the application for interim orders is *res judicata*.

F. ANALYSIS AND DETERMINATION

(a) Whether the court has become *functus officio*:

7. The court has considered the material and submissions on record on the first issue. **Black's Law Dictionary (10th Edition)** defines *functus officio* as follows:

“....(of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

8. The 1st Defendant relied upon the cases of **Chacha Mwita Mosenda v Baya Tsuma Baya & 2 Others [2018]eKLR** and **Re the Estate of Kinuthia Mahuti (Deceased) [2018] eKLR** in support of the submission that the instant application was not tenable on account of the doctrine of *functus officio*.

9. The court is of the opinion that even though the cited cases correctly describe the doctrine of *functus officio* and its application, the elements of the doctrine have not been satisfied in the instant matter. The Plaintiff is not seeking to re-open the same issues which were determined by the judgment and decree dated 5th November, 2019. The Plaintiff is not even seeking a review, variation or setting aside of the decree.

10. The material on record reveals that the Plaintiff correctly appreciated that her remedy with respect to the decree lies with the Court of Appeal hence the filing of the notice of appeal. The instant application simply seeks interim orders of inhibition and injunction pending the hearing and determination of the intended appeal. The context and purpose of the instant application is thus different from the reliefs sought in the plaint. The interim orders sought in the instant application were thus not considered and determined by the trial court. The court is thus of the opinion that the court is not *functus officio* with respect to the application for interim orders. The court is of the opinion that it could still entertain the application for interim orders pending appeal in spite of the fact that the Plaintiff's suit for corresponding permanent orders was declined.

(b) Whether the application is *res judicata*:

11. The court has also considered the material and submissions on record on the second issue. Although the Plaintiff submitted that the requirements of **Section 7 of the Civil Procedure Act (Cap. 21)** had not been satisfied in the instant matter, the 1st Defendant did not submit on the doctrine of *res judicata*. There is no doubt that the doctrine of *res judicata* is anchored in **Section 7 of the Civil Procedure Act (Cap. 21)** which precludes a court of law from entertaining in a subsequent suit any matter which was directly and substantially in issue in a previously decided suit between the same parties or parties under whom they claim.

12. In the case of **Kamunye & Others v The Pioneer Assurance Society Ltd [1971] EA 263** the test for *res judicata* was stated thus:

“The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time.”

13. The court is of the opinion that the context of the instant application must be properly appreciated in relation to the reliefs sought in the dismissed suit. The Plaintiff is not asking the court to reopen and relitigate her lost claim. She has already moved on and preferred an appeal. Any errors or mistakes in the decree can only be rectified on appeal. What the Plaintiff is seeking is an interim order pending the hearing and determination of the intended appeal. The Plaintiff is not asking the court for the final orders which were denied by the decree dated 5th November, 2019. The court is thus far from satisfied that the elements of *res judicata* have been demonstrated in the instant case.

14. The upshot of the foregoing is that the court finds no merit in the 1st Defendant's notice of preliminary objection dated 16th December, 2020. Accordingly, the same is hereby overruled with costs to the Plaintiff. As a result, the court shall proceed to fix the Plaintiff's application for interim orders dated 15th November, 2019 for hearing upon delivery of the ruling.

It is so ordered.

RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this 4th of February, 2021.

In the presence of:

Mr. Sigilai for the Plaintiff

Ms. Ndegwa for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the Attorney General for the 3rd Defendant

Court Assistant – Carol

Y.M. ANGIMA

JUDGE

04.02.2021