



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 94 OF 2019**

**WILSON KIARIE KIMANI** (*suing as the personal representative*

*of Margaret Wangui Kimani*).....**PLAINTIFF/APPLICANT**

**VERSUS**

**ABERDARE INVESTMENT LIMITED**.....**1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THIKA LAND REGISTRAR**.....**2<sup>ND</sup> DEFENDANT**

**THE DISTRICT SURVEYOR**.....**3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL**.....**4<sup>TH</sup> DEFENDANT**

**RULING**

There are two Applications for determination. The one dated **22<sup>nd</sup> May 2019**, by the Plaintiff/ Applicant and the second one is dated **14<sup>th</sup> February 2020**, by the **1<sup>st</sup> Defendant/Applicant**.

In the Application dated **22<sup>nd</sup> May 2019**, the Plaintiff/ Applicant has sought for orders that;

- 1. That this Honourable Court be pleased to issue an order of temporary injunction against the Defendants from demolishing, evicting, alienating, disturbing, interfering with the Plaintiff ownership, possession, stay constructions through his agents, occupants in land parcel Thika Municipality Block 6/1086 pending the hearing and determination of the suit herein.**
- 2. That the OCS Makongeni Police Station do ensure compliance of the orders herein.**

The Application is premised on the grounds that the plaintiff/ Applicant is the legal Administrator of the Estate of his late mother **Margaret Wangui Kimani**, who traded as Mawakim. That the deceased was the absolute allottee of the suit property and the Applicant after the demise of his mother followed up and paid all the requisite fees and a certificate of lease was subsequently issued in the name of the Deceased. That before the demise of the Plaintiff/Applicant's mother, she had sold the suit property to various parties, who have since constructed on the land various permanent buildings. That the **1<sup>st</sup> Defendant/ Respondent** has without any colour of right, invaded the suit land and carried on acts of wanton damages and destructions by demolishing the constructions thereon claiming ownership of the land. That if the **1<sup>st</sup> Defendant/ Respondent** is allowed to continue with his illegal mission, the Plaintiff/ Applicant through the occupants stands to suffer irreparable loss and damage.

In his Supporting Affidavit, **Wilson Kiarie Kimani** averred that his late mother was in the business of buying and selling land to members of the public. That after her demise, he proceeded with the process of title acquisition. That the lease was issued in the name of his late mother as it was more expeditious. Further that the **1<sup>st</sup> Defendant's/Respondent's** actions prompted them to look for a surveyor to distinguish the beacons between their parcels of land and **1<sup>st</sup> Defendant's land L.R 4953/2157**. That the surveyor drafted a report that which stated that their land is distinct and independent from the **1<sup>st</sup> Defendant's/Respondent's** land. That the **1<sup>st</sup> Defendant** has filed Nairobi **ELC 342 of 2013**, against the occupants who he claims are on its land **L.R 4953/2157**, but that the occupants are on **L.R 6/1086**. Further that the Judge in **ELC 342 of 2013**, ruled that the two parcels are unrelated and he could file his own suit to canvass his interests. He urged the Court to stop the **1<sup>st</sup> Defendant/Respondent** from stepping foot in the suit property.

The Application is opposed and the **1<sup>st</sup> Defendant/ Respondent** through **John Njaaga Wango**, its Managing Director swore a Replying Affidavit on **10<sup>th</sup> June 2019**, and averred that the issues raised in the instant suit are the same issues raised in **Nairobi HCCC 342 of 2013**, which the Plaintiff/ Applicant is an Interested Party. That the Plaintiff/ Applicant filed a Defence and Counter Claim and the suit is

pending before the High Court in Nairobi and is scheduled for hearing on **20<sup>th</sup> November 2019**. Further that on **18<sup>th</sup> September 2018**, the Plaintiff/ Applicant filed an Application seeking orders similar to the orders sought in the instant Application.

That on **28<sup>th</sup> March 2019**, the Court dismissed the Application dated **18<sup>th</sup> September 2018**, and the current suit amounts to abuse of the Court process. Further that the Plaintiff/ Applicant was ordered by the Court to provide security for costs in the sum of **Kshs. 10,000,000/=** as the Court considered his claim as frivolous and that he is not a man of means and the Plaintiff has not provided security.

That the current suit is meant to circumvent the order by the Court that a sum of Kshs. **10,000,000/=** be deposited in Court. He averred that he has been informed by his Advocate that Court orders must be obeyed and litigation must come to an end. Further that the Plaintiff's/ Applicant's claim against the Defendant/ Respondent is the same as the one pending before the Court of Appeal. That the Plaintiff/ Applicant filed an Application dated **24<sup>th</sup> April 2019** in **ELC 342 o 2013** to transfer the suit from the High Court in Nairobi to this Court which Application is pending.

That the deceased applied for a **certificate of title** on **1<sup>st</sup> August 2014**, after her demise. Further that the Surveyor **N.G Mwaaura of Aero Survey** went to site and prepared a report dated **6<sup>th</sup> June 2014**, which confirms their property is located on the position it is supposed to be as per the plan and coordinates. That the report by **Messers Kapanga Land Survey** as attached to the Plaintiff's/ Applicant's Application contains falsehoods as the map attached does not exist anywhere in the Director of Surveys. That he is not aware if **L.R 6/1086**, exists and he has no claim to it or the Plaintiff's / Applicant's property. That as per the survey by **Aero Surveyors**, the size of their land is **2.0 Ha** while the size of the land allegedly owned by **Margaret Wangui** is **1.712 Ha**.

The 2<sup>nd</sup> Application is the one dated **14<sup>th</sup> February 2020** by the 1<sup>st</sup> Defendant/Applicant seeking for orders that;

**1. That this Court be pleased to grant an order of stay of proceedings in this suit pending the hearing and determination of the Appeal at the Court of Appeal in Nairobi being Civil Appeal No. 50 of 2020 (Aberdare Investment Ltd & Others ... Vs... Wilson Kiarie Kimani).**

**2. The Costs of this Application be provided for.**

The Application is premised on the ground that this Court delivered a Ruling on **19<sup>th</sup> December 2019**, dismissing the 1<sup>st</sup> Defendant's Preliminary Objection seeking to have the suit struck out. That the 1<sup>st</sup> Defendant being aggrieved by the said Ruling filed an Appeal. That the Appeal has high chances of success. That the Application has been filed timely and if the stay of proceedings in this suit is not granted, the Appeal will be rendered nugatory and the Applicant will suffer irreparable harm and damage. Further that the Plaintiff/Respondent will not suffer any prejudice if the grant of the order of stay of proceedings is granted as he will participate in the Court of Appeal proceedings. That it is in the interest of Justice that the orders are granted so that the Appeal is not rendered nugatory.

In his Supporting Affidavit, **John Njaaga Wango**, the Managing Director of the 1<sup>st</sup> Defendant/Applicant averred that he has been advised by his Advocate on record which advice he believes to be true that the plaintiff/ Respondent will not suffer any prejudice and it is fair and just for the order to be granted for the ends of justice to be met. Further that since the Plaintiff admitted that there is a similar suit in which he participates as an interested party, it is just and fair for the Court of Appeal to determine the issue whether an Interested Party in proceedings is a party for purposes of addressing of the issue in controversy.

The Application is opposed and the Plaintiff, **Wilson Kiarie Kimani** swore a Replying Affidavit sworn on **3<sup>rd</sup> March 2020**, and averred that this Court is not the proper Court to determine whether the Appellant's Appeal **no. 50 of 2020**, is merited or not and the instant Application ought to have been filed at the Appellate Court. That the 1<sup>st</sup> Defendant/Respondent wants to delay the matter by filing frivolous and scandalous Appeals which delay is causing insecurity on **L.R 6/ 1086**, where the Applicant has invaded and demolished some houses. That the Applicant has been terrorizing residents and has hired goons who are instilling fear by keeping vigil in people's houses. He averred that he has been advised by his Advocate that the orders of stay are granted where the Court is satisfied that there is a likelihood of loss to be suffered by the Applicant. That there is no prejudice to be suffered by the Applicant if stay is not granted. That the Appeal is meant to raise havoc on the residents on the suit property.

The 1<sup>st</sup> Defendant filed a Supplementary Affidavit sworn on **2<sup>nd</sup> September 2020**, and averred that the Appeal raises pertinent issues relating to **Res Judicata** and **Jurisdiction** of a Court, to hear and determine matter that has already been heard and determined. That he lodged a claim with the police about the authenticity of the Plaintiff and upon conclusion of investigations, the Plaintiff was arraigned before the Chief Magistrates Court on criminal charges. That the injunctive orders that the Plaintiff is seeking are based on generated documents, which have no force in law. That the orders sought if granted will be injurious to the 1<sup>st</sup> Defendant and contravention of **Article 40 of the Constitution**. That the Ministry of Lands and Physical Planning has confirmed that the property known as **L.R 6/1086**, which the Plaintiff is claiming does not exist.

That it is only fair that this Court grants the Appellate Court an opportunity to discharge its appellate mandate. That on **4<sup>th</sup> of March 2020**, his Advocates notified the Registrar of the Court of Appeal about the two appeals and requested that the same be consolidated and be heard together as the parties and the subject matter of the two are the same.

The Applications were canvassed with by way of written submissions which the Court has carefully read and considered. The issues for determination are;

**1. Whether the suit is Res Judicata**

**2. Whether the Plaintiff/ Applicant is entitled to the Injunctive Orders sought**

### 3. Whether the 1<sup>st</sup> Defendant/ Respondent is entitled to the orders of stay of proceedings sought

#### 1. Whether the suit is Res Judicata

Section 7 of the Limitations of Actions Act provides:-

**“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 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 determined by such Court.**

In the case of **Kenyariri ...Vs... Salama Beach (2017)eKLR** the Court held that;

**“to constitute Res Judicata, there must be adjudication which conclusively determines the rights of the parties with regards to all or any of the matter in controversy.”**

Further in the case of **Independent Electoral and Boundaries Commission ...Vs... Maina Kiai & 5 Others (2017)eKLR**, the Court of Appeal held as follows:

**“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:**

- a) **The suit or issue was directly and subsequently in issue in the former suit.**
- b) **The former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

Is the suit herein res Judicata?

There is no evidence that **NRB ELC 342 of 2013**, has been heard and finally determined. Further the Court has gone through the **Plaint in ELC 342 of 2013** and notes that the prayers sought in the said suit relates to **L.R 4953/2157**, while the prayers sought in the instant suit relate to **L.R 6/1086**, As per the above decided cases, there is no doubt that for **res judicata** to apply, the subject matter must be the same. In the two suits, it is clear that the subject matter is not the same and therefore the Court finds and holds that the suit is **not Res judicata**.

#### 2. Whether the Plaintiff/ Applicant is entitled to the Injunctive Orders sought

The guiding principles in granting injunctive orders are to be found in the case of **Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358** and also in the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

**“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”**

It is not in doubt that the three principles as set out in the above cases are to be applied in a sequential manner so that the Plaintiff/ Applicant must satisfy all the three and failure to satisfy even one does not entitle him to the injunctive orders sought.

First the Plaintiff/ Applicant must establish a prima facie case. The Court of Appeal in the case of **Mrao Ltd ...Vs,,,First American Bank of Kenya Limited and 2 Others [2003] eKLR** held that a prima facie case is;

**“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”**

From the available evidence, it is clear that the Plaintiff/Applicant is the Administrator of the estate of **Margaret Wangui Kimani**. The Court has seen the Certificate of Lease dated **1<sup>st</sup> August 2014**, in her name and being the Administrator, the Plaintiff is mandated to sue and be sued on her behalf. Therefore, the Plaintiff has satisfied the Court that he has an interest in the suit property and thus has established a prima facie case.

The Plaintiff/ Applicant has averred that the 1<sup>st</sup> Defendant/ Respondent has sought to demolish properties of persons living in the said suit property. The Court has seen photographs of the same. It is the Court's considered view that if the evictions are carried out, then the persons living on the suit property will suffer irreparable loss that cannot be compensated by way of damages if the Applicant was the successful litigant. See the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, where the Court held that:-

***“a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”***

On the balance of convenience, the court finds that it tilts in favour of maintaining the **status quo** and the **status quo** herein is what existed before the wrongful act. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

***“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”***

The Upshot of the foregoing is that the Plaintiff/ Applicant has established the threshold for grant of injunctive orders and therefore he is entitled to grant of the same.

### **3. Whether the 1<sup>st</sup> Defendant/ Respondent is entitled to the orders of stay of proceedings sought.**

The 1<sup>st</sup> Defendant/Respondent has sought for stay of the instant proceedings pending the hearing and determination of the Appeal that he has filed against the Court's Ruling dismissing the Preliminary Objection stating that the suit herein is Res Judicata.

Jurisdiction is everything and without it a Court has no option but to down its tools. In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** the Court held that;

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added).***

Further the threshold for stay of proceedings in the in **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332, that:-

***“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”***

***“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”***

It was the 1<sup>st</sup> Defendant's /Respondent's contention that the suit herein is Res judicata. In his Preliminary Objection, the 1<sup>st</sup> Defendant/Respondent was questioning the jurisdiction of this Court which objection was dismissed for not being a Preliminary Objection properly raised. As the jurisdiction of the Court has been called into question, the Court finds that it will then only be prudent to allow the 1<sup>st</sup> Defendant/Respondent litigate over the same so as to have the same be determined first as the proceedings of this Court would be rendered a nullity if the Court of Appeal was to find that this Court did not have jurisdiction. Further, it would also be a waste of judicial time to litigate over the matter while a question of jurisdiction is hanging over our head and set to be determined by the Court of Appeal. Consequently the Court finds that the same is merited.

Having carefully considered the two Applications herein, the Court finds and holds that the Notice of Motion Application dated **22<sup>nd</sup> May 2019**, by the Plaintiff/ Applicant is merited and the same is allowed. Further, the Court further finds that the Notice of Motion Application dated **14<sup>th</sup> February 2020**, by the 1<sup>st</sup> Defendant/Applicant is also merited and the same is allowed. The Costs of both Applications shall be in the cause.

It is so ordered.

Dated, signed and Delivered at **Thika** this 25<sup>th</sup> day of March 2021

**L. GACHERU**

**JUDGE**

**25/3/2021**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kanyi for the Plaintiff/Applicant**

**Mr. Ondabu for the 1<sup>st</sup> Defendant/ Respondent**

**No appearance for the 2<sup>nd</sup> Defendant**

**No appearance for the 3<sup>rd</sup> Defendant**

**No appearance for the 4<sup>th</sup> Defendant**

**L. GACHERU**

**JUDGE**

**25/3/2021**