



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 163 OF 2019

GEOFFREY MUNGAI NJENGA.....1ST PLAINTIFF/APPLICANT

KAMAU THATHINI.....2ND PLAINTIFF/APPLICANT

VERSUS

REGISTRAR OF TITLES.....1ST DEFENDANT/RESPONDENT

MICHAEL JAMES KARANJA.....2ND DEFENDANT/RESPONDENT/OBJECTOR

RULING

There are two Applications herein for determination. The 1st is the *Notice of Motion Application* dated 20th January 2020, and the other is the Notice of Preliminary Objection dated 17th December 2019. In the Notice of Motion Application, the Plaintiffs/ Applicants have sought for orders that;

- 1. THAT Pending the hearing and determination of this suit, this Honourable Court be pleased to grant temporary orders of injunction restraining the 2nd Defendant, his servants, workers Auctioneers, advocates police officers or any other person acting on their behalf from trespassing upon, evicting, encroaching , damaging, subdividing, selling, Lessing or interfering with the Plaintiff's / Applicant's ownership , use and occupation of land known as L.R No. Karai/Lusigetti/T.1038.**
- 2. THAT this Honourable court be pleased to grant an Order directing the Directorate of Criminal Investigations Kiambu County to verify the contentious title deed held by the 2nd Defendant**
- 3. THAT costs of this Application be provided for.**

The Application is premised on the grounds that the Plaintiffs/ Applicants have ben residing on the suit property for over 30 years and are apprehensive that they are about to lose the said Land through a fraudulent sale as the same has been advertised for sale at a market value of **Kshs. 83 Million**. That the 2nd Defendant intends to sell the suit property and this action will deprive the Plaintiffs/ Applicants of their only property. Further that the 2nd Defendant/ Respondent has issued threats to evict the Plaintiffs/ Applicants and further conducted himself in a manner to deprive the Plaintiffs/ Applicants of their property . That the 2nd Defendant's/Respondent's has indicated that the suit property measures **13.8 Hectares**, which is contrary on what is on the ground as the surveyor Report on ascertaining the acreage of the suit property conducted by the County Government of Kiambu shows that the suit property measures **2.785 Hectares** which is approximately **6.882 acres**.

That as per the measurement indicated in the title deed, the Plaintiffs/ Applicants and other people will be displaced and rendered homeless over and above the contested suit property. That the 2nd Defendant/ Respondent has laid claim to the suit property by presenting a fraudulent and unlawful acquired title through concealment of material facts and is intending to trespass upon the suit property. It was contended that the Plaintiff's rights of proprietorship is governed undersection **25 (1) of the Land Registration Act** , and under Section **26 (1) of the Land Registration Act**, the Plaintiffs/ Applicants are the absolute and indefeasible owner of the suit property .

In his supporting Affidavit, the 1st Plaintiff, **Geoffrey Mungai Njenga** averred that he is one of the occupants of the suit property having been in possession for 3 decades . That he was issued with an allotment letter in **1991**, by the defunct Kiambu County Council which further issued him with beacon certificate in **2005**, together with other beneficiaries upon making formal payment of the requisite fees. He further averred that a Report from **Precision Valuer** dated **7th March 2018**, denotes the measurements given by the County Government Surveyor's report dated **26th September 2019**. It was his contention that the title deed at hand is fraudulent and it is in the interest of justice that the Court expedite the matter to restrain the 2nd Defendant/Respondent from using the fraudulent title in order to protect him and others who are living in fear, intimidation, and harassment and are apprehensive that they may be evicted from the suit property.

The Application is opposed and the 2nd Defendant/ Respondent **Michael James Karanja**, swore a Replying Affidavit on **21st January 2020**, and averred that the Plaintiffs/ Applicants are not in occupation of his property as they alleged and that they are all trespassers who had been squatting on his property and were evicted on the **15th January 2020**, pursuant to the orders of the Court given in **Nairobi ELC 323 of 2014**, on **22nd September 2017**. That upon successful eviction as directed by the Court under the supervision of the OCPD, the County Commissioner Kiambu and the **Chief, Lussigeti ward Ms. Wikam Auctioneers** filed a report in Court confirming the eviction.

He also averred that he is the registered owner of the suit property and his title to the property has been upheld by the Court. That the Applicants have never been in occupation since **1975** and such claims have already been dismissed. That the Plaintiffs/ Applicants have filed **Civil Appeal No. 370 of 2019**, on the same issues which Appeal is still pending before the Court of Appeal. That the issues relating to acreage of the suit property in relation to the space allegedly occupied by the Applicants is a boundary issue which should be resolved by the Registrar of Lands. Further the documents annexed to the Applicants Application cannot override his title and the rights he enjoys.

The 2nd Defendant/ Objector filed a Notice of Preliminary Objection dated **17th December 2020** on the grounds that;

1. That the suit is Res Judicata because the issues raised herein have already been heard and finally determined by the ELC Court at Nairobi in ELC 323 of 2014 in a Judgment delivered on the 22nd September 2017.

2. That in view of the Judgment of this Court delivered on 22nd September 2017 upholding the 2nd Defendant's right to the suit property as against the Plaintiffs, the Plaintiffs are barred under the doctrine of estoppel by record from raising and litigating the same issues in this matter.

3. This Court has no jurisdiction to determine the size and extent of the 2nd Defendants property in relation to the Plaintiffs unfounded allegations on the suit property in this matter in view of Section 18 (2) of the Land Registration Act 2012 that require boundary dispute to be first settled by the Land Registrar.

4. That otherwise the suit is vexatious, irresponsible, fatally defective and an abuse of the Court process which is liable to be struck out in limine.

The Preliminary Objection is opposed and the Plaintiff's/ Applicants filed a Response dated **13th February 2020**, and averred that they are stranger to **Suit No. 323 of 2014**, as they have never been parties to the said suit and they are the persons residing on the suit property. That the issue arising out of the Plaintiffs suit is the authenticity of the title deed held by the 2nd Defendant vis a viz official **Survey Report** and the same does not fall under **Section 18(2) of the Land Registration Act**. That the Preliminary Objection is an afterthought and a delay tactic. Further that the Preliminary Objection offends the provisions of **Article 159(1) of the Constitution**.

It was further averred that striking out the Plaintiffs/ Applicants suit at this stage will amount to violation of their rights. That Preliminary objections are not issues of law but matters of evidence.

The Notice of Motion Application and the **Preliminary Objection** were canvassed together by way of Written Submissions which the Court has carefully read and considered. The issues for determination are

1. Whether the Notice of preliminary Objection is merited

2. Whether the Notice of Motion Application dated 20th January 2020 is merited.

1. Whether the Notice of Preliminary Objection is merited

The 2nd Defendant/ Objector has raised a preliminary objection on various grounds among them is that the issues that have been raised in the instant suit have been determined in **ELC 323 of 2014**, and that this Court has no Jurisdiction to determine the size and extent of his property as the same is within the jurisdiction of the Land Registrar.

A Preliminary Objection was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

A **Preliminary Objection**, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Do the issues raised herein satisfy the ingredients of a **Preliminary Objection**? In the case of **Oraro...Vs...Mbaja(2005) 1KLR 141**, the

Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

In the instant **Preliminary Objection**, the 2nd Defendant/ Respondent has raised various grounds in support of the Preliminary Objection. He has alleged that the suit herein is **Res Judicata** and that the Court does not have Jurisdiction to determine the 2nd Defendant/ Respondent's property in view of **Section 18(2)** of the Land Registration Act.

Can the issue of Res Judicata be raised as a Preliminary Objection?

The answer to this question is in the negative as for the Court to determine whether the issues herein were directly and substantially in issue with the ones in **ELC 323 of 2014**, the Court will have to ascertain facts. Further from the definition of what, a Preliminary Objection is, it is quite clear that the same cannot be raised on disputed facts. The 2nd Defendant/ Objector contends that the issues in the instant suit are substantially similar to those in **ELC 323 of 2014**, but the said contention has been disputed by the Plaintiff/ Applicant who contends that the issues raised are very different. The Court finds that an issue of whether or not a matter is substantially in issue with another matter calls for probing of evidence and the best way to raise such an issue is for the party to file a Notice of Motion Application where pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue. See the case of **Henry Wanyama Khaemba ... Vs... Standard Chartered Bank Ltd & Another (2014) ECLR**, while the Court held that:-

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”

Further in the case of **George Kamau Kimani & 4 Others... Vs... County Government of Trans Nzoia & Another (2014), eCLR**, the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

The jurisdiction on **Preliminary Objection** is very limited and the test to be applied, is very clear. Therefore, the Court finds that the issue of **Res judicata**, involves probing of evidence and the same cannot be determined via a **Preliminary Objection**.

The 2nd Defendant/ Objector has also averred that the Court does not have Jurisdiction to deal with this matter and the suit herein offends the provisions of **Section 18(2)** of the **Land Registration Act**. The said provision of Law provides that;

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

Having called into question the Jurisdiction of the Court and given that the question of jurisdiction raises a pure point of law then this is a pure Preliminary Objection as without jurisdiction the Court has no option but to down its tools, See the case of **Owners of Motor Vessel ‘Lilian S’... Vs... Caltex Oil (Kenya) LTD (1989) 1 KLR**, where the Court held that:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”

Therefore, the Court finds that the **Notice of Preliminary Objection** as filed by the 2nd Defendant /Objector on the ground of whether the instant suit offends the provisions of **Section 18 (2)** of the Land Registration Act falls under the category of what amounts to a **Preliminary Objection** as described in the **Mukisa Biscuits Case (Supra)**.

The next question is whether the said **Preliminary Objection** herein is merited?

While the 2nd Defendant/ Objector has submitted that the instant suit is a boundary dispute, it is the Plaintiff's contention that the suit is not a boundary dispute. It is not in doubt that while the Court has no jurisdiction to determine a matter that involves a boundary dispute, as the provisions of the Land Registration Act are coached in mandatory terms, the Court must first determine whether the matter herein is a boundary dispute first as the same is disputed. The **Blacks Law Dictionary Free Online Legal Dictionary 2nd Ed**

redefines a boundary suit as ;

“a lawsuit that determines the boundaries of lands and is a dispute between 2 adjoining land owners.”

This Court has gone through the Plaint dated **8th November 2019**, and has considered the definition of what a boundary dispute is. Having carefully gone through the Plaint, the Court notes that the Plaintiff's/ Respondent's have challenged the validity of the 2nd Defendant's/ Objector title and have further accused the 2nd Defendant/ Respondent of fraudulently acquiring the title to the suit property by providing false measurements. The Plaintiffs/ Applicants have thus sought for Permanent Injunction restraining the 2nd Defendant/ Objector from trespassing on to the suit property.

It is not in doubt that trespass is the intrusion of another person's land. For the Plaintiffs/ Applicants to aver that there is trespass, there is no doubt that they are laying claim to the suit property. The Court therefore finds and holds that the instant suit is not a boundary dispute, but claim over ownership of the suit property.

Consequently the Court finds that the suit does not fall within the confines of **Section 18 (2) of the Land Registration Act**. In accordance with **Section 13 of the Environment and Land Court Act**, the Court finds that it is well equipped with the necessary jurisdiction to hear and determine the instant suit. The Upshot of the foregoing is that the Preliminary Objection is found not merited .

2. Whether the Notice of Motion Application dated 20th January 2020 is merited

The Plaintiffs/Applicants have sought for injunctive orders. In deciding whether or not to grant the said orders, the Court is guided by the threshold was set out in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, where the court held:-

“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.”

Further in the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria.”

The 2nd Defendant/ Respondent in his Replying Affidavit averred that the suit herein is **Res Judicata** as the issues that have been raised in the instant suit had already been dealt with in **ELC 323 of 2014**, wherein the Court had dealt with the issues that are similar to the ones raised in the instant suit. The Issue of **Res Judicata** are to be found under **Section 7** of the **Civil Procedure Act** which 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 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 Court has gone through the Judgment of the Court delivered in **ELC 323 of 2014**. The Court notes that on the said case the parties to the suit are not the same as the parties to the instant suit. Further the Court notes that in her Judgment, the Honourable Judge held that;

“In this suit the Plaintiff's title Deed has not been challenged by any of the Defendants .”

However, having gone through the instant suit, it is clear that the Plaintiffs are challenging the **Title Deed** held by the 2nd Defendant/ Respondent. The Court therefore finds and holds that the issues raised in the previous suit are not the same as the ones that have been raised in the instant suit as the parties are also not the same parties. Therefore, the Court finds and holds that the suit is not **Res Judicata**.

As to whether the Plaintiffs/ Applicants have met the threshold for grant of injunctive orders, the Court will first determine whether they have established a prima facie case with a probability of success. A *prima-facie* case was described in the **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean:-

“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In his supporting Affidavit, the Plaintiffs/ Applicants have annexed various documentations that show that they have an interest in the suit property. The Court has seen the Beacon Certificate granted to the 1st Plaintiff/ Applicant over the suit property. The Court has also seen the payment receipts of the same, and the letter dated **21st April 2005**, stating that occupants of **L.R Karai/Lusigetti 1037** and **1038** to be issued with ballot numbers.

From the said documents, on a prima facie basis, the Court concludes that the Plaintiffs/Applicants have interest over the suit property.

There is no doubt that the 2nd Defendant/ Respondent has sought to evict the Plaintiffs/Applicants from the said property. If indeed that happens, there is a likelihood that their rights would be infringed. Therefore, the Court finds and holds that the Plaintiffs/ Applicants have established a prima facie case with probability of success at the trial.

The 2nd Principle is whether the Plaintiffs/ Applicants would suffer irreparable loss. It has been acknowledged that the Plaintiffs/ Applicants have been in possession of the suit property. The Plaintiffs/ Applicants have averred that they have been in possession for a period of over 30 years. Indeed if the injunction is not granted and they are evicted, the Court finds that they will suffer irreparable harm that cannot be compensated by way of damages. 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 crystalized 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 that the Plaintiffs/ Applicants are in possession. 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.”

Having now carefully considered the two applications herein, the annexures thereto, the Written Submissions and the relevant provisions of Law, the Court finds that the **Notice of Preliminary Objection** dated **17th December, 2019** is **not merited** and the same is dismissed entirely with costs.

However, the Court finds and holds that the **Notice of Motion Application** dated **20th January, 2020**, is merited and the same is allowed entirely with costs to the Plaintiffs/Applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH, 2021

L. GACHERU

JUDGE

11/3/2021

Lucy - Court Assistant

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 the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. 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

By Consent of:

Mr Ronah for the Plaintiff/Applicant

No appearance for the Defendant

L. GACHERU

JUDGE

11/3/2021