REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

MISC. NO 4 OF 2019

MAKINDI PRIMARY SCHOOL..APPLICANT

VS

ELIJAH MUGO...1ST RESPONDENT

JOHN KIMOTHO...2ND RESPONDENT

SUPERIOR MBURU MARIGI................................... 3RD RESPONDENT

MARY WANJIRU...4TH RESPONDENT

KARIUKI NDUNGU..5TH RESPONDENT

DAVID KINUTHIA ....6TH RESPONDENT

NDUNGU NJOROGE...7TH RESPONDENT

KARUA KINYANJUI...8TH RESPONDENT

KARANJA KAHIGA ....9TH RESPONDENT

RULING

1. Vide a Notice of Motion dated the 12/6/2019 the Applicant moved the Court seeking the following orders;

a. Spent

b. The Respondents and or their servants or agents be restrained from constructing or undertaking any development on land parcel LR.23356 registered in the name of the Plaintiff till this application is heard and determined and or status quo be maintained.

c. This Honourable Court do call for Civil Suit No.424 of 1996 in the Principal Magistrate Court at Nairobi for enforcement of orders.

d. The Respondents be permanently restrained and evicted from land parcel L.R 23356 belonging to the Applicant.

e. The Applicant be allowed to erect a fence around land parcel L.R 23356 as per the beacons without interruption from the Respondents

f. Any other relief this Honourable Court may deem fit to grant

g. Costs of this application be provided for.

2. The application is grounded on the reasons adduced thereto and the supporting affidavit of Lucy Wachira Njeri deponed on the 12/6/2019.

3. The Applicant maintains it is the registered owner of the suit land and the Respondents have persisted in their trespass and have refused to vacate despite the eviction orders issued on 14/3/2002 by the Court in PMCC No 424 of 1996. Instead, some are embarking on developments

of a permanent nature on public land.

4. That the file cannot be traced in the Registry and urged the Court to call for the file. That no substantive suit can be filed given the orders of the Court aforesaid. It called upon the Court to enforce the eviction of the Respondents. That their continued presence is a threat to the Applicant and the students thus causing irreparable loss in form of destruction of School property interalia.

5. The application is opposed. Vide a Replying affidavit deponed by the 1st Respondent in his representative capacity, the Respondents term the motion as misconceived, incompetent and an abuse of the process of the Court. That the motion is statute barred as it is being brought 17 years after the orders of the Court were issued.

6. Further that the application is contrary to the provisions of the 4th Schedule of the Basic Education Act which require that a suit shall be commenced by the Board of Governors which is a body corporate with powers to sue and be sued.

7. That contrary to the views of the Applicant the Respondents have been in occupation of land parcel No 311/2/1 for over 30 years, constructed permanent houses and have acquired quiet and peaceful enjoyment of the same. Categorically, they refute that they have occupied the suit land. The former is unalienated public land belonging to Government of Kenya for which the National Land Commission vide a letter dated the 16/3/2016 recommended them for allocation.

8. They suspect that the Chairman of the Applicant is eyeing the land for grabbing given the escalating high prices of land in the area. Further they faulted the mode of filing the application by the Applicant through a motion and maintain that no orders can be issued in a vacuum in the absence of a proper suit.

9. With that the Respondents urged the Court to dismiss the application with costs.

10. In a further replying affidavit dated the 20/1/2020 and deponed by Mary Wanjiru, the 4th Respondent, the Respondents reiterated the contents of the supporting affidavit of the 1st Respondent and added that the school was set up in 1999 while they occupied the land (LR NO 311/2/1) since 1970s and their plea for land allocation has been overlooked by the successive governments of the day for the last 40 years. That the land they occupy was surrendered to the Government of Kenya by the Anglo-French Sisal Company Limited, the previous owners. She denied any destruction of school property and instead blame the parents of instigating destruction and pinning it on them. She has attached several correspondents with the Ministry of Lands and local administration seeking to be allocated land.

11. The parties elected to canvass the application by way of written submissions. The Applicant failed to file any contrary to the directions of the Court. I have read and considered the written submissions by the Applicant, 3rd 4th and 9th Respondents as well as the on record.

12. The issues for determination in my view are;

a. Whether there is a valid suit before the Court.

b. Whether the orders of the Court in SPMCC No 424 of 1996 are statute barred.

c. Whether the motion is resjudicata

d. Whether the Applicant has locus standi to file the motion

e. Who meets the cost of the motion?

13. The Civil Procedure Act defines a suit to mean all civil proceedings commenced in any manner prescribed. Filing of applications or notice of motions is provided for under Order 51 of the Civil Procedure Rules. It is trite that motions except otherwise provided must be anchored on a suit. This is especially where the parties are seeking the determination of rights like in this case. It is to be noted that this application being filed under a notice of motion cannot be taken as a suit in the proper meaning of Section 2 of the Civil Procedure Act.

14. Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides:

> "*4.(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.*"

15. **In the case of Willis Onditi Odhiambo –vs- Gateway Insurance Co. Ltd (2014) eKLR** the Court of Appeal stated that (4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows: -

> "*In other words the appellant wanted to execute the said decree against the Respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms-.*

> "*4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered*".

The judgment which the appellant sought to execute was passed on 26/8/1996. The judgment should therefore have been executed on or before 27/8/2008''.

16. **In the case of Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others (ELC NO. 5704 of 1992 (OS) the Court** while considering the application of Section 4(4) of the Limitation of Actions Act observed thus;

> "*What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such execution".*

17. According to the evidence on record the orders of the Court were issued in 1996, a period of over 12 years. The said orders lapsed by operation of law by the year 2008. This motion was filed in 2019, some odd 23 years later. There are therefore no orders capable of execution by the Applicants. The motion and all the prayers sought including eviction of the Respondents is statute barred. The Applicant is barred from evicting the Respondents on account of the said orders.

18. Closely linked to the issue of statute bar is the issue of resjudicata. Section 7 Civil Procedure Act acts as a statute bar and prevents re-litigation where an earlier Court with competent jurisdiction determined issues relating to a subject matter.

*19. The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. See **William Koross v. Hezekiah Kiptoo Komen & 4 Others**, CA. No. 223 of 2013.*

20. In ***Henderson v. Henderson (1843-60) All ER 378**,* the Court of Chancery stated thus, regarding the need for parties to bring forward their entire claims:

> "*…Where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

21. I have perused the pleadings filed in this suit as well as in the lower Court case and I have come to the conclusion that the parties are the same, the suit land is similar and the matter was heard and determined by a competent Court of law. The matter is therefore resjudicata.

22. **The Basic Education Act provides that the Board of Management is established under the Act to have perpetual succession and may sue or be sued in its own corporate name.** By law this is the only body that can sue in matters affecting a public school. Section 10(2)(2) of the Education Act cap 211 provides that:

> "*…. the minister may, by order, declare a board of governors to be a body corporate under the name of the board of governors of the school or schools, and the board shall have perpetual succession and a common seal with power to hold both moveable and immovable property, and may in its corporate name sue and be sued."*

23. In the case of **Republic *vs The Secretary to the Board of Governors, Musingu High School-Kakamega* (2011) eKLR Lenaola J** (as he then was) held that "from the above it is obvious that the body lawfully capable of being sued on behalf of a school is the Board of Governors as a corporate entity and not one of its officials such as the secretary to the board. I also note specifically that the (Board of Governors) order. That order provides in Rule 10 as follows:

> "*No governor shall be subject to any personal liability in respect of any matter or thing done or omitted or any contract entered into by or on behalf of the board which he is a governor or by or on behalf of any school or group of school administered by that board."*

24. Further Section 9 of the Education Act and the Education (School committees) Regulation made thereunder provides that it is only a school committee of a primary school which is mandated with authority of managing the said primary school. See the case of Headmistress **Menengai Primary School Another**

-vs- Jamila Anyona (2006) eKLR, where Kimaru J. held as follows:

> "*the issue for determination by this Court is whether the Respondent properly sued the appellants…… In any event, the Respondent would not have sued the headmistress of Menengai Primary School because she had no capacity in law to be sued. Under Section 9 of the Education Act and the Education (School committees) Regulations made thereunder, it is only a school committee of a primary school which is mandated with authority of managing the said primary school. It is the school committee of the primary school which can sue and be sued. The headmistress of a primary school cannot therefore be sued in respect of any action that she undertakes in the school on behalf of the school…… In the circumstances of this case therefore, it is clear that the Respondent sued the appellants wrongfully. The appellants lacked capacity to be sued on behalf of Menengai Primary School.*

25. In conclusion therefore the Applicant could not bring a claim in its own name, the school committee or board of management are the proper parties to such a suit.

26. The Applicant has urged this Court to call for the file in the SPMCC No 424 of 1996 on the grounds that the file cannot be traced and attributes the loss to the hands of the Respondents. An accusation of meddling with a Court file which is a public record is a serious one. The casual nature that this has been raised leaves a lot to be desired. The Court will ignore the invite as no evidence was laid before it in support.

27. That said section 34 of the Civil Procedure Act provides that *all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree.*

28. It behoved the Applicants to seek for further execution of the orders if any in SPMCC No 424 /96 and not to initiate a new suit. Even if the file had been misplaced or suffered some fate, the Applicant and the parties in that case had a chance to move Court for reconstruction of the file to revive that case for further proceedings to be taken. No effort was made in that regard. In my view this amounts to an abuse of the process of the Court, a practice that must be discouraged at all costs.

29. In the end I find no difficulty in arriving at the conclusion that the motion is unmerited and it is for dismissal.

30. It is dismissed with costs to the Respondents.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 11TH DAY OF MARCH 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Macharia HB for Kimwere for the Plaintiff/Applicant

1st Defendant – Present in person

2nd Defendant – Absent

3rd Defendant – Absent. (Advocate absent)

4th Defendant – Present in person. (Advocate is absent)

5th Defendant – Absent

6th Defendant – Present in person

7th Defendant – Absent

8th Defendant – Absent

9th Defendant – Present in person. (Advocate is absent)

Court Assistants, Njeri & Kuiyaki